DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-317

Title:	Halliburton Co., et al., Petitioners v. Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc.
Docketed:	September 11, 2013
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-10544)
Decision Date:	April 30, 2013
Rehearing Denied:	June 11, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 9 2013	Petition for a writ of certiorari filed. (Response due October 11, 2013)
Oct 11 2013	Brief of respondent Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc. in opposition filed.
Oct 11 2013	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Oct 11 2013	Brief amici curiae of Former SEC Commissioners and Officials, and Law Professors filed.
Oct 11 2013	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Oct 29 2013	Reply of petitioners Halliburton Co., et al. filed.
Oct 30 2013	DISTRIBUTED for Conference of November 15, 2013.
Nov 15 2013	Petition GRANTED.
Nov 25 2013	SET FOR ARGUMENT ON Wednesday, March 5, 2014
Dec 19 2013	Record received from U.S.C.A. 5th Circuit. This record is electronic.
Dec 23 2013	The time to file the joint appendix is extended to and including January 13, 2014.
Dec 30 2013	Brief of petitioners Halliburton Co., et al. filed.
Dec 30 2013	Consent to the filing of amicus curiae briefs, In support of either party or of neither party, received from counsel for the respondent.
Dec 31 2013	Consent to the filing of amicus curiae briefs, In support of either party or of neither party, received from counsel for the petitioners.
Jan 6 2014	Brief amici curiae of Former Members of Congress, et al., in support of neither party filed.
Jan 6 2014	Brief amicus curiae of Vivendi, S.A. filed.

Jan 6 2014	Brief amicus curiae of Amgen Inc. filed.
Jan 6 2014	Brief of Washington Legal Foundation filed.
Jan 6 2014	Brief amici curiae of Law Professors filed.
Jan 6 2014	Brief amicus curiae of Committee on Capital Markets Regulation filed.
Jan 6 2014	Brief amicus curiae of Securities Industry and Financial Markets Association filed.
Jan 6 2014	Brief amicus curiae of American Institute of Certified Public Accountants filed.
Jan 6 2014	Brief amici curiae of Former SEC Commissioners and Officials, and Law Professors filed.
Jan 6 2014	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Jan 6 2014	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jan 13 2014	Joint appendix filed. (2 Volumes) (Statement of costs filed)
Jan 13 2014	Supplemental Joint Appendix filed.
Jan 17 2014	CIRCULATED
Jan 27 2014	Record received from U.S.D.C. Northern District of Texas (1 Box).
Jan 29 2014	Brief of respondent Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc. filed. (Distributed)
Feb 4 2014	Brief amici curiae of Council of Institutional Investors, et al. filed. (Distributed)
Feb 5 2014	Brief amicus curiae of the United States filed. (Distributed)
Feb 5 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 5 2014	Brief amici curiae of Legal Scholars filed. (Distributed)
Feb 5 2014	Brief amici curiae of Former SEC Chairmen William H. Donaldson and Arthur Levitt, Jr. filed. (Distributed)
Feb 5 2014	Brief amici curiae of Securities Law Scholars filed. (Distributed)
Feb 5 2014	Brief amici curiae of Testifying Economists filed. (Distributed)
Feb 5 2014	Brief amici curiae of Civil Procedure Scholars filed. (Distributed)
Feb 5 2014	Brief amici curiae of AARP, et al. filed. (Distributed)
Feb 5 2014	Brief amici curiae of Current and Former Members of Congress and Staff filed. (Distributed)
Feb 5 2014	Brief amici curiae of Financial Economists filed. (Distributed)
Feb 5 2014	Brief amici curiae of Institutional Investors filed. (Distributed)
Feb 5 2014	Brief amici curiae of States of Oregon, et al. filed. (Distributed)
Feb 21 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 21 2014	Reply of petitioners Halliburton Co., et al. filed. (Distributed)
Mar 5 2014	Argued. For petitioners: Aaron M. Streett, Houston, Tex. For respondent: David Boies, Armonk, N. Y.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13-317

No. 13-___

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule or substantially modify the holding of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of classwide reliance derived from the fraud-on-the-market theory.

2. Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

PARTIES TO THE PROCEEDINGS BELOW

Halliburton Company and David Lesar were the defendants in the district court, and the appellants in the court of appeals.

Erica P. John Fund, Inc. fka Archdiocese of Milwaukee Supporting Fund, Inc. was the plaintiff in the district court, and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Halliburton Company states that it is a publicly held company, which has no parent company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Corporate Disclosure Statement	iii
Opinions Below	1
Statement of Jurisdiction	2
Rule Involved	2
Preliminary Statement	2
Statement	4
I. Background	4
II. Proceedings Below	7
A. Initial proceedings in district court	7
B. The court of appeals' initial decision	7
C. This Court's opinion	8
D. Proceedings on remand	9
Reasons for Granting the Petition	11
I. This Court Should Overrule *Basic* v. *Levinson*	12
A. *Basic* is premised on economic theory that is now roundly rejected	13
B. Because of *Basic's* faulty foundation, federal courts have struggled to apply it, and state courts have refused to adopt it	19

TABLE OF CONTENTS—Continued

Page

C. *Basic*'s "presumption" that common issues of reliance predominate is inconsistent with this Court's recent class-certification jurisprudence 21

D. This case presents an ideal vehicle for the Court to reconsider *Basic* 23

II. The Decision Below Deepens A Circuit Split Over Whether Price-Impact Evidence May Defeat Class Certification ... 26

A. Even under *Basic*, price-impact evidence belongs at the class-certification stage 26

B. *Amgen*'s rationale compels allowing price-impact evidence at certification 27

C. The decision below conflicts with decisions of the Second and Third Circuits 30

Conclusion 32

Appendix A – Fifth Circuit Order Affirming District Court Grant of Class Certification (April 30, 2013) 1a

Appendix B – Fifth Circuit Order Denying Rehearing En Banc (June 11, 2013) 23a

Appendix C – District Court Order Granting Motion to Certify Class and Denying Motion to Supplement Record (Jan. 27, 2012) 26a

TABLE OF CONTENTS—Continued

Page

Appendix D – Fifth Circuit Opinion Affirming District Court's Order Denying Class Certification (Feb. 12, 2010) 32a

Appendix E – District Court Memorandum Opinion and Order on Plaintiffs' Motion to Certify Class (Nov. 4, 2008) 54a

Federal Rule of Civil Procedure 23 ..... 100a

TABLE OF AUTHORITIES

Page

CASES

Amgen, Inc. v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) ..... *passim*

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) ..... *passim*

Bell v. *Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005) 15, 17

Cammer v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989) 19

Citizens United v. *FEC*, 558 U.S. 310 (2010) 23

Comcast Corp. v. *Behrend*, 133 S. Ct. 1426 (2013) 5, 21, 22, 23

Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) 4, 5

Erica P. John Fund, Inc. v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) ..... *passim*

Gariety v. *Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004) 17

Gen. Tel. Co. of Sw. v. *Falcon*, 457 U.S. 147 (1982) 21

In re DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011) 20, 31

In re Merck & Co. Sec. Litig., 432 F.3d 261 (3d Cir. 2005) 17

In re Salomon Analyst Metromedia Litig., 544 F.3d 474 (2d Cir. 2008) 31

TABLE OF AUTHORITIES—Continued

Page

Kaufman v. *i-Stat Corp.*,
754 A.2d 1188 (N.J. 2000) 20

Lebron v. *Nat'l R.R. Passenger Corp.*,
513 U.S. 374 (1995) 23

Manzo v. *Rite Aid Corp.*,
No. Civ. A 18451-NC, 2002 WL
31926606 (Del. Ch. Dec. 19, 2002), aff'd,
825 A.2d 239 (Del. 2003) 20

Matrixx Initiatives, Inc. v. *Siracusano*,
131 S. Ct. 1309 (2011) 27

Montejo v. *Louisiana*,
556 U.S. 778 (2009) 25

Oscar Private Equity Invs. v. *Allegiance Telecom, Inc.*,
487 F.3d 261 (5th Cir. 2007) 7

Payne v. *Tennessee*,
501 U.S. 808 (1991) 13, 20, 25

Pearson v. *Callahan*,
555 U.S. 223 (2009) 24, 25

Schleicher v. *Wendt*,
618 F.3d 679 (7th Cir. 2010) 31, 32

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*,
552 U.S. 148 (2008) 25

Unger v. *Amedisys, Inc.*,
401 F.3d 316 (5th Cir. 2005) 15

United States v. *Gaudin*,
515 U.S. 506 (1995) 23, 25

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 25

TABLE OF AUTHORITIES—Continued

Page

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011) 5, 21, 22, 23

STATUTES AND RULES

15 U.S.C. §78j(b) 4

28 U.S.C. §1254(1) 2

Fed. R. Civ. P. 23 ..... *passim*

17 C.F.R. §240.10b-5 ..... *passim*

MISCELLANEOUS

Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 Va. L. Rev. 945 (1991) 13

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Chang & Suk, *Stock Prices and the Secondary Dissemination of Information*, 33 Fin. Rev. 115 (1998) 17

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TABLE OF AUTHORITIES—Continued

Page

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Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L.J. 843 (2005) 14, 15, 16

Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009) 15

Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151 (2009) 14, 16, 20, 24

Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851 (1992) 19

Macey et al., *Lessons From Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic *v.* Levinson, 77 Va. L. Rev. 1017 (1991) 19

Posner, *On the Receipt of the Ronald H. Coase Medal*, 12 Am. L. & Econ. Rev. 265 (2010) 15

Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475 (2013) 16, 19

Stout, *The Mechanisms of Market Inefficiency*, 28 J. Corp. L. 635 (2003) 16

IN THE

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HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Halliburton Company and David Lesar respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-22a), on remand from this Court, see *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), is reported at 718 F.3d 423. The court of appeals' denial of rehearing (App., *infra*, 23a-25a), and the opinion of the district court (*id.* at 26a-31a), are unreported. The court of appeals' previous opinion (*id.* at 32a-53a) is reported at 597 F.3d 330. The district court's previous opinion (App., *infra*, 54a-99a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2013. The court denied rehearing *en banc* on June 11, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at App., *infra*, 100a-107a.

PRELIMINARY STATEMENT

This case returns to the Court for the second time, presenting fundamental issues about the presumption of reliance created by a four-Justice majority in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The presumption stemmed from the two-part economic theory that well-developed capital markets efficiently incorporate material information into a stock's market price and that investors, in turn, purchase stock in reliance on the market price to convey a company's true value. Under *Basic*, a putative class of investors need not prove that they actually relied in common on a misrepresentation in order to obtain class certification and prevail on the merits. Instead, they may invoke a classwide presumption of reliance based on the fiction that all investors relied on the misrepresentations when they purchased stock at a price distorted by the misrepresentations.

Basic's substitution of nascent economic theory for bedrock securities and class-action law was questionable from the start, as Justices White and O'Connor argued persuasively in dissent. Twenty-five years later, all doubt is gone; *Basic*'s theoretical framework has been subjected to withering scholarly and empirical attack. Four Justices recognized as much in *Amgen, Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). See *id.* at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ.,

dissenting). *Basic*'s naïve understanding of market efficiency and its simplistic view that market prices rationally convey information are at war with economic reality. Unsurprisingly, the lower courts struggle to apply *Basic*'s fictions to the facts of cases before them.

As troubling, *Basic*'s legal reasoning conflicts with this Court's insistence that class-action plaintiffs prove *in fact* that common issues predominate over individual ones. *Basic* concedes that individual reliance issues in fact predominate in most securities-fraud class actions, yet it creates a fictional presumption of reliance to enable collective claims. No reason—certainly not *Basic*'s embattled economic theory—justifies exempting securities class actions from the requirements of Rule 23.

Accordingly, the Court should overrule *Basic* or at least substantially modify the threshold for invoking a presumption of reliance. Plaintiffs currently obtain class certification principally by showing that a defendant's stock traded in an "efficient market"—a showing readily made for NYSE-listed stocks. But scholarly consensus now teaches that even in such well-developed markets, stock prices do not efficiently incorporate all types of information at all times. Because the presumption of reliance posits that investors rely in common on misrepresentations by relying on a market price that was distorted by the misrepresentations, plaintiffs seeking class certification should at least be required to prove that the alleged misrepresentations *actually* distorted the market price. This approach would more closely align the presumption of reliance with economic reality and with a plaintiff's burden under Rule 23 to show that common issues in fact predominate.

The decision below illustrates the anomalies that have flowed from *Basic*. The court of appeals, despite having acknowledged that no Halliburton misrepresentation affected its stock price, affirmed class certification under

Basic's presumption of classwide reliance. Although *Basic* assures that defendants may rebut the presumption of reliance by showing the absence of price distortion, 485 U.S. at 248, the court below believed that it was prohibited from considering such evidence at the class-certification stage. This Court specifically reserved that precise question in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011), and the decision below deepens a circuit split on it. Even if the Court is not inclined to overrule *Basic*, it should nonetheless grant certiorari to clarify that price distortion—*Basic*'s "fundamental premise," *id.* at 2186—may be rebutted at the class-certification stage.

STATEMENT

I. BACKGROUND

Respondent Erica P. John Fund, Inc. (the Fund) is lead plaintiff in this securities-fraud class action against Petitioners Halliburton Company and its CEO David Lesar. App., *infra*, 2a. The Fund alleges three categories of misrepresentations. *Id.* at 3a. These concern Halliburton's (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-price construction contracts; and (3) potential benefits of a merger with Dresser Industries. *Ibid.* The Fund contends investors lost money when Halliburton's stock price dropped following the release of negative news that touched on one of more of the categories of misrepresentations. *Ibid.*

The Fund relies upon the judicially-created action that this Court fashioned from Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and from SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. See *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005). To prevail on the merits, the Fund is required to prove the following elements: (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a se-

curity; (4) reliance; (5) economic loss; and (6) loss causation, *i.e.*, that the misrepresentation caused the alleged loss. *Id.* at 341-342.

To obtain class-action status, the Fund must also satisfy Federal Rule of Civil Procedure 23(a) and one of the Rule 23(b) requirements. The Fund sought certification under Rule 23(b)(3), which requires a plaintiff to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." The Fund was required to "affirmatively demonstrate * * * compliance" with this requirement by "prov[ing] * * * *in fact*" through "evidentiary proof" that common issues predominate. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011); *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013).

The Fund relied exclusively on this Court's opinion in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). In *Basic*, the Court recognized that under traditional principles of fraud and class certification, a securities-fraud plaintiff could rarely establish Rule 23(b)(3)'s predominance requirement. 485 U.S. at 230, 242; *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("*EPJ Fund*"). For if each member of the proposed class were required to prove that he actually relied on defendant's misrepresentations in purchasing stock, "individual issues" would "overwhel[m] the common ones." *Basic*, 485 U.S. at 242.

To remedy this perceived problem, the four-Justice majority[1] declared that a putative class-action plaintiff may obtain a "rebuttable presumption" of classwide reliance by invoking the "fraud-on-the-market" theory. *Id.*

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[1] Only Justices Brennan, Marshall, and Stevens joined Justice Blackmun's opinion creating the presumption of reliance. Justices White and O'Connor dissented. Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 225.

at 242, 247. That theory assumes that in an efficient, well-developed market all public information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Accordingly, "if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities." *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013).

To trigger the presumption of reliance at the class-certification stage, the plaintiff must show that (1) the misrepresentations were made publicly; (2) the defendant's shares were traded in an efficient market; and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 1198; *EPJ Fund*, 131 S. Ct. at 2185. These "threshold facts," *Basic*, 485 U.S. at 248, establish that the "investor presumptively relie[d] on [the] defendant's misrepresentation if that information [was] reflected in the market price of the stock at the time of the transaction." *EPJ Fund*, 131 S. Ct. at 2186 (quotation omitted).

Basic provides, however, that the defendant may "rebut the presumption of reliance" with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." 485 U.S. at 248. As relevant here, the defendant may rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." *Ibid.* Such rebuttal breaks the "causal connection" because "the basis for finding that the fraud had been transmitted through [the] market price would be gone." *Ibid.* In other words, a misrepresentation that "does not affect market price

* * * cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Amgen*, 133 S. Ct. at 1195.

II. Proceedings Below

A. Initial proceedings in the district court

The Fund sought to certify a class of all purchasers of Halliburton stock between June 1999 and December 2001. At that time, the Fifth Circuit required a plaintiff to prove "loss causation" to invoke the fraud-on-the-market presumption of reliance. See *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267-269 (5th Cir. 2007). "Loss causation * * * requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *EPJ Fund*, 131 S. Ct. at 2186.

The district court denied class certification because the Fund failed to establish loss causation. As part of its analysis, the district court observed that the Fund did "not point to *any* stock price increases resulting from positive misrepresentations." App., *infra*, 58a n.11.

B. The court of appeals' initial decision

The Fifth Circuit affirmed. It explained that to prove loss causation, the plaintiff must first show that the misrepresentations "actually moved the market." App., *infra*, 35a. For a plaintiff who relies solely on price declines following the release of negative news—as the Fund does—to make this showing, the evidence regarding the price decline must "raise an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 37a. To raise that inference, the plaintiff must show that the price decline was caused by a "correction to a prior misleading statement." *Id.* at 36a. The court concluded that none of the misrepresentations or disclosures satisfied these tests and therefore the Fund failed to prove loss causation. *Id.* at 42a-53a.

C. This Court's opinion

This Court granted the Fund's petition for certiorari. Halliburton conceded that a plaintiff need not prove loss causation—price impact *plus* a subsequent loss caused by the fraud—to invoke *Basic*'s presumption of classwide reliance. *EPJ Fund*, 131 S. Ct. at 2186. Halliburton argued instead that it had defeated class certification simply by showing the absence of "price impact"—*i.e.*, that the alleged misrepresentation did not affect the market price of the stock in the first place. *Id.* at 2186-2187. Halliburton noted that *Basic* permits a rebuttal "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248. Thus, Halliburton contended, the lower courts properly denied certification because, in the course of their "loss causation" analysis, they concluded that the alleged misrepresentations did not affect the market price.

This Court vacated the denial of class certification, holding that a plaintiff need not show "loss causation" to invoke *Basic*'s presumption of classwide reliance. The Court explained that "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *EPJ Fund*, 131 S. Ct. at 2186.

The Court reaffirmed that "[u]nder *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that 'information is reflected in [the] market price' of the stock* at the time of the relevant transaction." *Ibid.* (quoting *Basic*, 485 U.S. at 247) (emphasis added). While the *Basic* presumption focuses on price impact at the time of the transaction, "[l]oss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* Consequently, an investor may have "purchased the stock at a distorted price, and thereby presumptively

relied on the misrepresentation reflected in that price," yet "not be able to prove loss causation." *Ibid.* For these reasons, the court of appeals' loss-causation rule "contravene[d] *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *Ibid.* (emphasis added).

The Court acknowledged and summarized Halliburton's argument that it was entitled to rebut the presumption of reliance—and thereby defeat class certification—by showing an absence of "price impact." *Id.* at 2187. The Court declined to reach that issue, however, concluding only that "the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage." *Ibid.* The Court "d[id] not * * * address any other question about *Basic*, its presumption, or how and when it may be rebutted." *Ibid.* The Court remanded so that Halliburton's price-impact argument could "be addressed in the first instance by the Court of Appeals." *Ibid.*

D. Proceedings on remand

1. The court of appeals remanded to the district court, see App., *infra*, 4a, which certified the class. The five-page certification order contained only one sentence implicitly rejecting Halliburton's argument that it could rebut the classwide presumption of reliance by showing the absence of price impact: "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required." *Id.* at 30a.

2. The court of appeals granted leave to appeal. Just before oral argument, this Court issued its decision in *Amgen*, 133 S. Ct. 1184, holding that plaintiffs need not establish that misrepresentations were material to gain class certification via the presumption of reliance. Four Justices in *Amgen* signaled their willingness to recon-

sider the validity of *Basic*'s presumption of reliance. 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting).

The court of appeals affirmed the district court's order certifying the class. The court identified "[t]he pivotal question in this case [as] whether a defendant should be permitted to show the absence of price impact at the class certification stage * * * to establish that common issues among class members do not predominate and that class certification is inappropriate." App., *infra*, 5a. The court acknowledged that *Amgen* prohibited consideration of materiality at the class-certification stage "because materiality is an element of every fraud claim" and thus "[t]he absence of materiality 'ends the case for one and for all.'" *Id.* at 17a (quoting *Amgen*, 133 S. Ct. at 1196). Consequently, a decision on materiality could never cause individual questions to predominate.

The court further recounted that *Amgen* requires certain fraud-on-the-market prerequisites to be considered at class certification, including market efficiency and whether the misrepresentation was made publicly. *Id.* at 11a-12a (citing *Amgen*, 133 S. Ct. at 1198-1199). These issues are proper subjects for a class-certification inquiry because they are not Rule 10b-5 elements and thus "[a] plaintiff can fail to establish publicity [or] market efficiency * * * and therefore lose the class-wide presumption of reliance, but still establish individual reliance and prove fraud." *Id.* at 12a (citing *Amgen*, 133 S. Ct. at 1198-1199).

The court of appeals conceded that price impact is not an element of a Rule 10b-5 claim, App., *infra*, 17a, but it nonetheless held that price impact is more analogous to materiality than it is to publicity and market efficiency. The court reasoned that while price impact is not an element, "a plaintiff must nevertheless prevail on this fact in order to establish [the element of] loss causation." *Ibid.*

Thus, according to the court, "if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action." *Id.* at 18a. Because the court of appeals believed that the absence of price impact would doom all individual claims, it concluded that price impact is not relevant to common-issue predominance and therefore is off-limits at class certification. *Ibid.* Consequently, the court of appeals refused to consider "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11.

3. Halliburton sought rehearing *en banc*, arguing that (1) the court erred in forbidding price-impact evidence at class certification, in conflict with the Second and Third Circuits; and (2) *Basic* v. *Levinson* should be overruled, as suggested by four Justices in *Amgen*. The court denied rehearing. App., *infra*, 23a-25a.

REASONS FOR GRANTING THE PETITION

Basic v. *Levinson* should be overruled. The *Basic* majority erred by substituting economic theory for law—and bad economic theory at that. In the years since *Basic*, scholars have roundly rejected its approach to market efficiency. Meanwhile, *Basic*'s legal framework has proven unworkable in the lower courts and inconsonant with this Court's recent decisions. Relying on an acknowledged fiction, *Basic* allows certification of internally disparate classes that would not be tolerated outside of the securities-fraud context. As a judge-made rule that generates no societal reliance interests, *Basic*'s presumption is ripe for reconsideration.

At a minimum, certiorari is warranted to resolve a circuit split regarding whether a defendant may defeat class certification by showing that alleged misrepresentations did not affect stock price. The Court specifically flagged

this question when it last reviewed this case, and the circuit split has only deepened since. The price-impact issue is especially salient here, as the court of appeals previously found that none of Halliburton's alleged misrepresentations distorted the market price of its stock.

I. THIS COURT SHOULD OVERRULE *BASIC* v. *LEVINSON*

No party in *Amgen* asked the Court to reconsider *Basic*. Four Justices nonetheless recognized that, in a case where a party does raise that argument, this Court may need to "to revisit *Basic*'s fraud-on-the-market presumption" because "[t]he *Basic* decision itself is questionable." *Amgen*, 133 S. Ct. at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting); *id.* at 1204 (Alito, J., concurring) ("reconsideration of the *Basic* presumption may be appropriate" because "more recent evidence suggests that the presumption may rest on a faulty economic premise").[2]

This case provides the opportunity to decide whether *Basic* should be overruled. It should be, because *Basic*'s central economic premise—the efficient capital markets hypothesis—has been almost universally repudiated. *Basic*'s legal reasoning is as out of step with modernity as its economic theory. Its substitution of a judicially-created presumption for the traditional element of reliance vastly expanded a judicially-created cause of action. And its use of a presumption of common reliance to facilitate class actions is in grave tension with current Rule 23 case law that requires common-issue predominance to be proven, not presumed.

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[2] Indeed, all nine Justices recognize the instability in *Basic*'s theoretical foundation. The *Amgen* majority acknowledged "modern economic research tending to show that market efficiency is not 'a binary, yes or no question,' but instead operates differently depending on the information at issue." 133 S. Ct. at 1197-1198 n.6 (citation and internal quotation marks omitted).

A. *Basic* is premised on economic theory that is now roundly rejected

In creating its presumption of reliance, *Basic* invoked "considerations of fairness, public policy, and probability, as well as judicial economy," 485 U.S. at 245, and "common sense." *Id.* at 246. It trusted in the accuracy of then-"[r]ecent empirical studies," *id.* at 246 & n.24, to engraft the efficient capital markets hypothesis into federal securities law. Under that hypothesis, "the market price of shares traded on well-developed markets reflects all publicly available information, and hence any material misrepresentations." *Id.* at 246.

At the time, those "[r]ecent" studies justified at least some confidence in the hypothesis, and the Court noted "[c]ommentators['] general[] * * * applau[se]" for lower courts' then-recent adoption of the fraud-on-the-market theory. *Id.* at 247 (citing two student notes and one law-review article). But the virtually universal conclusion after *Basic* has been that the Court prematurely adopted a nascent and unexplored theory, which has subsequently been discarded. When a decision proves "unworkable or * * * badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). There is no reason to maintain the fictional presumption of reliance where it has been shown inconsistent with the considerations of probability, common sense, and judicial economy that motivated it.

1. Academics have largely given up on *Basic*'s economic premises. Criticism began immediately, as "each formulation of the [efficient capital market hypothesis] * * * c[a]me under sustained empirical and theoretical attack." Ayres, *Back to* Basics: *Regulating How Corporations Speak to the Market*, 77 Va. L. Rev. 945, 967 (1991). The consensus built over the decades, leading a preeminent scholar to recently (and understatedly) observe that "[d]oubts about the strength and pervasive-

ness of market efficiency are much greater today than they were in the mid 1980s." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 175 (2009).

The reason for this development is practical and empirical. *Basic* posits that a well-developed market efficiently incorporates all public information and "transmits information to the investor in the processed form of a market price," such that "the value of the stock is worth the market price." 485 U.S. at 244 (quotation omitted). This efficient-market hypothesis showed early promise, but "empirical research became more specialized and sophisticated, and evidence of potential inefficiencies began to accumulate. * * * There are now hundreds of papers documenting pricing anomalies, even for the most actively traded common stocks." Cornell, *Market Efficiency and Securities Litigation*, 6 Va. L. & Bus. Rev. 237, 243-244 (2001).

In other words, "[t]he fraud-on-the-market (FOTM) cause of action just doesn't work. At least that is the consensus view among academics respecting the primary class action vehicle under the federal securities laws." Bratton & Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72 & n.1 (2011) (describing how even the views of *Basic*'s academic proponents have evolved in recent years). The *Basic* presumption "seemed like a good idea at the time. But FOTM simply did not work in practice. The consensus to that effect is notable in itself because big-ticket causes of action tend to have squads of academic cheerleaders." *Id.* at 74.

Real-world experience has crippled the theoretical underpinnings of *Basic*. "Implicit in the notion of an efficient market—even a mechanically efficient market as courts understand the securities market to be—is the assumption that the market acts rationally." Fisher, *Does*

the Efficient Market Theory Help Us Do Justice in a Time of Madness?, 54 Emory L.J. 843, 898 (2005). But a "goodly section of academic thought now challenges" this core tenet of *Basic*, *id.* at 899, because too many recent events disprove it. "During the [1998-2001 technology] bubble, the market professionals imposed no such rationality, and in fact the market acted irrationally, with stock prices far away from fundamental values. These developments dissolved the link between the efficient market theory and the normative notions underlying 10b-5 elements." *Id.* at 847. The "economic crisis" of 2008 even further "undermine[d] 'efficient markets theory.'" Posner, *On the Receipt of the Ronald H. Coase Medal*, 12 Am. L. & Econ. Rev. 265, 278 (2010). See generally Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009) (discussing the state of efficient-market theory in the wake of 2008 crisis).

Basic's efficient-market theory depends heavily on "market professionals" who "generally consider most publicly announced material statements about companies, thereby affecting stock prices." 485 U.S. at 247 n.24. But "both the caselaw and economic literature" now reflect that market makers and stock analysts do not guarantee efficiency. *Bell* v. *Ascendant Solutions, Inc.*, 422 F.3d 307, 315 & nn.16-17 (5th Cir. 2005). Courts and scholars have found that "the number of market makers [does] not marginally contribute to distinguishing between efficient and inefficient firms." Barber et al., *The Fraud-on-the-Market Theory and Indicators of Common Stock's Efficiency*, 19 J. Corp. L. 285, 307 (1994); see *Unger* v. *Amedisys, Inc.*, 401 F.3d 316, 324 (5th Cir. 2005) (collecting cases). And the Internet bubble taught that analysts are often "behaviorally biased" by conflicts of interest and thus may "contribut[e] to market *ineffi-*

ciency by statistically biasing price changes." Fisher, *supra*, at 972 (emphasis added); *id.* at 967-972.

2. A central problem with *Basic* is that "efficiency is not a binary, yes or no question." Langevoort, *supra*, at 167. Asking whether or not a stock "trade[s] on an efficient market," *Basic*, 485 U.S. at 248 n.27, has almost no real meaning, because efficiency is rarely uniform even for a single stock. "A stock might trade efficiently some of the time, for some information types, but then trade inefficiently at other times, for other information types." Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1484 (2013). "Information that is easy to understand and is trumpeted in the business media * * * may be incorporated into market prices almost instantaneously." Stout, *The Mechanisms of Market Inefficiency*, 28 J. Corp. L. 635, 656 (2003). "But information that is 'public' but difficult to get hold of * * *, complex[,] or requires a specialist's knowledge to comprehend may takes weeks or months to be fully incorporated into prices." *Ibid.* "Indeed it may never be incorporated at all." *Ibid.* Yet *Basic* relies upon an outdated binary conception of efficiency: "[I]f a market is shown to be efficient, courts may presume" investors' reliance on *all* "public, material misrepresentations regarding those securities," *Amgen*, 133 S. Ct. at 1192, without requiring plaintiffs to first prove that the market price actually incorporated the misrepresentations alleged in the case.

Even those scholars who may favor the result in *Basic* now repudiate *Basic*'s economic premise, precisely because efficiency is far from a binary question. See, *e.g.*, Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1500 (2013). For instance, "the market did not react to publicly available information about the impact of a breakthrough in cancer research on a corporation until the New York Times wrote about it

more than five months after the original release." *Ibid.* Similarly, Wall Street Journal reports on insider trades appear to quickly affect a stock's trading price, despite *days-earlier* disclosure of the same information by the SEC. See Chang & Suk, *Stock Prices and the Secondary Dissemination of Information*, 33 Fin. Rev. 115, 115-117 (1998). See also *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 263-271 (3d Cir. 2005) (similar example of Journal report affecting the price weeks after the information was publicly released in a complicated SEC filing). "Because the notion of information efficiency upon which the fraud-on-the-market presumption rests is crumbling under sustained academic scrutiny, the future of securities fraud class action litigation—dependent on this presumption—may be in jeopardy." Black, *supra*, at 1502.

Because *Basic* subjects litigants to "the misleading notion of binary efficiency," Cornell, *supra*, at 250, it is both under- and overinclusive. If a stock typically does not efficiently incorporate information or trades in an underdeveloped market, defendants who made specific misrepresentations that affected the stock price immediately may escape class certification and even substantial liability. See, *e.g.*, *Bell.*, 422 F.3d at 316 & n.18 (rejecting class certification because price decline following alleged corrective disclosure was insufficient to prove market efficiency); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 364 n.*, 368 (4th Cir. 2004) (similar). But if a stock trades on a market that is generally efficient (or at least well-developed), that mere fact says nothing about whether it was efficient with respect to a particular misrepresentation—whether the market in fact incorporated the information or not. "[T]reating market efficiency in a binary manner," unsurprisingly, "often makes case law irreconcilable with the actual behavior of the markets." Cornell, *supra*, at 255. Such a clumsy tool, based on an economic fallacy, should not retain this Court's imprimatur.

3. Scholarship and experience have borne out Justice White's prescient dissent (joined by Justice O'Connor), not the reasoning of the four Justices in the *Basic* majority:

> [T]he fraud-on-the-market theory is a mere babe. Yet today, the Court embraces this theory with the sweeping confidence usually reserved for more mature legal doctrines. In so doing, I fear that the Court's decision may have many adverse, unintended effects as it is applied and interpreted in the years to come.
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> * * *
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> For while the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are—in the end—nothing more than theories which may or may not prove accurate upon further consideration.

Basic, 485 U.S. at 250-251, 254.

Beyond his discomfort with adopting *any* unproven theory into law, Justice White presaged what scholars later would say. "If investors really believed that stock prices reflected a stock's 'value,' many sellers would never sell, and many buyers never buy." *Id.* at 256. Given the scholarly consensus undercutting *Basic*'s brand of efficient-market theory, the presumption should no longer be regarded as an adequate proxy for the actual reliance that fraud claims traditionally require.

At the least, the presumption should be refashioned to require affirmative proof that the market price was distorted by the particular misrepresentations at issue. It makes scant sense to certify enormous "fraud-on-the-market" class actions based on disproven notions of gen-

eral efficiency without inquiring whether the market was actually defrauded by the alleged misrepresentations.[3]

B. Because of *Basic*'s faulty foundation, federal courts have struggled to apply it, and state courts have refused to adopt it

Basic's inapt approach to market efficiency is matched by its threat to judicial efficiency. Justice White warned that "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252. We have seen that occur in this instance.

1. Courts have struggled to apply *Basic*. Because *Basic*'s binary approach to market efficiency is unsound and not susceptible to principled application, there has inevitably been a "high level of inconsistency in the courts regarding what makes a market sufficiently efficient to trigger the fraud-on-the-market presumption." Rapp, *supra*, at 1484.

Federal courts often use the well-known *Cammer* factors to assess market efficiency,[4] but those factors are

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[3] *EPJ Fund* hints at making price impact a threshold showing for the presumption. 131 S. Ct. at 2186 ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that information is reflected in [the] market price* of the stock at the time of the relevant transaction.") (emphasis added). Scholars concur. See Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 899 (1992) ("[t]he only important question is whether the price was distorted," not "determining what is or is not a truly efficient market"); Macey et al., *Lessons From Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic *v.* Levinson, 77 Va. L. Rev. 1017, 1018 (1991) ("[W]hat determines whether investors were justified in relying on the integrity of the market price is not the efficiency of the relevant market but rather whether a misstatement distorted the price of the affected security.")

[4] See *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

themselves indeterminate and frequently correlated with each other. Courts cannot help but arrive at "a massive hodgepodge of * * * outcomes." Ferillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 102 (2004). "*Basic*'s obfuscation about the role of efficiency sent the [lower] courts off on a long journey without a particularly good compass." Langevoort, *supra*, at 167.

As Judge Scirica recently lamented, the *Basic* majority's "inject[ion] [of] nascent economic theory into legal doctrine" has, as Justice White's dissent predicted, led to "'[c]onfusion and contradiction in court rulings.'" *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (3d Cir. 2011) (quoting *Basic*, 485 U.S. at 252). A decision that has so thoroughly "defied consistent application by the lower courts" is not worth preserving. *Payne*, 501 U.S. at 830.

2. The actions of state courts—which are not bound by *Basic*—speak as loudly as the confusion emanating from federal courts. Twelve years after *Basic* was decided, "*no state court* with the authority to consider whether *Basic* is persuasive has chosen to apply it" under state law. *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1198 (N.J. 2000) (emphasis added). That is because "the persuasiveness of [*Basic*'s] intellectual underpinning, the Efficient Capital Market Hypothesis," has been found wanting. *Ibid.* State courts have concluded that "[a]s more time has passed, and there has been greater opportunity to examine and test market efficiency, the hypothesis has shown greater weakness." *Ibid.*

So far as petitioners know, no states since 2000 have bucked the uniform trend of rejecting *Basic*'s analysis. Indeed, states have continued to disavow *Basic*. See, *e.g.*, *Manzo* v. *Rite Aid Corp.*, No. Civ. A 18451-NC, 2002 WL 31926606, at *4 (Del. Ch. Dec. 19, 2002) ("plaintiff cannot rely on a presumption of reliance based on a type of

'fraud on the market' theory because the [Delaware] Supreme Court has determined that Delaware does not recognize such a claim"), aff'd, 825 A.2d 239 (Del. 2003).

C. *Basic*'s "presumption" that common issues of reliance predominate is inconsistent with this Court's recent class-certification jurisprudence

The case for overruling *Basic* goes beyond its substitution of now-discredited economic theory for the once-indispensable reliance element of a fraud claim. The application of *Basic*'s presumption of reliance to facilitate class actions coexists uncomfortably with this Court's recent, more rigorous approach to class certification.

Even before *Basic*, this Court admonished that "actual, *not presumed*, conformance with [Rule 23] remains * * * indispensable." *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). By allowing courts to presume common reliance, the Court departed from this principle in *Basic*, and the conflict has only become starker since.

In *Wal-Mart Stores, Inc.* v. *Dukes*, for example, this Court emphasized that plaintiffs must "affirmatively demonstrate * * * compliance" with Rule 23, and thereby "prove * * * *in fact*" that common issues predominate before a district court may certify a class. 131 S. Ct. 2541, 2551 (2011). The Court reiterated these principles in *Comcast Corp.* v. *Behrend*, holding that certification is improper when proponents do not actually "satisfy" the predominance requirement with "evidentiary proof." 133 S. Ct. 1426, 1432 (2013).

In *Wal-Mart*, the Court considered "statistical evidence about pay and promotional disparities" and sociological testimony that Wal-Mart's culture "was vulnerable to gender discrimination." 131 S. Ct. at 2549 (quotation marks omitted); *id.* at 2553-2556. But the Court concluded that this evidence did not establish that Wal-Mart

in fact had a common policy of discrimination that similarly affected all class members.

Likewise, in *Comcast*, this Court held that the lower court erred in refusing to address "whether the methodology" that allegedly established predominance of common issues "'[was] a just and reasonable inference or speculative.'" *Comcast*, 133 S. Ct. at 1433. The Court rejected an analytical framework by which "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Ibid.* The Court explained that "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Ibid.*

Basic's approach to class certification could not be more different. *Basic* openly acknowledges that without a "presumption" of classwide reliance, individualized issues would in fact predominate. 485 U.S. at 242. Yet it allows courts to presume predominance in the face of these facts. And the presumption is at best a "speculative" and "arbitrary" stand-in for real common reliance, not a methodology capable of demonstrating that common reliance questions in fact predominate. If expert testimony and economic models are insufficient to show that common issues truly predominate, a bare presumption that all agree is unrelated to *actual* common reliance cannot coexist with Rule 23. At the very least, *Basic*'s outdated economic theory should undergo the searching scrutiny given to the methodologies proffered to establish predominance in *Wal-Mart* and *Comcast*.[5]

Under *Basic*, putative plaintiff classes bringing Rule 10b-5 claims are given special solicitude available to no

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[5] The distance from traditional Rule 23 principles is even greater still under the decision below: If courts turn a blind eye to price-impact evidence, there is no basis even to *presume* that investors commonly relied on the misrepresentation by relying on the market price.

one else—immunity from the very Rule 23 principles articulated in cases like *Wal-Mart* and *Comcast*. That shortcut was perhaps understandable when *Basic* was decided—a time when many courts did not require plaintiffs to establish "in fact" that Rule 23's requisites were satisfied. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1266 & n.54 (2002) (collecting cases "requiring a certification analysis focused on allegations rather than evidence"). But this anomaly should not survive after *Wal-Mart* and *Comcast*. "*[S]tare decisis* cannot possibly be controlling when * * * the decision in question has * * * [had] its underpinnings eroded * * * by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995).

D. This case presents an ideal vehicle for the Court to reconsider *Basic*

1. The particulars of this case present an especially clear path to revisiting *Basic*.[6] It implicates a key reason that the economic basis of *Basic*'s presumption is unsound—that binary "market efficiency" of the defendant's stock is the key driver for class certification. *Of course* the "market" for Halliburton stock, which trades

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[6] In their petition for rehearing *en banc*, Petitioners argued that *Basic* should be overruled, noting the recent indication in *Amgen* that *Basic* was subject to reconsideration. Pet. for Reh'g *En Banc* 14-15 (filed May 24, 2013). Even that step was not a necessary prerequisite to this Court's review, because overruling or substantially modifying *Basic* is "not a new claim * * * but a new argument to support what has been [Petitioners'] consistent claim," namely that class certification should be denied. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Accord *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (allowing direct challenge to this Court's precedents that petitioner had disclaimed below because it was a "new argument" in support of petitioner's consistent First Amendment "claim"). This Court retains the authority to overrule a precedent that underlies a claim rather than "assuming a premise * * * that is itself in doubt." *Id.* at 331.

heavily on the NYSE, is "efficient" under *Basic*'s binary test for market efficiency. Langevoort, *supra*, at 173 (noting that "[f]or large-cap stocks, there is seldom any debate over [efficiency]" at class certification). But, as described above, this hardly means that any *particular* misrepresentation will be efficiently incorporated into Halliburton's stock price. Indeed, the court of appeals' previous opinion found no evidence that Halliburton's alleged misrepresentations moved the market price. App., *infra*, 35a, 37a, 42a-53a. Without price impact, there is no reason to presume classwide reliance on the misrepresentations by relying on the market price, because nothing establishes that the misrepresentations *were even reflected* in that price. This case illustrates *Basic*'s misplaced trust in general market efficiency as the foundation for a presumption of reliance, and this Court should abandon it now.

At the very least, *Basic* should be modified to require plaintiffs to prove price impact in order to invoke the presumption in the first instance. This approach would be more consistent with Rule 23's requirement that plaintiffs must establish common-issue predominance. It would acknowledge the scholarly consensus that general market efficiency does not mean that all types of misrepresentations are efficiently incorporated into market price at all times. And it would refocus *Basic* on whether there is a plausible case for presumed reliance on misrepresentations via reliance on a distorted market price.

2. *Stare decisis* considerations support overruling *Basic* without further delay. "Where a decision has been questioned by Members of the Court in later decisions"—as *Basic* was questioned by four Justices in *Amgen*—"and [has] defied consistent application by the lower courts, these factors weigh in favor of reconsideration." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (quotation omitted). While *stare decisis* may counsel reluctance to

revisit errant constructions of statutes, it does not weigh against correcting errant economic analysis injected into the *corpus juris* to replace traditional legal principles. Indeed, "judge made" rules do not "implicate the general presumption that legislative changes should be left to Congress" because "any change should come from this Court, not Congress." *Id.* at 233-234.

Basic is uniquely unsuited to *stare decisis* deference. *Basic* used a judicially-created presumption to expand a judicially-created cause of action. Such innovation is for Congress, not the judiciary, as this Court's more recent precedents explain. See, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-165 (2008). This was, in fact, one of Justice White's chief complaints in *Basic*. See 485 U.S. at 254, 256-257.

All of the *stare decisis* factors favor overruling. See *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009) (listing factors). Experience has taught that *Basic*'s economic theory is unrealistic and its legal rubric unworkable. The decision was poorly reasoned, signed by only four Justices, and of relatively recent vintage. It "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Gaudin*, 515 U.S. at 521. Nor are reliance interests at stake, for *Basic* does not "serve as a guide to lawful behavior," *ibid.*, and *stare decisis* concerns are at their nadir "in cases * * * involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828.

The Court should act now to "bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (quotation omitted).

II. The Decision Below Deepens A Circuit Split Over Whether Price-Impact Evidence May Defeat Class Certification

The decision below precludes price-impact evidence at the class-certification stage. This contravenes both *Basic* and *Amgen*. It also deepens a circuit split.

A. Even under *Basic*, price-impact evidence belongs at the class-certification stage

Even if this Court ultimately declines to overrule or substantially modify *Basic*, certiorari is independently warranted to ensure that *Basic* at least remains tethered to its "fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Flowing directly from that premise, *Basic* guarantees that defendants may "rebut the presumption of reliance" by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248.

If Halliburton successfully rebutted the presumption of classwide reliance in this way, the Fund should not have obtained class certification, for the class could not presumptively rely in common on misrepresentations by purchasing at a market price unaffected by the misrepresentations. Instead, individual class members would have to prove that they actually relied on the misrepresentations despite there being no effect on price. This would ineluctably cause individual issues to predominate. Yet both lower courts forbade Halliburton from introducing price-distortion evidence at the class-certification stage—the very procedural juncture that motivated this Court's creation of the rebuttable presumption in *Basic*. See 485 U.S. at 230 ("We granted certiorari * * * to determine whether the courts below properly applied a presumption of reliance in certifying the class."); *id.* at 242.

B. *Amgen*'s rationale compels allowing price-impact evidence at certification

Amgen reaffirms that a misrepresentation that "does not affect market price * * * cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." 133 S. Ct. at 1195. Nonetheless, the court of appeals thought that *Amgen*'s reasoning precludes consideration of price-impact evidence at the class-certification stage. To the contrary, *Amgen* requires courts to consider the fraud-on-the-market predicates of publicity and market efficiency that, like price impact, are not "elements" of a securities-fraud claim. Logically, price-impact evidence must also be considered pre-certification.

1. In *Amgen*, the Court declined to require proof (or allow rebuttal) of "materiality" at the class-certification stage because "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating."[7] 133 S. Ct. at 1196; *id.* at 1203-1204. This is so "because materiality is an essential element of a Rule 10b-5 claim." *Id.* at 1196. "[A] failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Ibid.* The Court emphasized *four* more times

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[7] *Amgen*'s holding is carefully limited to materiality, a concept distinct from the price-impact issue this Court reserved in *EPJ Fund*. Materiality "is satisfied when there is a substantial likelihood that the disclosure * * * would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1318 (2011) (quotation omitted). Price impact, by contrast, involves not the content of the misstatement, but whether the alleged misrepresentation distorted the stock's market price. *EPJ Fund*, 131 S. Ct. at 2187 ("'Price impact' simply refers to the effect of a misrepresentation on a stock price.").

that materiality is irrelevant to class certification because materiality is an "element" of a Rule 10b-5 claim.[8] *Id.* at 1191, 1196, 1197, 1199.

The Court contrasted materiality with other fraud-on-the-market requirements that *must* be addressed at class certification: "that the alleged misrepresentations were publicly known" and "that the stock traded in an efficient market." *Id.* at 1198. The Court explained the critical difference: "[U]nlike materiality, market efficiency and publicity are *not indispensable elements of a Rule 10b-5 claim.* Thus, where the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption." *Id.* at 1199 (emphasis added). But individual plaintiffs could establish actual reliance without resort to the presumption. *Ibid.* "Individualized reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action." *Ibid.*

2. The court of appeals erred by concluding that price impact is more analogous for Rule 23 purposes to materiality than to publicity and market efficiency. As with publicity and market efficiency, the absence of price impact would mean that "a plaintiff cannot invoke the fraud on the market presumption." *Amgen*, 133 S. Ct. at 1199; see *Basic*, 485 U.S. at 248. And, as with publicity and market efficiency, price impact is "not [an] indispensable elemen[t] of a Rule 10b-5 claim." *Amgen*, 133 S. Ct. at 1199.

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[8] The Court also observed that materiality is an "objective" question that "can be proved through evidence common to the class." *Amgen*, 133 S. Ct. at 1195. This factor was not determinative because the Court recognized that other equally objective, common requirements must be considered at the class-certification stage, such as market efficiency and publicity. *Id.* at 1199.

Conceding these points, App., *infra*, 15a, 17a, the court of appeals nonetheless reasoned that price-impact evidence may not be considered at certification because a successful price-impact rebuttal would defeat the Rule 10b-5 element of loss causation. *Id.* at 17a-18a. But that does not distinguish price impact from publicity. If alleged misrepresentations are nonpublic, by definition those misrepresentations could not cause loss through a decline in the market price. See *EPJ Fund*, 131 S. Ct. at 2185 (observing that if a misrepresentation is not public, "how would the market take [the misrepresentation] into account?"). Consequently, the fact that price impact is necessary to proving loss causation in a fraud-on-the-market case cannot be the basis for excluding such evidence at class certification.

Indeed, *Amgen*'s rationale for allowing publicity evidence at certification requires permitting price-impact evidence as well. The Court explained that in a case involving non-public misrepresentations—which cannot proceed under the presumption of reliance—an individual plaintiff "can, however, attempt to establish reliance through the traditional mode of demonstrating that she was personally aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Amgen*, 131 S. Ct. at 1199 (quotation omitted). That statement is equally true in a case where the defendant shows that the misrepresentations did not distort the market price. Therefore, the absence of price impact—like publicity—is a proper subject for the class-certification stage.

3. Finally, the court of appeals mistakenly perceived that it had to intuit the specific "reason" for which Halliburton proffered price-impact evidence. App., *infra*, 13a-15a & n.7, 18a-19a n.10. The court based this understanding on its belief that "*Amgen* determined that defendants are not permitted to use evidence of no price

impact to rebut materiality * * * at class certification." *Id.* at 18a-19a n.10; accord *id.* at 14a. *Amgen* does not state, much less hold, any such thing. The *Amgen* defendant did not proffer price-impact evidence; it presented a "truth-on-the-market" rebuttal to show that the misrepresentations would not have been "material" to the objective investor. 133 S. Ct. at 1203. *Amgen* simply does not address whether or how price-impact data may be considered at class certification.

The court of appeals' approach transforms *Basic*'s "fundamental premise" of price distortion, *EPJ Fund*, 131 S. Ct. at 2186, into a mere conduit for proving either materiality (impermissible, according to the court of appeals) or market efficiency or publicity (permissible, one supposes). See App., *infra*, 13a-15a & n.7, 18a-19a n.10. This gets it exactly backwards: price distortion is the glue that enables common reliance on misrepresentations via reliance on the market price. Materiality, publicity, and market efficiency are merely factors that affect whether the price will be distorted by a given misrepresentation. See *Amgen*, 133 S. Ct. at 1199. Price-impact evidence is always relevant to class certification because it is the "fundamental premise" of the presumption of reliance, but unlike materiality, it is not a securities-fraud element. The court of appeals' fractured approach to determining the permissibility of price-impact evidence highlights the disarray caused by *Basic*'s presumption of reliance and its tension with core class-action principles.

C. The decision below conflicts with decisions of the Second and Third Circuits

The court of appeals held that "price impact evidence does not bear on the question of common question predominance, and is thus appropriately considered only on the merits after the class has been certified." App., *infra*, 19a. That decision deepens a circuit split over whether defendants may prevent class certification by

showing that alleged misrepresentations did not distort the market price. If the Fund had brought its lawsuit in the Second or Third Circuit, Halliburton would have been entitled to rebut the presumption of reliance at the class-certification stage with price-impact evidence.

1. In *In re Salomon Analyst Metromedia Litigation*, the Second Circuit held that a defendant is "allowed to rebut the presumption, prior to class certification, by showing * * * the absence of a price impact." 544 F.3d 474, 484 (2d Cir. 2008); *id.* at 483. The court explained that "successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485. Because the district court had refused to allow price-impact evidence, the Second Circuit vacated the class-certification order and remanded for consideration of whether "the market price was * * * affected by the alleged misstatements." *Id.* at 485-486.

The Third Circuit "agree[s] with the Second Circuit." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011). That court likewise held that "a defendant's successful rebuttal demonstrating that misleading material statements or corrective disclosures did not affect the market price of the security defeats the presumption of reliance for the entire class, thereby defeating the Rule 23(b) predominance requirement." *Ibid.*[9]

The Seventh Circuit, by contrast, agrees with the decision below that price impact may not be considered at class certification. *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). The court rejected the defendants' argument that "before certifying a class, a court must de-

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[9] *Amgen* disapproved of the Second and Third Circuits' holdings that "materiality" may be considered at class certification, 133 S. Ct. at 1194, but did not address those circuits' independent holdings that a defendant may defeat class certification by showing the absence of price impact.

termine whether false statements materially affected the price." *Ibid.* The Seventh Circuit reasoned that price impact is a "questio[n] on the merits" that could not be considered at class certification. *Ibid.*

2. Halliburton flagged this division of authority in its merits brief the first time this case reached the Court. See Br. of Resps., No. 09-1403, at 17, 29-30. The Court likewise identified the "price impact" issue but declined to address it at that time. *EPJ Fund*, 131 S. Ct. at 2187. Now that the issue is squarely presented, disagreement among the circuits should not be allowed to persist on such a central question of securities and class-action law.

This case presents a strong vehicle for resolving the split. The court of appeals' previous opinion found that the evidence did not "raise an inference that the price was actually affected by [the] alleged misrepresentations." App., *infra*, 37a, 42a-53a. The decision now under review also acknowledged "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11. Consequently, the court of appeals' holding that "price impact evidence * * * is not appropriately considered at class certification," *ibid.*, was outcome-determinative. If these facts were presented in the Second or Third Circuits, the class could not have been certified.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-10544

ERICA P. JOHN FUND, INCORPORATED, formerly known as Archdiocese of Milwaukee Supporting Fund Inc., On Behalf of Itself and All Others Similarly Situated,

Plaintiff-Appellee

v.

HALLIBURTON COMPANY,

Defendant-Appellant

LORI A. RUSSO, On Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

ERNEST HACK, On Behalf of Himself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

POLAR INVESTMENT CLUB, On Behalf Of Itself And All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

(April 30, 2013)

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, GRAVES, and HIGGINSON, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs-Appellees, a putative class of plaintiffs, seek to recover damages from Defendants-Appellants for securities fraud under § 10(b) of the Securities Exchange Act of 1934. The district court concluded that Defendants-Appellants were not entitled to use evidence of no market price impact to rebut the fraud-on-the-market presumption of reliance at class certification. We AFFIRM.

I.

This litigation arises out of alleged misrepresentations by the Halliburton Company and its CEO, President, and Chairman of the Board, David Lesar (collectively "Halliburton"). The Plaintiffs-Appellees, represented by the Erica P. John Fund, Inc. ("the Fund"), are a putative class of shareholders who allege that they suffered material losses as a result of these fraudulent misrepresentations between June 3, 1999, and December 7, 2001. Over

this period of time, the Fund contends that Halliburton made misrepresentations concerning three primary aspects of its operations: (1) it understated its projected liability for asbestos claims, (2) it overstated its revenues by including billings whose collections were unlikely, and (3) it exaggerated the cost savings and efficiencies Halliburton would derive from its 1998 merger with Dresser Industries. Plaintiffs allege that these misrepresentations temporarily and artificially inflated the price of Halliburton stock; when the truth was subsequently revealed, the stock price fell, causing damages to those who purchased the stock in the relevant timeframe.

In September 2007, the Fund moved to certify a class of all persons who purchased Halliburton's common stock during the class period. The district court first determined that the Fund had satisfied the Fed. R. Civ. P. 23(a) threshold class certification requirements of numerosity, commonality, typicality, and adequacy of representation. Turning to Rule 23(b)(3)'s predominance requirement, the district court conducted a limited inquiry into the plaintiffs' cause of action to determine whether common questions of law and fact predominated over questions affecting only individual plaintiffs. The court observed that "the Fifth Circuit has placed an extremely high burden on plaintiffs seeking class certification in a securities fraud case." Specifically, the court pointed to Fifth Circuit precedent requiring securities fraud plaintiffs to make a showing of *loss causation* before obtaining certification. The district court then found that plaintiffs had not established loss causation and declined to certify the class. *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2008 WL 4791492 (N.D. Tex. Nov. 14, 2008) (unpublished).

On appeal, a panel of this court affirmed the district court's denial of class certification based on its conclusion that the Fund had "failed to meet this court's requirements for proving loss causation at the class certification stage." *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 344 (5th Cir. 2010) ("*AMS Fund*"). The Fund filed a petition for a writ of certiorari, which the Supreme Court granted. In *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("*EPJ Fund*"),[1] a unanimous Supreme Court reversed the judgment of the Fifth Circuit, finding that this court "erred by requiring proof of loss causation for class certification." The Court then remanded the case back to this court, stating, "To the extent Halliburton has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand." *Id.* at 2187.

On remand from the Supreme Court, this court remanded the case to the district court for further proceedings. Halliburton argued to the district court that the class should still not be certified because Halliburton's class certification evidence revealed that its alleged fraud did not affect the market price of the stock; that is, its alleged misrepresentation did not cause "price impact" or "price distortion." The district court declined to consider Halliburton's evidence on the issue, finding that price impact evidence did not bear on the critical inquiry of whether common issues predominated under Rule 23(b)(3). Based on its finding that common issues predominated and that the other Rule 23 class prerequisites

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[1] Archdiocese of Milwaukee Supporting Fund, Inc. was eventually replaced by Erica P. John Fund as the named class representative. Thus, judicial decisions under both names concern the instant putative class.

were satisfied, the district court certified the class. Halliburton now appeals.

II.

We review the district court's class certification decision for abuse of discretion. *See Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011). "Because, however, a court by definition abuses its discretion when it applies an incorrect legal standard, we review such errors de novo." *Id.* While the district court has substantial discretion to grant or deny certification, it "must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class." *Id.*

III.

A.

Halliburton's primary argument on appeal is that the district court erred by not permitting Halliburton to challenge class certification with evidence that the alleged misrepresentations did not impact the price of the stock (*i.e.*, there was no price impact).

1.

The pivotal question in this case is whether a defendant should be permitted to show the absence of price impact at the class certification stage of the proceedings to establish that common issues among class members do not predominate and that class certification is inappropriate.

A potential class of securities fraud plaintiffs, like any other group seeking class certification, must satisfy the requirements of Fed. R. Civ. P. 23 in order to be certified. Rule 23 provides that a class action may be maintained if the conditions of 23(a) and (b) are met. To satisfy the criteria set forth in Rule 23(a), a plaintiff must demonstrate numerosity, commonality, typicality, and

adequacy of representation. In this case, the plaintiff must also show that common questions predominate, as provided in Rule 23(b). The parties agree that Rule 23(a)'s requirements have been met, so that the only element at issue is whether common questions predominate. Thus, if "questions of law or fact common to class members predominate over any questions affecting only individual members," then a class of purchasers of Halliburton common stock from June 3, 1999-December 7, 2001 should be certified. FED. R. CIV. P. 23(b)(3).

The private securities fraud action is based upon federal securities statutes and their implementing regulations. Section 10(b) of the Securities Exchange Act of 1934 forbids the use of any "deceptive device," in "connection with the purchase or sale of any security." 15 U.S.C. § 78j(b) (2006). The Securities and Exchange Commission's corresponding Rule 10b-5 forbids, among other things, the making of any "untrue statement of a material fact" "in connection with the purchase or sale of any security." 17 CFR § 240.10b-5 (2004). From these provisions, courts have derived a private securities fraud cause of action; to succeed at trial or summary judgment, a plaintiff is required to establish the 10b-5 action's elements: (1) a material misrepresentation, (2) scienter (deceptive intent), (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

The burden of establishing all the requirements of class certification likewise falls on the party seeking certification, here the Fund. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Establishing common question predominance as a prerequisite to class certification is different from the burden of proving 10b-5

fraud on the merits, although the inquiries may overlap. As the Supreme Court has stated, "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *EPJ Fund*, 131 S. Ct. at 2184. Because common question predominance in this context hinges on reliance, there has been considerable debate concerning what evidence relating to reliance is required or allowed at class certification. The Supreme Court has issued several decisions touching on this issue, which we now turn to for guidance.

2.

The Court in *Basic Inc. v. Levinson* first considered the difficulty inherent in establishing proof of class-wide reliance. 485 U.S. 224 (1988). As the *Basic* Court stated, "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243. "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *EPJ Fund*, 131 S. Ct. at 2185. However, if this were the only way to prove reliance, it "would place an unnecessarily unrealistic evidentiary burden on the [securities fraud] plaintiff who has traded on an impersonal market." *Basic*, 485 U.S. at 245. Without some legal accommodation, the element of reliance would become a "barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation." *Dukes*, 131 S. Ct. at 2552 n.6.

As a result, the *Basic* Court adopted a legal presumption previously accepted by several circuits: the "fraud-on-the-market presumption" of reliance. The Supreme Court explained that because the market price of a secu-

rity in an efficient market will immediately incorporate any material, public representation, a purchaser who buys a security at the market price will be presumed to have relied upon the representation:

> In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

Basic, 485 U.S. at 244 (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

To invoke the fraud-on-the-market presumption, a plaintiff must establish the prerequisites necessary for market price incorporation of information: (1) misrepresentation publicity, (2) misrepresentation materiality, (3) market efficiency, and (4) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 248 n.27.

Basic also established that the defendant is entitled to rebut the fraud-on-the-market presumption by demonstrating certain facts that undermine its basic assumptions. "Any showing that severs the link between the misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reli-

ance." *Id.* at 248. For example, there would be no reliance if a misrepresentation was ignored because the truth was well-known to the market, or there would be no reliance by those who purchased the security after the truth had already entered the market and dissipated the effects of the fraud. *Id.* at 248-49. If the defendant could make such a showing, the market price could not be said to have incorporated—or relied upon—the misrepresentation, and "the basis for finding that the fraud had been transmitted through market price would be gone." *Id.* Similarly, if a defendant could demonstrate that a plaintiff knew about the misrepresentation but decided to purchase the stock anyway, the plaintiff would not have relied upon the integrity of the market price. *Id.* at 249. Though making clear that the fraud-on-the-market presumption could be rebutted, the Court in *Basic* did not decide the extent to which the presumption could be rebutted at class certification.

After *Basic*, the circuits eventually began to apply the fraud-on-the-market presumption inconsistently. As a result, the Supreme Court stepped in to clarify the law again in *EPJ Fund v. Halliburton*, 131 S. Ct. 2179 (2011), when the Court considered another issue in its review of an earlier decision by this court in the instant case. The specific question before the Supreme Court in *EPJ Fund* was whether proof of loss causation was required to invoke the fraud-on-the-market presumption of reliance at the class certification stage. In *AMS Fund*,[2] this court found that in order for plaintiffs to invoke the fraud-on-the-market presumption of reliance and obtain class certification, they must establish proof of loss causation; this

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[2] Recall that the case was originally brought before us as *AMS Fund*, but the plaintiff class representative was redesignated as *EPJ Fund* before Supreme Court proceedings.

requires proof that the stock price declined after the false statement is corrected and the truth is revealed.[3] Because the Fund had not established loss causation, we affirmed the district court's denial of class certification. *See AMS Fund*, 597 F.3d at 339-43.

After granting certiorari, the Supreme Court acted swiftly to correct this court's error, rejecting our position that a putative class had to establish loss causation as a predicate to invoking the fraud-on-the-market presumption of reliance at class certification: "The Court of Appeals' requirement is not justified by *Basic* or its logic. . . . Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *EPJ Fund*, 131 S. Ct. at 2186. The Court held that proof of loss causation, or a decline in stock value after revelation of the truth, is a conceptually distinct inquiry and is not necessary to establish reliance. *Id.* at 2185-86. The *EPJ Fund* Court declined, however, to address Halliburton's assertion that it was entitled to rebut the presumption at class certification for other reasons. The Court stated: "[T]he Court of Appeals erred by requiring EPJ to prove loss causation at the certification stage, . . . and [we] do not, address any other question about [the fraud-on-the-market] presumption, or how and when it may be rebutted." *Id.* at 2187.

The Supreme Court had to intervene yet a third time as courts struggled with the question of which issues a securities fraud plaintiff had to prove in order to invoke the fraud-on-the-market presumption *at class certifica-*

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[3] *See AMS Fund*, 597 F.3d at 335 ("'[W]e require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption.'" (quoting *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007))).

tion, and the corollary question of whether the defendant could present rebuttal evidence on the issues. *See Amgen Inc. v. Conn. Ret. Plans and Trust Funds.* 133 S. Ct. 1184 (2013). Although it was clear that plaintiffs must eventually establish the materiality of a misrepresentation on the merits to invoke the fraud-on-the-market presumption, the precise questions before the *Amgen* Court were whether the putative class must establish materiality at class certification to invoke the presumption; and relatedly, whether a defendant is entitled to rebut the presumption at class certification with proof of immateriality. *Id.* at 1194.

The *Amgen* Court began by emphasizing that the central issue in resolving this question was whether proof of materiality was required to satisfy Rule 23(b)(3)'s requirement of common question predominance. *Id.* at 1195. Thus, the twin issues of what a plaintiff must prove and what a defendant may rebut at class certification are resolved by the same inquiry: "[T]he pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).[4] Thus, the focus of the 23(b)(3) class certification inquiry—predominance—is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together*. *Id.* at 1197. Although

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[4] At least this is true in cases in which the defendant's proffered rebuttal evidence concerns an issue which the court has already deemed to be not relevant to class certification. While rebuttal evidence concerning an issue which *is* relevant at class certification—such as market efficiency—would seemingly be relevant to the question of common question predominance and therefore admissible at class certification, that question is not before us and nor was it before the *Amgen* Court.

the other prerequisites to invoke the fraud-on-the-market presumption—purchase timing, publicity, and market efficiency—must be established at class certification, the same is not true of materiality. *Id.* at 1198-99. The Court held, "While [a putative class] certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification." *Id.* at 1191. The *Amgen* Court thus made clear that what is required for a plaintiff to "invoke" the fraud-on-the-market presumption on the merits is not necessarily what is required for the plaintiff to benefit from the presumption at class certification.

The Court based its determination that materiality need not be established at class certification on the answers to two crucial questions: (1) whether the question of materiality was an objective inquiry that could "be proved through evidence common to the class;" and (2) whether there was a risk that a failure of proof on the question of materiality would "result in individual questions predominating." *Id.* at 1195-96. The Court determined that because materiality is established by evidence common to all plaintiffs, and because a failure to prove materiality will cause all plaintiffs' individual claims to fail, materiality evidence was not relevant at class certification. *Id.* at 1197. In summary, the Court stated: "As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id.* at 1191. It is this characteristic of materiality which distinguishes it from the other fraud-on-the-market presumption's prerequisites. *Id.* at 1198-99. A plaintiff can fail to establish publicity, market efficiency, or trade timing, and therefore lose the class-wide presumption of reliance, but still establish individual reli-

ance and prove fraud. *Id.* Thus, only those issues which bear directly on the pivotal inquiry of common question predominance and the propriety of class resolution should be addressed at class certification. *Id.*

3.

We thus know from the above Supreme Court cases that in order for a 10b-5 plaintiff to invoke the fraud-on-the-market presumption of reliance on the merits, a plaintiff must establish (1) trade timing, (2) market efficiency, (3) publicity, and (4) materiality. *See id.* at 1192-93. However, the fraud-on-the-market elements that should be addressed *at class certification* are limited to those matters which bear on common question predominance and the propriety of class resolution: trade timing, market efficiency, and publicity (*but not* materiality).[5] *Id.* at 1194-99.

Halliburton frames the question before us as whether *price impact* is an issue which a defendant may address at class certification to rebut the fraud-on-the-market presumption that the stock price was affected by a misrepresentation. According to *EPJ Fund*, "'Price impact' simply refers to the effect of a misrepresentation on a stock price."[6] 131 S. Ct. at 2187. It is neither an element of 10b-5 fraud nor an element of the fraud-on-the-market theory. In fact, price impact evidence does not fit neatly

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[5] To be clear, the *Amgen* Court actually found that trade timing related not to the Rule 23(b)(3) question of common question predominance, but to the 23(a) requirements of typicality and adequacy of representation. *See* 133 S. Ct. at 1198.

[6] Price impact, or an effect of a misrepresentation on a stock price, can be established in two ways: either by showing (1) that the stock price increased following the allegedly false positive statements or (2) that there was a corresponding decrease in price following the revelation of the misleading nature of these statements. *See Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 662 (5th Cir. 2004).

into any one fraud issue, but is probative of materiality, statement publicity, and market efficiency, all of which are relevant in establishing the presumption of fraud-on-the-market reliance.[7] According to *Amgen*, however, only some of these matters may be considered at class certification. 133 S. Ct. at 1197-99. For example, price impact evidence relating to materiality may not be considered at class certification (because materiality does not bear on Rule 23(b)(3) common question predominance), but price impact evidence relating to market efficiency or statement publicity could be considered. *See id.* We must therefore determine at what issue Halliburton's price impact evidence is directed.

In this case, Halliburton contends that its price impact evidence is not intended to rebut materiality, market efficiency, or statement publicity—the issues which the Supreme Court has specifically addressed. Rather, Halli-

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[7] For example, evidence that a stock's price was unaffected by a misrepresentation is convincing evidence that a misrepresentation was not material. *See, e.g., In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) ("Because the market for BCF stock was 'efficient' and because the . . . disclosure had no effect on BCF's price, it follows that the information . . . was immaterial as a matter of law."); *Miller v. Thane Int'l, Inc.*, 372 F. Supp. 2d 1198, 1209 (C.D. Cal. 2005); *see also In re Polymedica Corp Sec. Litig.*, 432 F.3d 1, 13 (1st Cir. 2005). Furthermore, if a misrepresentation is concededly material, evidence that a stock's price was still unaffected could serve as evidence that the market is not efficient or that the misrepresentation was not public, undermining the fraud-on-the-market presumption of reliance. Or as Halliburton argues in this case, proof that a stock's price was unaffected might broadly serve as evidence that the market price did not in fact transfer the effect of the misrepresentation to a purchaser, refuting the ultimate conclusion of the fraud-on-the-market presumption of reliance. Finally, as we will discuss more fully *infra*, a plaintiff cannot establish the element of loss causation without demonstrating a negative price impact resulting from the defendant's release of corrective information.

burton contends that its price impact evidence is intended only to generally rebut the fraud-on-the-market presumption of reliance without necessarily attacking one of the presumption's individual elements. More specifically, Halliburton argues that despite the proof offered in support of invoking the fraud-on-the-market presumption of reliance, its evidence shows that the price did not actually transfer the effects of the alleged fraud to a stock purchaser.

As the *Basic* Court stated, "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." 485 U.S. at 248. We agree with Halliburton that in the absence of price impact, "the basis for finding that fraud has been transmitted through market price would be gone." *See id.* Accordingly, Halliburton's price impact evidence potentially demonstrates that despite the presence of the necessary conditions for market price incorporation of fraudulent information (fraud-on-the-market reliance), no such incorporation occurred in fact. Thus, Halliburton's price impact evidence could be used at the trial on the merits to refute the presumption of reliance.[8] *See id.*

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[8] We accordingly reject the Appellants' contention that *EPJ Fund* disclaimed the relevance of price impact evidence to fraud-on-the-market reliance. In fact, the Supreme Court in *EPJ Fund* made it clear that it was not evaluating the relevance of price impact to the fraud-on-the-market theory. *See EPJ Fund*, 131 S. Ct. at 2187. Other circuits have similarly found evidence of a lack of price impact relevant to rebutting the fraud-on-the-market presumption. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474,484 (2d Cir. 2008) ("[D]efendants are allowed to rebut the [fraud-on-the-market] presumption . . . by showing, for example, the absence of a price impact."); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623,638 (3d Cir. 2011) ("In an otherwise efficient market, the failure of a corrective disclo-

at 248-49. The *Amgen* Court did not discuss whether evidence offered for this purpose could be considered at class certification, but it did set forth the proper analytical framework so that we may resolve the question.

As the *Amgen* court made clear, the "pivotal inquiry" when determining whether to consider a matter at class certification is whether resolution of the matter "is needed to ensure that the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Amgen*, 133 S. Ct. at 1195. *Amgen* held that materiality and the rebuttal of materiality were not issues to be considered at class certification because this proof depended on evidence common to all class members; moreover, the failure of plaintiffs to prevail on the issue of materiality would not cause individual issues to "overwhelm questions common to the class, for the class members' claims will have failed on their merits, thus bringing the litigation to a close." *Id.* at 1204.

Turning to the instant case, the first question we ask is whether price impact evidence is common to the class. Because price impact is simply a measure of the effect of a misrepresentation on a security's price, it is undoubtedly an objective inquiry. *See EPJ Fund*, 131 S. Ct. at 2187. As the record evidence in this case demonstrates, price impact is ordinarily established by expert evaluation of a stock's market price following a specific event and it inherently applies to everyone in the class. The first Amgen consideration therefore suggests that price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification.

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sure to affect the market price may therefore serve as a rebuttal to the presumption of reliance . . . .").

The second inquiry suggested by *Amgen* is whether there is any risk that a later failure of proof on the common question of price impact will result in individual questions predominating. *See Amgen*, 133 S. Ct. at 1196. In *Amgen*, the Court found that a failure to establish materiality could not result in the continuation of any individual claims, because immateriality would be fatal to all plaintiffs' claims. *Id.* Because materiality is an element of every fraud claim, immateriality absolutely destroys both class and individual causes of action. The absence of materiality "end[s] the case for one and for all." *Id.*

Turning to the instant case, we must determine whether the failure to prove price impact will necessarily cause all plaintiffs' claims to fall together. In other words, if Halliburton successfully rebuts the fraud-on-the-market presumption with evidence of no price impact, could individual plaintiffs still proceed with their fraud claims? Halliburton contends that a failure on the part of the plaintiffs to prove price impact will not cause all claims to fail, because unlike materiality, price impact is not a required element of fraud. Thus, Halliburton argues, a plaintiff class which fails to show price impact would only lose the class-wide presumption of reliance, leaving individual plaintiffs with viable fraud claims.

We disagree. Although the 10b-5 fraud action does not expressly require proof of price impact as an element of the claim, a plaintiff must nevertheless prevail on this fact in order to establish another element on which the plaintiff does bear the burden of proof: loss causation. As the Court in *EPJ Fund* stated, "'Price impact' simply refers to the effect of a misrepresentation on a stock price." 131 S. Ct. at 2187. Price impact can be shown either by an increase in price following a fraudulent public statement or a decrease in price following a revelation of the

fraud. To successfully prove a lack of price impact, Halliburton would thus be required to demonstrate both that the stock price did not increase when the misrepresentation was announced, and that the price did not decrease when the truth was revealed. If Halliburton were to successfully show that the price did not drop when the truth was revealed, then no plaintiff could establish loss causation. *See id.* at 2185.[9] In other words, because a showing of negative price impact is required to establish loss causation, plaintiffs who cannot establish price impact cannot establish loss causation. Thus, if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action. In the words of the Amgen Court, "[T]he class members' claims will have failed on their merits, thus bringing the litigation to a close." *See Amgen*, 133 S. Ct. at 1204. Thus, the second *Amgen* consideration also leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification.[10]

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[9] ("The court determined that . . . EPJ Fund needed to prove that the decline in Halliburton's stock was 'because of the correction to a prior misleading statement' and 'that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market.' This is the loss causation requirement as we have described it." (citations omitted) (citing *Dura Pharms.*, 544 U.S. at 342, and *AMS Fund*, 597 F.3d at 336)).

[10] This conclusion is also buttressed by the Supreme Court's specific conclusion in *Amgen* that evidence of materiality is not an issue that should be considered at class certification. The price impact evidence considered here is both similar to and offered for much the same reason as the materiality evidence considered by the Supreme Court in *Amgen*. Many if not most plaintiffs offer proof of price impact to demonstrate that a defendant's misrepresentation affected the stock price and was material. While Halliburton insists that it is

Halliburton's only other argument is its policy-based contention that not considering evidence of price impact at class certification will enhance the "*in terrorem* power of certification," and allow plaintiffs to extort non-meritorious settlements from corporate defendants. *See Oscar*, 487 F.3d at 267. The Supreme Court rejected an identical argument in *Amgen*, pointing out that "Congress has homed in on the precise policy concerns raised" by this argument, but has selected different remedies. *See Amgen*, 133 S. Ct. at 1201.

The *Amgen* Court's analysis leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be considered at class certification.[11] Proof of price impact is based upon common evidence, and later proof of no price impact will not result in the possibility of individual claims continuing. Accordingly, Halliburton's price impact evidence does not bear on the question of common question predominance, and is thus appropri-

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questioning reliance and not the materiality of its alleged misrepresentations, in fraud-on-the-market cases such as this, the presumption of reliance actually depends upon the misrepresentation's materiality. As a result, there is a fuzzy line between price impact evidence directed at materiality and price impact evidence broadly directed at reliance. Because *Amgen* determined that defendants are not permitted to use evidence of no price impact to rebut materiality (and thereby rebut the fraud-on-the-market theory) at class certification, it would be anomalous to permit Halliburton to nonetheless use evidence of no price impact to "generally" rebut the fraud-on-the-market theory at class certification.

[11] Because we hold that Halliburton's price impact evidence in this context is not appropriately considered at class certification, it is not necessary to consider Halliburton's argument that the district court erred by refusing to allow Halliburton to supplement the record on remand with additional price impact rebuttal evidence. Nor is it necessary to evaluate the extensive evidence of no price impact offered by Halliburton. *See* Joint Brief of Appellants at 35-61.

ately considered only on the merits after the class has been certified.[12]

B.

The Fund also argues that because Halliburton waived the argument it now presents by failing to initially raise it before the district court, the argument has not been preserved and we may not consider it.[13] This waiver issue is not subject to our discretion, the Fund contends, because the Supreme Court expressly limited our consideration of issues on appeal to those which Halliburton had "preserved."

When the Supreme Court remanded the instant case back to this court, it instructed us to consider Halliburton's arguments against class certification "[t]o the extent Halliburton has preserved" them. *See EPJ Fund*, 131 S. Ct. at 2187. As the Supreme Court has consistently noted, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Penn. R.R. Co.*, 334 U.S. 304, 306 (1948). We thus may consider Halliburton's fraud-on-the-market

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[12] As the above discussion demonstrates, we conclude that this court's position in *Oscar* and other cases requiring plaintiffs to prove price impact as a prerequisite to the fraud-on-the-market presumption and class certification is inconsistent with the Supreme Court's reasoning in *EPJ Fund* and *Amgen*. *See, e.g., Oscar*, 487 F.3d at 264-65.

[13] The Fund argues that waiver is in fact the basis of the district court's failure to discuss the legal question of whether Halliburton is entitled to rebut the fraud-on-the-market presumption of reliance at the class certification stage. Brief of Plaintiffs/Appellees at 27-28. However, support for that conclusion is not found in the district court's brief statement, "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required."

rebuttal argument only to the extent it has been preserved.

Ordinarily, "arguments not raised before the district court are waived and cannot be raised for the first time on appeal." *Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009). The Fund insists that because Halliburton never attempted to rebut fraud-on-the-market reliance before the district court, the Supreme Court's decree prevents this court from considering the argument now. The Fund contends that Halliburton attempted to use its price impact evidence to rebut the element of loss causation but did not challenge the element of reliance; having lost on the loss causation issue before the *EPJ Fund* Court, Halliburton should not now be able to challenge the Fund's fraud-on-the-market reliance.

However, the Fund's argument ignores both the substance of Halliburton's pleadings and the state of the fraud-on-the-market theory as interpreted by this circuit before *EPJ Fund*. Although Halliburton's reliance-rebuttal argument has technically been available since *Basic*, this court had since applied a significant judicial gloss to *Basic*. In fact, our cases required defendants to use evidence of no price impact to undermine the fraud-on-the-market theory in another way—by rebutting loss causation.[14] Halliburton did not direct its evidence of no

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[14] This court has . . . tighten[ed] the requirements for plaintiffs seeking a presumption of reliance. We now require more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market. That is, 'the plaintiff may recover under the fraud on the market theory if he can prove that the defendant's non-disclosure materially affected the market price of the security.' Essentially, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption.

price impact at fraud-on-the-market reliance in an effort to comply with our case law: under our pre-*EPJ Fund* framework, evidence directed at loss causation was by definition directed at fraud-on-the-market reliance. The Supreme Court has since corrected our fraud-on-the-market framework and established that loss causation is not relevant to the fraud-on-the-market presumption of reliance. *EPJ Fund*, 131 S. Ct. at 2185-86. However, we decline to penalize Halliburton for framing its evidence in the manner we instructed. It is well-settled that when the law changes in unanticipated ways during an appeal, parties are generally given an opportunity to apply the new law and present arguments relevant to the new standard. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 282 (5th Cir. 1999).

IV.

For the reasons stated above, the judgment of the district court is AFFIRMED.

Oscar, 487 F.3d at 264-65 (5th Cir. 2007) (citations and brackets omitted); *see also AMS Fund*, 597 F.3d at 335.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-10544

ERICA P. JOHN FUND, INCORPORATED, formerly known as Archdiocese of Milwaukee Supporting Fund Inc., On Behalf of Itself and All Others Similarly Situated,

Plaintiff-Appellee

v.

HALLIBURTON COMPANY,

Defendant-Appellant

LORI A. RUSSO, On Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

ERNEST HACK, On Behalf of Himself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

POLAR INVESTMENT CLUB, On Behalf Of Itself And All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

(June 11, 2013)

ON PETITION FOR REHEARING EN BANC

(Opinion 04/03/13, 5 Cir., _____, _____, F.3d _____)

Before:

DAVIS, Graves, and HIGGINSON, *Circuit Judges*,

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., ET AL.,
Lead Plaintiff

v.

HALLIBURTON COMPANY, ET AL.,
Defendants

(January 27, 2012)

ORDER

Before the Court are Plaintiffs Motion to Certify Class [Docket Entry #341] and Defendants' Alternative Motion to Supplement the Record [part of Docket Entry #468]. The Motion to Certify Class is **GRANTED** and the Alternative Motion to Supplement the Record is **DENIED** as untimely. Defendants had a sufficient opportunity to develop the record to supplement their position against class certification when the Court conducted a class certification hearing on March 28, 2008.

This case was filed in 2002 as a purported class action. The Court received briefs, evidence, and heard argument on Plaintiffs Motion to Certify Class. Following the law

in the Fifth Circuit pertaining to loss causation, this Court denied class certification [Docket Entry #444], stating that but for Fifth Circuit law on loss causation, it would certify the class. The Fifth Circuit affirmed on that same basis, but on June 6, 2011, the Supreme Court reversed the decision of the Fifth Circuit, holding that Plaintiff need not prove loss causation as a prerequisite to class certification. The Fifth Circuit remanded the case to this Court for further proceedings.

The Court has reviewed the additional briefing from the parties on the issue of class certification [Docket Entries #468 and #469] and finds that all elements for class certification under Rule 23 have been met.

Analysis

For the reasons below and those stated by the Court in its Memorandum Opinion and Order dated November 4, 2008 [Docket Entry #444] and on the record at the March 28, 2008 hearing, the Court finds that Plaintiff satisfied the class certification requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). The proposed class is sufficiently numerous, the members of the class have common claims, The Archdiocese of Milwaukee Supporting Fund, Inc. (AMSF) is a typical and adequate class representative, and common questions of law or fact predominate, making a class action the superior method of adjudicating the claims of the class members.

1) Numerosity

Rule 23(a)(1) requires that the class be so numerous that the joinder of all members is impracticable. Plaintiff need not demonstrate the precise number in the class to satisfy this requirement. See *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). Lead Plaintiff estimates that there are tens, if not hun-

dreds, of thousands of class members. Defendants do not challenge certification on this ground. The Court finds that the size of the proposed class is sufficiently large to satisfy Rule 23(a)(1).

2) Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. "The threshold of 'commonality' is not high." *Bertulli v. Ind Ass'n of Cont'l Pilots*, 242 F.3d 290, 296-97 (5th Cir. 2001). It "does not require complete identity of legal claims among the class members"—only that they have "at least one issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982). This requirement, too, is satisfied, as at least the following issues constitute common questions of law or fact: whether the Defendants violated federal securities laws; whether the Defendants omitted or misrepresented material facts; whether Defendants acted with knowledge or with reckless disregard for the truth in omitting or misrepresenting facts; and whether the market price of the Company's common stock during the proposed class period was artificially inflated due to the Defendants' omissions and/or misrepresentations. Defendants do not dispute the satisfaction of this element, and the Court finds it to be established here.

3) Typicality

Rule 23(a)(3) requires that the claims of the representative party be typical of the claims of the class, but the claims of the representative party need not be identical to those of the class. See *Philips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981). Typicality is satisfied when the representative plaintiffs claims arise out of the same event or course of conduct as the other class members,

and is based on the same legal theory. See *Durrett v. John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993). The test for typicality is not extremely rigorous. See *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

The Court finds that the claims of the Lead Plaintiff, AMSF, are typical of those of the class members. AMSF, like all class members, allegedly suffered economic losses from its transactions in Halliburton stock. As stated at the March 2008 hearing, the Court finds that AMSF's use of money managers does not disqualify its claims from being typical of those of other class members, many of whom no doubt used advisors, brokers, and/or research in making their investments.

4) Adequacy

Rule 23(a)(4) requires a finding that the representative party will fairly and adequately protect the interests of the class. Under *Berger v. Compaq Computer Corporation*, 257 F.3d 475, 479 (5th Cir. 2001), *denying rehearing and rehearing en banc*, 279 F.3d 313 (5th Cir. 2002), to establish adequacy, a plaintiff must show that plaintiff's counsel has the zeal and competence to represent the class, and that the proposed class representative is willing and able to take an active role in controlling the litigation and protecting the absent class members. The adequacy inquiry also serves to uncover conflicts of interest between the named plaintiff and the class the plaintiff seeks to represent. *Id.* at 480.

Plaintiff's counsel has extensive experience in securities class action litigation that well qualifies them to represent the class. The Court finds that the Lead Plaintiff has demonstrated sufficient interest in prosecuting this case and is willing to take an active role in controlling the litigation and protecting absent class members, as dem-

onstrated in part by its vigor in challenging a settlement advocated by former Lead Plaintiffs and rejected by the Court, replacing counsel charged with, and later convicted of, crimes, and appealing the loss causation issue to the Fifth Circuit and Supreme Court. The Court knows of no relevant conflicts of interest between the Lead Plaintiff and other class members. The Court is not persuaded by Defendants' argument that AMSF is not an adequate representative merely because it designated an officer other than its CEO as its representative for the pursuit of this litigation.

5) Common Questions of Law or Fact Predominate

Rule 23(b)(3) requires that common questions of law or fact predominate and that a class action be superior to other methods of adjudication. Here, the issues of law or fact common to the members of the putative class predominate over questions affecting individual class members. The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 (1988); see also *Krogman v. Sterritt*, 202 F.R.D. 467, 473 (N.D. Tex. 2001). Although the extent of damages suffered by each class member will vary, individual damages can be calculated. The Court concludes that common questions of law or fact predominate over that individual issue, and a class action is the superior method for adjudicating the issues alleged here. A class approach will promote judicial economy and avoid the risk of inconsistent judgments, which would exist if multiple individual suits were to be litigated. This method of adjudication is superior to individual claims.

Conclusion

Therefore, this case will proceed as a class action for all persons and entities who purchased or otherwise ac-

quired Halliburton Company's common stock between June 3, 1999, through and including December 7, 2001, excluding the individual Defendants and their families, and officers and directors of Halliburton and their families.

The Court appoints The Archdiocese of Milwaukee Supporting Fund, Inc. as Class Representative and David Boies of Boies, Schiller & Flexner LLP as Class Counsel.

SO ORDERED. /s/ Barbara M.G. Lynn

BARBARA M. G. LYNN

January 27, 2012. UNITED STATES DISTRICT JUDGE

NORTHERN DISTRICT OF TEXAS

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-11195

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Plaintiff-Appellant

v.

HALLIBURTON CO; DAVID J. LESAR,

Defendants-Appellees

(February 12, 2010)

Appeal from the United States District Court
For the Northern District of Texas

Before REAVLEY, CLEMENT, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

The Archdiocese of Milwaukee Supporting Fund, Inc. filed this putative securities fraud class action as lead plaintiff against Halliburton Company and David Lesar, the Chief Operating Officer and then CEO during the class period, alleging violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10(b)-5. The district court denied the Plaintiff's motion for class certification under

FED. R. CIV. P. 23, and Plaintiff appeals that order. Finding no abuse of discretion by the district court, we AFFIRM the denial of class certification.

I.

This is a private securities fraud-on-the-market case. Under the fraud-on-the-market theory, it is assumed that in an efficient, well-developed market all public information about a company is known to the market and is reflected in the stock price. When a company has publicly made material misrepresentations about its business, we may presume that a person who buys the company's stock has relied on the false information. The stockholder then suffers losses if the falsity becomes known and the stock price declines. *See Basic Inc. v. Levinson.*[1] It is the response of the market to the correction that proves the effect of the false information and measures the plaintiff stockholder's loss.

Plaintiff here claims that Halliburton made false statements about three areas of its business: (1) Halliburton's potential liability in asbestos litigation, (2) Halliburton's accounting of revenue in its engineering and construction business, and (3) the benefits to Halliburton of a merger with Dresser Industries. It contends that investors lost money when Halliburton issued subsequent disclosures correcting the false statements and the market declined following the negative news. In order to obtain class certification on its claims, Plaintiff was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses.[2]

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[1] 485 U.S. 224, 246–47, 108 S. Ct. 978, 991–92 (1988).

[2] Plaintiff contends that our precedent, specifically the requirement of *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*,

The district court denied class certification because it found that Plaintiff failed to prove this causal relationship. We review the district court's certification decision for an abuse of discretion, but we review de novo the legal standards employed by the district court. *Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (Local 66)*.[3] Plaintiff contends that the district court applied an erroneous standard for loss causation and required it to prove more than is required under law. Our review of the district court's order and the evidence leads us to conclude, however, that the district court fully understood loss causation under our precedent and correctly applied the legal standard. As we explain, the district court's decision was well supported and was not an abuse of discretion.

II.

Before discussing the Plaintiff's specific allegations against Halliburton, we first set forth the appropriate framework for a private securities fraud case and consider the district court's application of that framework. A securities fraud claim under § 10(b) of the Securities Exchange Act and Rule 10b-5 requires a plaintiff to show (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.

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487 F.3d 261, 269 (5th Cir. 2007), that class plaintiffs prove loss causation at the class certification stage, is contrary to Supreme Court and sister circuit precedent. Plaintiff may not assail *Oscar* as wrongly decided, as we are bound by the panel decision. *See Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991) ("In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court.").

[3] 579 F.3d 401, 406 (5th Cir. 2009).

Dura Pharms., Inc. v. Broudo.[4] In the case of a putative class, a plaintiff may create a rebuttable presumption of reliance under the fraud-on-the-market theory by showing "that (1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed." *Greenberg v. Crossroads Sys., Inc.*[5] A defendant may rebut the presumption "by '[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at fair market price [.]'"[6]

Here, the parties contest only the alleged misrepresentations and do not dispute the efficiency of the market or Plaintiff's trading activity. In order to take advantage of the fraud-on-the-market presumption of reliance, Plaintiff must prove that the complained-of misrepresentation or omission "materially affected the market price of the security." *Alaska Elec. Pension Fund v. Flowserve Corp.*[7] In other words, Plaintiff must show that an alleged misstatement "actually moved the market."[8] Thus, "we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption."[9] And we require this showing "at the class certification stage by a preponderance of all admissible evidence."[10]

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[4] 544 U.S. 336, 341–42, 125 S. Ct. 1627, 1631 (2005).

[5] 364 F.3d 657, 661 (5th Cir. 2004).

[6] *Id.* at 66 1–62 (quoting *Basic*, 485 U.S. at 248, 108 S. Ct. at 992).

[7] 572 F.3d 221, 228 (5th Cir. 2009) (quotation and citation omitted).

[8] *Oscar*, 487 F.3d at 265.

[9] *Id.*

[10] *Id.* at 269. Although Plaintiff *must* establish loss causation at the certification stage, the court *may* examine the issue at a variety of

The district court explicitly recognized the need for Plaintiff to establish a causal link between the alleged falsehoods and its losses in order to invoke the fraud-on-the market presumption. *See Nathenson v. Zonagen, Inc.*[11] The court also correctly recognized that the causal connection between an allegedly false statement and the price of a stock may be proved either by an increase in stock price immediately following the release of positive information, or by showing negative movement in the stock price after release of the alleged "truth" of the earlier falsehood.[12] Plaintiff here relies only on stock price decreases following allegedly corrective disclosures by Halliburton.

That being the case, the district court correctly noted that Plaintiff has an added burden because it is not enough merely to show that the market declined after a statement reporting negative news.[13] We must bear in mind that the main concern when addressing the fraud-on-the-market presumption of reliance is whether allegedly false statements actually inflated the company's stock price.[14] By relying on a decline in price following a corrective disclosure as proof of causation, a plaintiff need prove that its loss resulted directly *because* of the correction to a prior misleading statement; otherwise

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stages during the course of the litigation. *See Fener*, 579 F.3d at 407 ("A court can examine loss causation at the pleadings stage, the class certification stage, on summary judgment, or at trial.") (footnotes omitted).

[11] 267 F.3d 400, 413 (5th Cir. 2001) (Loss causation is "a direct causal link between the misstatement and the claimant's economic loss.") (internal quotation marks and citation omitted).

[12] *See Greenberg*, 364 F.3d at 665.

[13] *See id.* (holding that plaintiffs must do more than "simply offer[] evidence of any decrease in price following the release of negative information").

[14] *Id.*

there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with.[15] In other words, the decline in price following a corrective disclosure must raise an inference that the price was actually affected by earlier alleged misrepresentations.[16] We therefore require plaintiffs to show that a loss occurred from the decline in stock price because the truth "'ma[de] its way into the marketplace,'" rather than for some other reason, such as "a result of 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions,' or other factors independent of the fraud."[17] Similarly, if a company releases multiple items of negative information on the same day, the plaintiff must establish a reasonable likelihood that a subsequent decline in stock price is due to the revelation of the truth of the earlier misstatement rather than to the release of the unrelated negative information.[18] In this way, the plaintiff must satisfy the court that its loss likely resulted from the specific correction of the fraud and not because of some independent reason. A subsequent disclosure that does not correct and reveal the truth of the previously misleading statement is insufficient to establish loss causation.[19]

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[15] *Id.*

[16] *See Nathenson*, 267 F.3d at 415 (stating that "where the facts properly considered by the district court reflect that the information in question did not affect the price of the stock then the district court may properly deny fraud-on-the-market based recovery").

[17] *Flowserve*, 572 F.3d at 229 (quoting *Dura*, 544 U.S. at 342–43, 125 S. Ct. at 1627).

[18] *Greenberg*, 364 F.3d at 665.

[19] *See Flowserve*, 572 F. 3d at 230 (holding that "to establish loss causation this disclosed information must reflect part of the 'relevant truth'–the truth obscured by the fraudulent statements").

Causation therefore requires the Plaintiff to demonstrate the joinder between an earlier false or deceptive statement, for which the defendant was responsible, and a subsequent corrective disclosure that reveals the truth of the matter, and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market.[20] This requirement that the corrective disclosure reveal something about the deceptive nature of the original false statement is consistent with liability in a securities fraud action, where it is those who affirmatively misrepresent a material fact affecting the stock price that are held responsible for losses.[21]

It is also necessary "that the earlier positive misrepresentation not be confirmatory."[22] Confirmatory information is already known to the market and, having been previously digested by the market, will not affect the stock price.[23]

After surveying our precedent, the district court correctly summed up Plaintiff's burden in this case by stat-

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[20] *See Greenberg*, 364 F.3d at 662 (noting that loss causation may be proved from a "decrease in price following the revelation of the misleading nature of these [prior] statements") (discussing *Nathenson*, 267 F.3d at 414); *id.* at 665 ("To raise an inference through a decline in stock price that an earlier false, positive statement actually affected a stock's price, the plaintiffs must show that the false statement causing the increase was related to the statement causing the decrease.").

[21] *See Dura*, 544 U.S. at 344, 125 S. Ct. at 1632–33 (noting that in private securities fraud actions, which have common-law roots, "a person who '*misrepresents* the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].'") (quoting RESTATEMENT (SECOND) OF TORTS §548A cmt. b) (emphasis added).

[22] *Greenberg*, 364 F.3d at 666.

[23] *Id.*

ing that because Plaintiff presented no evidence that a false, non-confirmatory positive statement caused a positive effect on the stock price, Plaintiff would have to show "(1) that an alleged corrective disclosure causing the decrease in price is *related to* the false, non-confirmatory positive statement made earlier, and (2) that it is *more probable than not* that it was this related corrective disclosure, and not any other unrelated negative statement, that caused the stock price decline."[24] This was the correct standard.[25]

III.

Plaintiff argues that the district court misapplied our precedent, however, because it incorrectly required Plaintiff to prove actual fraud at the class certification stage. Plaintiff asserts that this requirement runs afoul of our recent decision in *Flowserve*.[26] We do not agree with the Plaintiff's reading of *Flowserve* or its characterization of the district court's opinion.

In *Flowserve*, certain alleged misstatements by the defendant concerned projected earnings guidance released in October 2001 for the company's fiscal year 2002. The

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[24] *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152, 2008 WL 4791492, at *3 (N.D. Tex. Nov. 4, 2008) (emphasis in original) (internal quotation marks and citation omitted).

[25] The district court's statement of the Plaintiff's burden was nearly identical to the standard we announced in *Greenberg*. *See Greenberg*, 364 F.3d at 666 (stating that plaintiffs must prove "(1) that the negative 'truthful' information causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline").

[26] *See Flowserve*, 572 F.3d at 230 (rejecting as incorrect defendant's theory that "a fraud causes a loss only if the loss follows a corrective statement that specifically reveals the fraud").

subsequent alleged corrective disclosures were downward revisions to the earnings guidance released in July and September 2002. The defendant argued that the standard for loss causation required plaintiffs to show a "fact-for-fact" disclosure that fully corrected prior misstatements, which had not occurred in either of the alleged corrective disclosures.[27] We rejected that approach, but we also insisted that plaintiffs need to show more than that a subsequent disclosure reveals the defendant's true financial condition.[28] We held that the disclosure "must reflect part of the 'relevant truth'–the truth obscured by the fraudulent statements."[29] The *Flowserve* court found erroneous the district court's belief that the defendant's revised earnings guidance in July and September 2002 was not relevant to any prior alleged misrepresentations, and we therefore reversed the district court's denial of class certification.[30]

But *Flowserve* did not eliminate the requirement at class certification that plaintiffs must prove the corrective disclosure shows the misleading or deceptive nature of the prior positive statements.[31] We have previously explained that the "relevant truth" necessary in an alleged corrective disclosure is such that "the truth disclosed must simply make the existence of the actionable fraud more probable than it would be without that alleged fact (taken as true)." *Lormand v. US Unwired, Inc.*[32] When confronted with allegedly false financial predictions and estimates, the district court must decide whether the corrective disclosure more probably than not

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[27] *Id.* at 229.
[28] *Id.* at 230.
[29] *Id.*
[30] *Id.* at 231.
[31] *See Greenberg*, 364 F.3d at 662.
[32] 565 F.3d 228, 256 n.20 (5th Cir. 2009).

shows that the original estimates or predictions were designed to defraud. As we held in *Flowserve*, "[i]f [Plaintiff] cannot prove by a preponderance of the evidence that the market learned more than that [Defendant's] earnings guidance was lower and so its business seemed less valuable, it cannot establish that its loss was caused by [Defendant's] misstatements . . . ."[33] Thus, the truth revealed by the corrective disclosure must show that the defendant more likely than not misled or deceived the market with earnings misstatements that inflated the stock price and are actionable. Otherwise, the misstatements would do little more than "touch upon" the alleged loss rather than cause the loss.[34]

We are satisfied that the district court here understood the need for the corrective disclosures to reveal the actionable truth about prior misstatements.[35] The district court correctly stated that "[i]mportantly, it is the misrepresentations themselves, not the corrective disclosures, which form the basis of a valid securities fraud claim. . . . Unless actionable statements, which were later corrected, are identified, Plaintiffs cannot establish loss causation."[36] The court went on to conclude that Plaintiff

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[33] *Flowserve*, 572 F.3d at 232.

[34] *See Dura*, 544 U.S. at 343, 125 S. Ct. at 1632 (holding that it is insufficient for a misrepresentation to merely "touch upon" a later economic loss because "[t]o 'touch upon' a loss is not to *cause* a loss").

[35] Plaintiff challenges statements in the district court's decision that Plaintiff had not identified a disclosure specifically revealing fraud. We recognize that a plaintiff need not prove at the class certification stage intentional fraud by the defendant. *See Flowserve*, 572 F.3d at 230. But reading the entirety of the *Flowserve* opinion, we conclude that a plaintiff still must prove that the defendant is responsible for the error of the misrepresentation. We read the district court's decision to say no more.

[36] *Archdiocese of Milwaukee Supporting Fund*, 2008 WL 4791492, at *5.

largely failed to identify disclosures that had a *corrective* effect linked to a specific misrepresentation, as opposed to simply a *negative* effect, and that many of the alleged corrective disclosures constituted confirmatory information. We therefore conclude that the district court did not apply an incorrect legal standard, and we turn to the specific statements and corrective disclosures alleged in Plaintiff's complaint.

IV.

Plaintiff contends that it has identified specific misrepresentations by Halliburton and linked those misrepresentations to partial corrective disclosures. It asserts that the allegations of its complaint together with the report of its expert, Jane Nettesheim, demonstrated that those disclosures are related to the misrepresentations and proximately caused its losses. Upon examining the alleged corrective disclosures and the evidence, we remain unpersuaded.

Plaintiff relies on three general categories of alleged misstatements by Halliburton made during a class period of June 3, 1999, to December 7, 2001. The first category of statements concerns Halliburton's exposure to liability in asbestos litigation and the company's stated reserves for such litigation. The allegedly corrective statements were made in press releases and SEC filings on June 28, 2001, August 9, 2001, October 30, 2001, and December 4–7, 2001.

Halliburton's asbestos liability derived from its 1998 merger with Dresser Industries and from a former subsidiary of Dresser known as Harbison-Walker Refractories Company. As of May 2001, Halliburton reported that its reserves were approximately $30 million to cover asbestos-related liability. On June 28, 2001, Halliburton reported in a press release that Harbison-Walker had

asked Halliburton to provide financial assistance for asbestos claims that Harbison-Walker had previously agreed to assume when it spun off from Dresser in 1992. The release reported that this was a new development, as Harbison-Walker had previously reaffirmed its responsibility for those claims. Halliburton reported in the press release that in response it would need to increase its asbestos reserves by $50 million to $60 million, after tax. On August 9, 2001, Halliburton filed a Form 10-Q with the SEC reporting that its asbestos reserves were $124 million. On October 30, 2001, Halliburton announced in a press release that a Mississippi jury had returned a plaintiff's verdict in an asbestos suit on October 26, 2001, for which Halliburton was responsible for $21.3 million. Then on December 4 and 7, 2001, Halliburton reported in a SEC filing and press release additional judgments against Dresser in other asbestos cases. Halliburton's stock price declined following each of these statements. Plaintiff contends that the filings and press releases related directly to and corrected Halliburton's previous misrepresentations that its asbestos reserves were adequate. We find no merit to this contention.

The June 28, 2001, press release does not correct any specific misrepresentation by revealing a previously obscured truth.[37] Nowhere in the release is there any mention of prior asbestos reserve estimates, and Plaintiff makes no argument that Halliburton made prior statements about exposure from claims related to Harbison-Walker.[38] At most, the release relates to prior estimates

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[37] *See Flowserve*, 572 F.3d at 230.

[38] *See Greenberg*, 364 F.3d at 667 (holding that an allegedly corrective disclosure was not related to prior allegedly false reports on the speed of new routers where the disclosure "makes no reference to increased router speed"); *id.* at 668 (holding that an alleged corrective disclosure reporting problems with third quarter earnings was

that asbestos reserve levels were adequate generally, but it does not correct a specific prior alleged misstatement.[39] Just as merely lowering earnings estimates does not reveal that a defendant previously misrepresented those estimates, merely raising the asbestos reserves does not show that those prior reserve estimates were intentionally misleading—the market must learn more than that Halliburton's business was potentially less valuable because of erroneous estimates of asbestos liability.[40] We agree with the district court that the situation could be different if Plaintiff had alleged that Halliburton previously stated it was including Harbison-Walker claims in its asbestos reserve estimates but actually did not do so, or if Halliburton had previously stated it had no exposure from Harbison-Walker claims and that it would not cover them, when in fact that was not true. Instead, Plaintiff asks us to draw an inference that the June 28, 2001 press release corrected prior allegedly false estimates of asbestos reserves merely because those reserves changed. But a company is allowed to be proven wrong in its estimates, and we can discern no indication from the June 28, 2001 press release that Halliburton's prior asbestos reserve estimates were misleading or deceptive.[41] It fol-

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not related to prior statements about first or second quarter earnings where the disclosure made "no reference at all" to the first and second quarters).

[39] *See, e.g., Nathenson*, 267 F.3d at 419 (rejecting as inadequate plaintiff's allegations that "suffer[ed] from a lack of required specificity . . . in pin-pointing the particular misleading statement (other than general statements that the Phase III results were 'positive')").

[40] *See Flowserve*, 572 F.3d at 232.

[41] *See id.* at 232 ("*Flowserve* was free to be wrong in its October 2001 earnings guidance and even for such error to cause investors loss when it was revealed in July and September 2002—so long as Flowserve did not commit fraud. Only if Flowserve's October 2001

lows that the June 28, 2001 press release was not an actionable corrective disclosure.

The same is true for the August 9, October 30, and December 4–7, 2001 SEC filings and press releases. Although Halliburton reported a much larger reserve for the asbestos litigation on August 9, this information was actually confirmatory because Halliburton had previously reported that it would need to increase its reserves by an additional amount of approximately $60 million, *after tax*. The August 9, 2001 Form 10-Q reported, consistent with Halliburton's prior statements, that the company "recorded as discontinued operations . . . an accrual of $92 million ($60 million, after tax)."

The announcements of various jury verdicts were also not actionable corrections. As noted by the district court, Halliburton actually repeated in a series of public filings the warning about "the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the expected resolution of asbestos claims." We are not moved by Plaintiff's suggestion that these warnings, which appeared in at least five of Halliburton's 10-K and 10-Q filings, constituted mere boilerplate disclaimers of the risks associated with litigation.[42]

Neither the announcement of the Mississippi verdict nor the verdicts in other states demonstrated that Halliburton's previous estimates of asbestos liability obscured the relevant truth about the asbestos estimates.[43] While

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guidance (or another alleged misstatement) was fraudulent would any loss it caused Alaska be actionable.").

[42] *See Rubinstein v. Collins*, 20 F.3d 160, 167–68 (5th Cir. 1994) (while not dispositive per se, cautionary language is relevant to materiality of predictive statements as basis for securities fraud claim).

[43] Plaintiff contends that the disclosure of the Mississippi verdict exposed the falsity of estimates of asbestos liability in part because one

Plaintiff cites news reports about the asbestos verdicts and has shown that Halliburton's stock price reacted to the negative news, a decline in price following negative news does not prove loss causation.[44] We see in the evidence concerning the asbestos litigation a pattern of Halliburton keeping the market abreast of asbestos developments as they occurred and its necessary adjustments to the litigation reserves. We think this undermines any conclusion that the asbestos-related statements corrected prior misrepresentations or that the company acted with deception.

V.

We reach a similar conclusion with respect to the second and third group of alleged public misrepresentations by Halliburton. These alleged misrepresentations concern the benefits to Halliburton of its merger with Dresser Industries, and the company's accounting of revenue from cost-overruns on fixed-price construction and engineering contracts (so-called unapproved claims). The alleged corrective disclosures occurred on October 4, 1999, January 5, 2000, October 24, 2000, and December 21, 2000.

Halliburton announced on October 4, 1999, that it was selling its interest in two Dresser joint ventures and that

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analyst wrote that "[t]his jury award sets new precedents; the size of the award is enormous." However, rather than show that Halliburton's previous statements obscured the truth about asbestos exposure, this analyst's statement appears to confirm the unexpected nature of a precedent-setting jury verdict. The district court noted that another analyst, cited in the report of Plaintiff's expert, also supported the perception by the market that the verdict was a surprise rather than a revelation of a falsehood. That analyst stated, "[w]e expect a vigorous defense by [Halliburton] and remain optimistic that the asbestos liability will remain under control."

[44] *See Greenberg*, 364 F.3d at 665.

it expected its third quarter earnings to be less than previously expected, due in part to lower than expected profits from joint ventures and other business units of the Dresser group. On January 5, 2000, two analysts reduced their earnings estimates for Halliburton after discussions with company executives. According to Plaintiff, the October announcement and the analyst reports exposed the inaccuracy of Halliburton's previous positive statements about merging with Dresser, particularly statements in July and September 1999 that Halliburton expected annualized cost savings of $500 million from the merger.

Even if it were possible to say that the prior statements were more than erroneous expectations, both the October 4, 1999 announcement and the analyst reports contained multiple pieces of negative news. This required Plaintiff to "demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information."[45] This showing of loss causation is a "rigorous process" and requires both expert testimony and analytical research or an event study that demonstrates a linkage between the *culpable* disclosure and the stock-price movement.[46]

Plaintiff's expert failed to do this. The October 4, 1999 announcement reported that the Dresser Equipment Group was experiencing lower than expected profits; that there had been a decline in the downstream engineering and construction business segment; and that the earnings

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[45] *Greenberg*, 364 F.3d at 665.

[46] *Fener*, 579 F.3d at 410–11; *see also Oscar*, 487 F.3d at 271 ("[T]he plaintiffs must, in order to establish loss causation at this stage, offer some empirically-based showing that the corrective disclosure was more than just present at the scene.").

of the energy services group would be flat or only slightly higher because of low spending levels by energy industry customers. As a result of these items, the release then reported lower guidance on Halliburton's third quarter earnings per share. Nettesheim indicated in her expert report that the decline in Halliburton's stock price following the October 4, 1999 release was due to the reduction in the earnings guidance and recognized that the lower guidance in turn was based on more than one factor. When questioned about the report, however, Nettesheim testified that she did not perform any statistical or econometrical analyses of the three different pieces of information in the release because she was not asked to do so. Nettesheim's report indicated that her conclusions were based on statements from "news commentary and analysts." We have characterized such evidence as merely "well-informed speculation."[47]

Similarly, the January 2000 analyst reports indicated that the earnings estimate was reduced because of "less powerful synergies from the Dresser merger" *and* because of reduced expectations for offshore construction and a reduced growth estimate for oilfield spending. Although she recognized that the reports included nonculpable information, especially the decline in oilfield spending, Nettesheim presented no empirically-based evidence to show that news related to Dresser more

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[47] *Oscar*, 487 F.3d at 271 (rejecting as insufficient to show loss causation "the raw opinion of analysts, without supporting study of the market at issue—such as now common use of basic principles of econometrics"). Nettesheim testified in her deposition that she could have performed a more refined analysis and had done so in other cases.

probably affected the stock price than the other negative information.[48]

Plaintiff also argues generally that several alleged corrective disclosures demonstrated the falsity of former CEO Dick Cheney's statement about Dresser that "[t]he merger with Dresser Industries is now behind us" and "[t]he potential rewards to our shareholders are vast." We think, however, that this statement, appearing in a letter in Halliburton's 1999 Annual Report, is the kind of "generalized positive statement[] about a company's progress [that is] not a basis for liability."[49]

Turning to alleged misstatements about Halliburton's accounting methodology, Plaintiff contends that Halliburton improperly recorded cost-overruns in fixed-price construction contracts as revenue by misleadingly deeming the cost-overruns "probable" of collection, even if a customer had not agreed to pay the additional amount. Plaintiff argues that Halliburton revealed the falsity of its previous accounting methods when (1) it announced on October 24, 2000, that it would undertake a massive restructuring of its construction business and (2) it announced on December 21, 2000, that it would take a fourth quarter charge of $120 million as a result of the restructuring.

Plaintiff fails to show these announcements corrected any prior misleading statements and revealed deceptive practices in Halliburton's accounting assumptions. The October 24 press release does not mention fixed price contracts, unapproved claims, or the method for recogni-

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[48] *See Fener*, 579 F.3d at 409; *Greenberg*, 364 F.3d at 666.

[49] *Nathenson*, 267 F.3d at 419 (citing *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (observing that "broad, general statements" are "precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable")).

tion of revenue from such claims. Rather than revealing the truth about unapproved claims, the release attributes a large drop in the group's revenue to a decline in customer spending. Nettesheim's expert opinion that the October 24 disclosure concerned the company's booking of unapproved claims is also conclusory. She admitted in her deposition testimony that she did not match the October 24 statements to any particular prior misrepresentations by Halliburton.

Nettesheim's report shows that she relied for her conclusions on her examination of news reports and statements from analysts and the subsequent stock price movement. But the news reports Nettesheim cited discuss only problems and weak results generally in Halliburton's engineering and construction business. Nettesheim makes too great a leap in her conclusion that because analysts reduced earnings estimates based on weakness in Halliburton's construction business as a whole, the downgrades to estimates were due to Halliburton improperly recognizing revenue from unapproved claims. We see no such relationship evident in the statements.

Finally, we find no loss causation evident from the December 21, 2000 announcement, which indicated that the $120 million fourth quarter charge would include $25 million for reorganization costs, leaving approximately $95 million for project specific matters.[50] As with other al-

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[50] Plaintiff's contention is that the $25 million is attributed to problems with the Dresser integration, and that this disclosure provided corrective information about Halliburton's prior false representations about the merger. Nettesheim conceded in her report, however, that the $25 million disclosure "does not appear to have been a surprise or a concern" to the market because some charge was already expected due to prior announcements. This portion of the De-

leged corrective disclosures, the December 21 announcement included clearly non-culpable negative information. For example, the release informed the market about "the poor near term market outlook for the downstream engineering and construction business," which Halliburton attributed to a "consolidating customer base, difficult relationships with certain customers, and some financially stressed competitors and a fiercely competitive environment." The negative information constituted non-culpable changes in market conditions and the competitive environment that Halliburton faced, which Plaintiff's expert failed to differentiate from any allegedly culpable information.

The market recognized that Halliburton's business faced general economic difficulties and industry-wide pressures. One reporting service, CIBC World Markets, noted the following after the December 21 release:

> The customer base for [engineering and construction] is consolidating and financially pressured competitors have intensified competition and pricing in the marketplace. As a result, HAL is restructuring its company into two operating segments . . . Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts. . . . General industry-wide issues are also impacting the E&C business. Despite high oil and natural gas prices, spending for engineering and construction projects remains depressed. The difficult operating environment has forced some of Halliburton's E&C competition to cut prices and increase competitiveness.

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cember release was therefore confirmatory information and was not an actionable corrective disclosure. *See Greenberg*, 364 F.3d at 666.

We think the consolidating customer base, increased competition, and other "industry-wide issues," like depressed customer spending, are the kind of economic circumstances and industry-specific facts that are not actionable and must be proven by Plaintiff to have played a much lesser role in the stock price movement than alleged culpable disclosures.[51]

Nettesheim's conclusion that the December 21 disclosure related to cost-overruns in construction projects was based on news commentary. But the commentary shows reaction only to "the entire bundle of negative information," including the general downturn in Halliburton's construction business. By failing to provide empirical data to account for other negative news in the disclosure that was also part of the problem with Halliburton's engineering and construction business (e.g., increased labor costs, consolidated customer base, fiercely competitive environment), Nettesheim failed to provide the necessary linkage between the change in stock price and the *allegedly culpable* information (cost-overruns). Plaintiff therefore seeks to prove loss causation from the December 21 release by improperly relying only on evidence of a decrease in stock price following the negative disclosure of a fourth quarter charge.[52] Plaintiff has failed to prove loss causation with respect to the December 21, 2000 disclosure.

VI.

After reviewing the alleged misrepresentations and corrective disclosures, we conclude that Plaintiff has failed to meet this court's requirements for proving loss causation at the class certification stage. Therefore, the

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[51] *See Flowserve*, 572 F.3d at 229.

[52] *See Greenberg*, 364 F.3d at 665.

district court's judgment denying the Plaintiff's motion for class certification is AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., ET AL.,
Lead Plaintiff

v.

HALLIBURTON COMPANY, ET AL.,
Defendants

(November 4, 2008)

MEMORANDUM OPINION AND ORDER

Before the Court is the Plaintiffs' Motion to Certify Class [Docket Entry #34 1]. The Court held a hearing on this Motion on March 21, 2008, and approved The Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS") as Class Representative.[1] The Court also noted the parties' agreement, and finds independently, that the Proposed Class satisfies Federal Rule of Civil Procedure 23 as to numerosity, commonality, typicality, and adequacy of AMS as a class representative. The parties did not dispute, and the Court also finds, that but for the sin-

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[1] The Court did not approve Plaintiff Ben Alan Murphey as a Class Representative.

gle issue discussed below, a class action would be the superior method for adjudicating the claims of these class members.

The sole issue in dispute is the application of the requirement that, in a securities fraud class action, loss causation must be proven at the class certification stage.[2] Absent this requirement, the Court would certify the class. However, having considered the parties' extensive briefing, oral argument, and the applicable law, the Court is of the opinion that Plaintiffs have not demonstrated loss causation as to any of their claims. For that reason, Plaintiffs' Motion to Certify is **DENIED**.

BACKGROUND

Plaintiffs' Fourth Consolidated Amended Complaint ("Complaint") against Defendant Halliburton Company, et al ("Halliburton"), alleges misrepresentations with respect to three issues: (1) the expense of asbestos litigation; (2) changes to the accounting methodology used by Halliburton and their effect on earnings; and (3) the benefits of Halliburton's merger with Dresser Industries ("Dresser"). The class period is June 3, 1999 to December 7, 2001. Plaintiffs allege that during this period Halliburton, under the guidance of Dick Cheney (CEO until July 2000) and David Lesar (CEO since July 2000), downplayed the company's estimated asbestos liabilities, falsified earnings statements, and overstated the benefits of a merger with Dresser, in an effort to inflate Halliburton's stock price.

Plaintiffs point to eight specific disclosures, accompanied by a drop in Halliburton's stock price, as evidence of the inflationary effects of alleged misrepresentations on

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[2] *See Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007).

Halliburton's stock price. Plaintiffs rely on an expert witness, Jane Nettesheim ("Nettesheim"), who prepared a statistical model of Halliburton's stock price during the class period. Nettesheim asserts that each of these eight disclosures resulted in a company-specific decline in the stock price that cannot be attributed to general market trends or other external factors. Halliburton argues that Nettesheim's model is inadequate to satisfy the requirements for loss causation in the Fifth Circuit. The parties do not dispute that there was an efficient market in this case.

LEGAL STANDARD REGARDING LOSS CAUSATION

To establish a securities claim under Securities and Exchange Commission ("SEC") Rule 10b-5, a plaintiff must establish six elements: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation, "i.e., a causal connection between the material misrepresentation and the loss."[3] In class action securities cases such as this one, plaintiffs can satisfy the reliance requirement through the fraud-on-the-market theory.

The fraud-on-the-market theory presumes that in an open and developed securities market, a company's stock price is determined by all available material information. Thus, buyers or sellers can be defrauded even if they cannot prove they personally relied on the alleged misstatements.[4] In *Greenberg v. Crossroads Systems, Inc.*,

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[3] *See Ind. Elec. Workers' Pension Trust Fund IBEW, et al, v. Shaw Group Inc.*, et al, 537 F.3d 527, 532 (5th Cir. 2008) (citations omitted); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (citations omitted).

[4] *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (citation omitted).

the Fifth Circuit held that class-wide reliance is rebuttably presumed where: "(1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed."[5]

The Fifth Circuit recently tightened the first *Greenberg* requirement by requiring "proof that the [defendant's] misstatement *actually moved* the market."[6] As a result, Plaintiffs in this case must demonstrate loss causation in order to trigger the fraud-on-the-market presumption of class reliance.[7] The Fifth Circuit requires loss causation to be "established at the class certification stage by a preponderance of all admissible evidence."[8] The Court must make an empirical judgment on loss causation "drawing largely from publicly available data thereby leaving minimal need for discovery."[9]

This approach to loss causation imposes an exceedingly high burden on Plaintiffs at an early stage of the litigation, but the Fifth Circuit determined that such a high burden was justified because of "the *in terrorem* power of class certification, the extraordinary leverage bestowed upon plaintiffs with certification and the due process rights of the parties."[10] This Court is bound to follow the Fifth Circuit's precedent, but notes that the bar is now extremely high for all plaintiffs seeking class certification in securities litigation.

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[5] 364 F.3d 657, 661 (5th Cir. 2004).

[6] *Oscar*, 487 F.3d at 265.

[7] *Id.*

[8] *Id.* at 269.

[9] *Ryan v. Flowserve Corp.*, 245 F.R.D. 560, 569 (N.D. Tex. 2007) (Boyle, J.) (citing *Oscar*, 487 F.3d at 267).

[10] *Id.* (citing *Oscar*, 487 F.3d at 266-67 ("class certification creates insurmountable pressure on defendants to settle")).

Plaintiffs can show that an alleged misrepresentation actually affected the market in one of two ways: (1) demonstrating an increase in the stock price after the release of false positive news; or (2) demonstrating a decrease in price following a corrective disclosure.[11] Confirmatory statements, or information already known to the market, are deemed not to actually affect the stock price, because an efficient market does not respond to information already known.[12] An efficient securities market fully responds to new information the first time it is made public, so misrepresentations cannot be actionable unless they are non-confirmatory, and complete corrective disclosures will only affect the stock price when they are first made.

The burden on claimants like Plaintiffs is further enhanced by the requirement that when relying on a *decline* in the company's stock price to prove that the price had been inflated by false positive information, they "must show that the false statement causing the increase was related to the statement causing the decrease."[13] This burden is derived from the theory of proximate loss—plaintiffs must show that the loss resulting from the corrective disclosure is proximately derived from the earlier misrepresentation. The absence of such a requirement would "bring about harm of the very sort the

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[11] *Nathenson v. Zonagen*, 267 F.3d 400, 418-19 (5th Cir. 2001). Here, Plaintiffs rely only on the second method of proving stock price inflation—showing the stock price decreased following alleged corrective disclosures. They do not point to *any* stock price increases resulting from positive misrepresentations.

[12] *Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 419); *Greenberg*, 364 F.3d at 665-66 ("confirmatory information has already been digested by the market and will not cause a change in stock price").

[13] *Greenberg*, 364 F.3d at 665.

statutes seek to avoid" and would "tend to transform a private securities action into a partial downside insurance policy."[14]

When a company makes corrective disclosures and combines them with a discussion of unrelated negative information, plaintiffs must also "demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information."[15] Although at the class certification stage plaintiffs need not quantify the portion of loss that resulted from the false information rather than the unrelated disclosure, or prove that "some percentage of the drop was attributable to the corrective [portion of the] disclosure—the plaintiffs must, in order to establish loss causation at this stage, offer some empirically-based showing that the corrective disclosure was more than just present at the scene."[16]

Expert analysis can provide evidence to support the causation requirement, but it is not sufficient to carry plaintiffs' burden "without reference to any post-mortem data [the experts] have reviewed or conducted."[17] However, in some cases it may be so evident that a stock decline is driven by a particular corrective disclosure that no empirical analysis would be necessary to disaggregate the effect of the corrective disclosure from other unrelated disclosures.[18] For example, in *Greenberg*, the Fifth Circuit compared information about company earnings to "news of temporary interoperability problems," and concluded that:

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[14] *Dura Pharm., Inc.*, 544 U.S. at 347.
[15] *Greenberg*, 364 F.3d at 665.
[16] *Oscar*, 487 F.3d at 271.
[17] *Id.*
[18] *See Greenberg*, 364 F.3d at 669.

> [U]nlike the news of temporary interoperability problems, we are persuaded the news that a company's revenue will be 66% below estimates satisfies the plaintiffs [sic] burden. News that a company's earnings will be two-thirds short of analysts [sic] estimates is the type of negative information most likely to cause a sharp decline in stock price.[19]

As a result, even though the "plaintiffs offer[ed] no evidence or analysis tending to show that the drop in price following the [corrective disclosure] was likely caused by the negative financial news" the court found "that [the defendant's] statements. . . may form the basis for the plaintiffs [sic] fraud-on-the-market claim."[20]

In *Flowserve*, Judge Boyle clarified the plaintiffs' burden at the class certification phase:

> Plaintiffs who seek class status by showing collective reliance through the fraud-on-market presumption must show that the defendant made public, material misstatements, that the stocks traded in an efficient market, and that the stock price was actually affected by the purported fraud. To show that a stock price was actually affected, plaintiffs must show that false, non-confirmatory positive statements caused a positive effect on the stock price. Alternatively, plaintiffs must show: (1) that an alleged corrective disclosure causing the decrease in price is *related to* the false, non-confirmatory positive statement made earlier, and (2) that it is *more probable than not* that it was this related corrective disclosure, and not any

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[19] *Id.*
[20] *Id.*

other unrelated negative statement, that caused the stock price decline.[21]

Because the Plaintiffs in this case have presented no evidence of false, non-confirmatory positive statements causing a *positive* effect on the stock price, it is this second, alternative burden that Plaintiffs must meet.

ANALYSIS

Plaintiffs claim that Halliburton made material misrepresentations, and then later made corrective disclosures with respect to three different issues: first, that Halliburton knowingly minimized its prospective liabilities from asbestos litigation to maintain its attractiveness to investors; second, that Halliburton employed fraudulent accounting practices to overstate its revenue; and third, that Halliburton executives made false statements about the anticipated success of Halliburton's merger with Dresser, to inflate the price of Halliburton' s stock.

I. Asbestos Liabilities

Plaintiffs allege that Halliburton "intentionally concealed and affirmatively misrepresented the true significance of Halliburton's exposure to asbestos liabilities in Halliburton's financial statements, [SEC] [sic] filings, press releases and communications with analysts and investors." Plaintiffs point to four separate statements they claim are corrective disclosures, each addressed in greater detail below. First, on June 28, 2001, Halliburton disclosed that Harbison-Walker,[22] a former subsidiary of Halliburton's new subsidiary (Dresser), had requested financial assistance from Halliburton to cover potential losses from asbestos lawsuits. David Lesar and Gary Morris, Halliburton's Executive Vice President and Chief

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[21] *Flowserve*, 245 F.R.D. at 569 (emphasis added).

[22] Harbison-Walker Refractories Company.

Financial Officer through August of 2001, stated during a conference call with analysts that as a result, the "worst case scenario" would be a net exposure of $50 to $60 million in asbestos liabilities, a considerable increase over the previous month's estimate of $30 million. On June 28, 2001, Halliburton increased its asbestos reserves by $30 million to include this "worst case scenario," for total reserves of $60 million.

Second, Plaintiffs point to a Form 10-Q filed by Halliburton with the SEC on August 9, 2001, in which it further increased its asbestos liability reserves to $124 million in response to the request for assistance from Harbison-Walker. Third, on October 30, 2001, Halliburton issued a press release announcing a $150 million jury verdict in an asbestos lawsuit, for which Halliburton would be responsible for $21.3 million. Fourth, on December 7, 2001, Halliburton issued a press release detailing the recent asbestos verdicts returned against it. Nettesheim asserts that each of these disclosures was accompanied by a company-specific, statistically significant decline in Halliburton's stock price, and therefore proves loss causation.

The Court concludes that Plaintiffs' arguments with respect to the asbestos issue are legally insufficient to establish loss causation. Defendants correctly argue that Plaintiffs' expert must link the alleged corrective disclosures with prior actionable misrepresentations in order to establish loss causation.[23] Here, Plaintiffs do not actually link *any* alleged misrepresentations with the four asbestos disclosures. Instead, Plaintiffs claim that the aggregate of Halliburton's SEC filings, financial statements, press releases, and conferences with analysts arti-

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[23] *See Greenberg*, 364 F.3d at 666.

ficially inflated the value of Halliburton's stock price. Plaintiffs then argue that each of the four disclosures corrected some of the inflation caused by the aggregate of Halliburton's prior statements. However, this "fraud in the aggregate" argument simply fails to satisfy the Fifth Circuit's loss causation requirements.

In *Greenberg*, the court identified five distinct actionable statements regarding the interoperability of the defendant's routers that directly correlated with alleged corrective disclosures.[24] Here, Plaintiffs cite four "partial" corrective disclosures and argue that each disclosure led to a partial market correction of the aggregate inflation in Halliburton's stock price. Plaintiffs do not identify specific statements that were revealed to be fraudulent by these corrective disclosures. Importantly, it is the misrepresentations themselves, not the corrective disclosures, which form the basis of a valid securities fraud claim.

Prior to the class period, Halliburton had in fact made significantly lower asbestos liability estimates in a number of its public filings. Plaintiffs point to these prior financial statements as creating an inflated stock price, without either identifying particular statements revealed to be fraudulent or eliminating confirmatory statements from the analysis.[25] Unless actionable statements, which were later corrected, are identified, Plaintiffs cannot establish loss causation.

However, even if the Court were to accept Plaintiffs' generalized approach as satisfying the initial requirements of loss causation, Plaintiffs' specific arguments

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[24] *Id.*

[25] *See Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 419).

with respect to each of the four alleged corrective disclosures are also insufficient to meet the loss causation burden.

A. June 28, 2001 Partial Corrective Disclosure

To establish an inflated stock price, Plaintiffs rely on those portions of Halliburton's SEC filings from 1999 to 2001, which reported the company's reserves for asbestos liabilities. Halliburton's latest SEC filing prior to the June 28, 2001 disclosure, filed in May 2001, reported liability reserves totaling $30 million and stated that Halliburton had reserved sufficient funds for its estimated asbestos liabilities. However, in June 2001, Harbison-Walker asked Halliburton for financial assistance with potential asbestos claims.[26] Plaintiffs cite a conference call with analysts on June 28, 2001, where "Lesar and Morris stated that the 'worst case scenario' would be exposure, after insurance, of $50 to $60 million—not the $30 million that they had reported to be 'adequate' the previous month." Nettesheim opines that the drop in Halli-

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[26] Harbison-Walker asked Halliburton for financial assistance with its potential asbestos claims, which Harbison-Walker assumed in 1992 as part of its spin-off from Dresser. Dresser agreed to handle asbestos claims filed prior to the spin-off, and Harbison-Walker agreed to handle asbestos claims filed afterward. Dresser and Harbison-Walker agreed that Harbison-Walker could access Dresser's historical insurance coverage for the asbestos-related liabilities it assumed. The companies were, in effect, co-insured, so Halliburton had a direct interest in how Harbison-Walker's claims were resolved. If Harbison-Walker exhausted the insurance available to protect Dresser/Halliburton, or if Dresser was named as a party to a lawsuit along with Harbison-Walker and Harbison-Walker was unable to fund the claims, then Halliburton would be responsible for these claims. Understandably, Halliburton stated to analysts that it had a "substantial interest" in resolving the asbestos claims against Harbison-Walker.

burton's stock price following this alleged corrective disclosure establishes loss causation because the disclosure "related to Halliburton's misstatements—specifically misstatements concerning the significance of Halliburton's exposure to asbestos liabilities."

However, the disclosure does not "specifically reveal[]" any misrepresentation or fraud in Halliburton's prior asbestos estimates.[27] In *Greenberg*, the company's corrective disclosure about the interoperability of its routers "specifically revealed" that the prior representations about interoperability were incorrect.[28] Here, Plaintiffs do not allege, or prove, that Halliburton's prior asbestos liability estimates were revealed by the June 28 disclosure to be fraudulent or even incorrect. In fact, it is just as likely that Halliburton revised its estimated asbestos liability figures based on newly acquired information about the Harbison-Walker situation. Halliburton is correct in arguing that "[t]here is no allegation in the Fourth Complaint—and certainly no evidence—that Harbison-Walker required Dresser's assistance prior to this disclosure."

In *Flowserve*, Judge Boyle granted summary judgment for the defendants because the alleged corrective disclosures did not "disclose the truth about the alleged misrepresentations at the center of Plaintiffs' claims."[29] Judge Boyle found that lowering the company's earnings estimates did not show that Flowserve had previously misstated its financials or misrepresented its internal controls.[30] Likewise, adjusting Halliburton's estimated asbestos liability (especially in the context of Harbison-

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[27] *See Greenberg*, 364 F.3d at 666.

[28] *Id.*

[29] *Flowserve*, 245 F.R.D. at 578.

[30] *Id.* at 579.

Walker's recent request for financial assistance) does not constitute evidence that Halliburton previously fraudulently misrepresented its asbestos liability estimates. Without citing an actionable prior misrepresentation, Plaintiffs cannot meet the requirements of loss causation.[31]

Quite simply, countless external factors can cause a company to incur a loss, fail to meet earnings forecasts, or adjust liability estimates—each of which will very likely affect the company's stock price. However, Plaintiffs cannot establish loss causation by simply speculating that fraud caused the loss.[32] Plaintiffs must provide actual evidence of an unlawful scheme which inflated the stock price.[33] The corrective disclosure cited by the Plaintiffs does not reveal that Halliburton made an initial false statement about its asbestos liability. This flaw is apparent from Nettesheim's report, which states that "the stock price decline on June 29 was caused by information [provided on June 28] that partially corrected *investors' erroneous assessments* [of] Halliburton's asbestos liability." Plaintiffs' own expert failed to opine that the June 28 disclosure corrected intentionally *fraudulent information* produced by Halliburton regarding its asbestos liability.

The circumstances would be different if it were alleged, for example, that Halliburton previously stated that it was including Harbison-Walker's asbestos exposure in its liability estimates but in fact was not, or that Halliburton had no exposure to the Harbison-Walker claims and had agreed never to cover them, when in fact it had made such an agreement. In contrast, Plaintiffs seek a finding

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[31] *See Greenberg*, 364 F.3d at 661.
[32] *See Oscar*, 487 F.3d at 271.
[33] *See Flowserve*, 245 F.R.D. at 579.

of loss causation based on speculation, a step Fifth Circuit precedent bars this Court from taking.[34] In short, Plaintiffs have not established loss causation with respect to the first disclosure.

B. August 9, 2001 Partial Corrective Disclosure

Similarly, Plaintiffs cannot establish loss causation with respect to the August 9, 2001 partial corrective disclosure. On August 9, 2001, Halliburton filed a Form 10-Q with the SEC, revealing that its accrued liability reserves had been increased from $64 million, as disclosed in its June 28, 2001 disclosure, to $124 million. Plaintiffs argue that the increase in Halliburton' s reserves to $124 million, in response to Harbison-Walker's request for assistance, contradicted Halliburton's earlier statement on July 25, 2001 that it would be "'prudent to accrue $60 million" to cover "potential exposure" for asbestos litigation after Harbison-Walker asked Halliburton for financial assistance with potential asbestos claims.[35]

Plaintiffs cannot establish loss causation with respect to the August 9, 2001 disclosure because they have not shown that the disclosure had a *corrective* effect, as op-

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[34] *See Oscar*, 487 F.3d at 271.

[35] On July 25, 2001, Halliburton held a conference call for analysts and money managers, where Lesar stated: "As we've previously reported in a press release on June 28, in a response [sic] to a request from Harbison-Walker for assistance to fund settlements of asbestos claims that Harbison had assumed at the time they were spun-off from Dresser Industries, we went in and took a look at the situation. . . Based on our analysis of Harbison's claims at this point in time and our concern that they may not be able to perform under their obligations, however, we thought it was prudent to accrue $60 million after-tax against the gain on the discontinued operations which, we believe, in our best judgment, is the potential exposure we have for this asbestos litigation. . . "

posed to simply a *negative* effect, on the stock price.[36] If the release of negative information to the market "does not disclose the scheme [to drive up stock prices]," then the information "cannot correct the artificial inflation caused by the scheme."[37] The Court is "unwilling to infer loss causation" from mere speculation of fraud.[38]

The sudden and substantial increase in Halliburton's asbestos liability reserves is the *sine qua non* of Plaintiffs' allegation; however, there is nothing in the August 9 disclosure to suggest that Halliburton or Lesar were lying about the company's prior analysis of Harbison-Walker's asbestos liabilities. Rather, Plaintiffs point to the substantial difference between the two numbers and ask the Court to bridge the gap with an inference of fraud. While the Court recognizes that there was a significant increase in the amount of asbestos liability reserves which occurred over a very short period of time, it cannot speculate about Halliburton's motivation behind suddenly increasing the reserves, and is in fact barred from doing so by applicable precedent. Plaintiffs have not demonstrated that the August 9 disclosure *revealed a scheme* to inflate stock prices, as opposed to merely revealing a change in circumstances.[39] The Court will not infer fraud where there is no evidence of a scheme to inflate the stock price.[40]

In *Flowserve*, Judge Boyle did not certify a class, and granted summary judgment in favor of the defendants,

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[36] *See Flowserve*, 245 F.R.D. at 579 (citing *In re Initial Pub. Offering Sec. Litig.*, 339 F. Supp. 2d 261, 266 (S.D.N.Y. 2005)).

[37] *Id.*

[38] *See Oscar*, 487 F.3d at 271.

[39] *See Greenberg*, 364 F.3d at 665 ("plaintiffs cannot trigger the presumption of reliance by simply offering evidence of any decrease in price following the release of negative information").

[40] *See Flowserve*, 245 F.R.D. at 579.

because the alleged corrective disclosures did not "disclose the truth about the alleged misrepresentations at the center of Plaintiffs' claims."[41] There, releases that corrected previous earnings estimates did not establish that the company had either misstated its previous financial statements or misrepresented its internal controls.[42] Likewise, the mere existence of SEC filings that alter previous asbestos liability estimates cannot establish that the company misstated its previous asbestos liability estimates or misrepresented its potential asbestos liability.

While it is within the realm of possibility that Halliburton executives deliberately understated the company's asbestos liability a mere two weeks before doubling the reserve, Plaintiffs offer no disclosure that actually "*reveal[s]*" any such improper behavior to the market.[43] Plaintiffs' argument is, at best, "well-informed speculation."[44] Although the loss causation requirements imposed by the Fifth Circuit are significant, that is the law which this Court must follow, and it bars certification of the class with respect to the second disclosure.

C. October 30, 2001 Partial Corrective Disclosure

Plaintiffs similarly cannot establish loss causation with respect to the October 30, 2001 disclosure. After the market closed on that day, "Halliburton announced that on October 26, 2001, a jury in Mississippi found Dresser (through Harbison-Walker) liable in two of six asbestos cases for total compensatory damages of $21.3 million."[45]

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[41] *Id.* at 578.

[42] *Id.* at 579.

[43] *See Greenberg*, 364 F.3d at 665 (emphasis added).

[44] *See Oscar*, 487 F.3d at 271.

[45] No judgment on the verdict had been entered against Halliburton as of that date. Plaintiffs provide conflicting information regarding

Plaintiffs claim that "[t]he stock price declines on October 31 and November 1, 2001 were caused by information that partially corrected investors' erroneous assessments [of] Halliburton's asbestos liability."

This allegation focuses on the timing of the disclosure of a number of sizeable asbestos verdicts for which Halliburton was responsible. On September 12, 2001, a Texas jury returned a $130 million verdict against Halliburton and its co-defendants in an asbestos lawsuit.[46] On Octo-

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this asbestos verdict, first stating that a *Mississippi jury* returned the verdict in the Complaint, and later stating that a "*second Texas jury*" returned this verdict in its reply brief. However, this discrepancy is not significant to the Court's loss causation inquiry.

[46] Plaintiffs also provide inconsistent information about this asbestos verdict. First, Plaintiffs claim in the Complaint that asbestos claims *relating to Harbison-Walker* led to the September 12 verdict, but Plaintiffs also allege in the Complaint that "a jury returned a $130 million verdict *against Halliburton* and a co-defendant for five asbestos plaintiffs" (emphasis added), and again in their reply brief state that "*Halliburton* learned that a jury had returned a $130 million verdict *against it*" (emphasis added). Plaintiffs also initially allege only one "co-defendant" but later in the Complaint assert that the verdict was rendered against multiple "co-defendants." Finally, Plaintiffs allege that the Texas jury returned a *$130 million* verdict against Halliburton and a co-defendant for five asbestos plaintiffs, but later point to analysts' knowledge of the Texas jury award of *$65 million* in compensatory and punitive damages to five plaintiffs (and Nettesheim in fact refers to the fact that "a Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001"). These discrepancies could be important, given that Plaintiffs rely on Lesar's statement that "there have been no adverse developments at all with respect to the *Harbison-Walker* situation" (emphasis added) as a prior misstatement, and do not specifically allege that the September jury verdict was in fact a Harbison-Walker claim. However, assuming that the September verdict arose from a *Harbison-Walker claim* (and Halliburton does in fact state that the Texas court entered judgment "against Dresser"), the Plaintiffs still fail to meet the requirements of loss causation, as explained in greater detail below.

ber 26, 2001, a Mississippi jury returned an adverse asbestos verdict of $150 million, $21.3 million of which was Halliburton' s responsibility. Plaintiffs cite a press release issued by Halliburton on October 30, 2001, which discussed only the October verdict, as a corrective disclosure. Plaintiffs claim generally that Halliburton executives artificially inflated its stock price by making positive statements to analysts regarding Halliburton's estimated asbestos liabilities, and by failing to disclose the entire truth about the asbestos verdicts. Plaintiffs identify one statement that could qualify as a misrepresentation: on October 23, 2001, after the September verdict was returned, Lesar stated that "there have been no adverse developments at all with respect to the Harbison-Walker situation."

However, the Court cannot certify a class based on the October 30 disclosure because it lacks one necessary element: the corrective disclosure must reveal to the marketplace the truth behind the alleged misrepresentation.[47] The October 30 disclosure does not reveal to the market the truth of the alleged misrepresentation of October 23, because the correction does not reference the September verdict. If any misrepresentation occurred on October 23, it necessarily went to the failure to disclose the September verdict, because the October verdict had not yet been returned. But only the October verdict, not the September verdict, was revealed in the October 30, 2001 disclosure.

The requirement that there be a corrective disclosure of the alleged misrepresentation is not a mere triviality. To establish a presumption of reliance, the Plaintiffs must show that the misrepresentation actually moved the

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[47] *See Greenberg*, 364 F.3d at 661.

market.[48] Such a showing may be made by Plaintiffs (1) showing an increase in stock price following the alleged misrepresentation, or (2) showing a decrease in the stock price following a corrective disclosure.[49] Without a corrective disclosure regarding the September verdict, the *only* verdict the alleged misrepresentation could relate to, Plaintiffs cannot show that the stock price declined as a result of a *corrective* disclosure.[50]

Plaintiffs argue that the October 30, 2001 disclosure in fact related to the September verdict, because it demonstrated that Halliburton's anticipated asbestos liabilities were higher than generally reported. Plaintiffs argue that Lesar's statement on October 23 falsely suggested to the marketplace that Halliburton's prospective asbestos liabilities were under control, while the subsequent disclosure of the October verdict proved they were not. However, Halliburton's previous warning in its Form 10-K filings that a series of high asbestos verdicts remained a possibility directly contradicts this theory.[51]

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[48] *See Oscar*, 487 F.3d at 265.

[49] *Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 418-19). The Plaintiffs have not alleged an increase in stock price following any of the alleged misrepresentations, and therefore only the second mode of proving the misrepresentation actually moved the market is available to them.

[50] *See id.* There are two ways for the Plaintiffs to satisfy the *Oscar* requirement that the misrepresentation actually moved the market, and only one requires the existence of a corrective disclosure. If Nettesheim's model demonstrated an increase in Halliburton's stock price following Lesar's statement, one could argue that a corrective disclosure was not required. However, because Plaintiffs rely only on the decline in the stock price, this avenue is closed.

[51] For example, in Halliburton's 1999 Form 10-K filing with the SEC, it stated in the "Notes to Annual Financial Statements" section that "We *recognize the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the ex-*

Plaintiffs do not satisfy *Greenberg's* requirement of demonstrating that Halliburton made a misrepresentation that moved the market, which was related to the later correction.[52] Lesar stated that "there have been no adverse developments," not "there *will* be no adverse developments." Plaintiffs do not present opinions, much less any that reference "post-mortem data," to suggest that the market perceived the October 30, 2001 disclosure as having a *corrective* effect after any earlier *fraudulent* statement by Lesar.[53] Plaintiffs ignore the distinction between negative and corrective disclosures.[54] A negative disclosure does not necessarily have a corrective effect on the stock price.

Although Nettesheim concludes that the October 30, 2001 announcement had a negative effect on the stock price, she does not show that the resulting decline in the stock price was proximately caused by a prior misstatement. In fact, Nettesheim cites to the opinion of an A.G. Edwards analyst, who stated "[w]e expect a vigorous defense by [Halliburton's] [sic] and remain optimistic that the asbestos liability will remain under control." Thus, the market perception of the disclosure of the recent verdict was not that Halliburton fraudulently concealed its potential asbestos liabilities, but that the verdict was a surprising event against which Halliburton would vigor-

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pected resolution of asbestos related claims. However, based on our historical experience with similar claims, the time elapsed since Dresser and its former divisions or subsidiaries discontinued sale of products containing asbestos, and our understanding of the facts and circumstances that give rise to such claims, we believe that the pending asbestos claims will be resolved without material effect on our financial position or results of operations" (emphasis added).

[52] *Greenberg*, 364 F.3d at 661.

[53] *See Oscar*, 487 F.3d at 271.

[54] *See Flowserve*, 245 F.R.D. at 579.

ously defend. The market did not perceive the revelation of the verdict as evidence of prior fraud. As a result, the October 30 disclosure does not satisfy the requirements of loss causation.

In *Flowserve*, the plaintiffs argued that the "true financial condition" of the company was not accurately reflected by the company's prior earnings estimates.[55] Likewise, Plaintiffs argue that Lesar's statement suggested that Halliburton's asbestos liabilities were under control, which was not an accurate reflection of the "true asbestos condition" of the company. In *Flowserve*, the plaintiffs argued that subsequent financial statements demonstrated the company's "true financial condition;" here, Plaintiffs argue that subsequent asbestos verdicts revealed that Halliburton's true asbestos condition was not under control. The court rejected the argument in *Flowserve*, and this Court similarly rejects the argument here.[56]

For yet another reason, the October 30, 2001 disclosure is insufficient to establish loss causation: Plaintiffs have not separated the negative effect of the *new* information—the recent October verdict— from any corrective effect flowing from the revelation of increased *existing* asbestos exposure, if the corrective disclosure in fact related to Lesar's failure to reveal the September verdict. In short, Plaintiffs have not demonstrated loss causation as to the third asbestos disclosure.

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[55] *Id.* at 573.

[56] *See id.* at 574 ("the 'true financial condition' theory, if accepted, threatens to undermine the objective of securities law and disregards precedent").

D. December 4-7, 2001 Partial Corrective Disclosures

From December 4 through December 7, Halliburton disclosed a number of recent adverse asbestos jury verdicts in its Form 8-K SEC filings. On December 4, Halliburton filed a Form 8-K with the SEC, in which it disclosed that a Texas district court entered a judgment against Halliburton/Dresser on a jury verdict rendered in September 2001.[57] This filing also disclosed that the same district court entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs, for an aggregate amount of $35.7 million, due to a an "alleged breach of a purported settlement agreement." Then, on December 7, 2001, Halliburton issued a press release detailing the recent asbestos verdicts rendered against it.[58]

Plaintiffs argue that the decline in Halliburton's stock price on December 4, 5, and 7 demonstrates loss causation because Halliburton intentionally minimized the market's perception of its asbestos liabilities. However, Nettesheim's report appears to treat only the December 7 filing as a corrective disclosure, stating "[t] he cause of the large decline in Halliburton's stock price on December 7 was directly related to the disclosure regarding its asbestos exposure and subsequent market assessments

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[57] *See supra* footnote 46.

[58] Plaintiffs' Complaint and reply brief each identify a "release detailing all the recent asbestos verdicts" issued by Halliburton on December 7, 2001 as the corrective disclosure. However, Nettesheim's report only refers to a Form 8-K filed by Halliburton on December 7, 2001, disclosing a $30 million verdict rendered by a Maryland jury on December 5, 2001, in favor of five plaintiffs and against Halliburton/Dresser, as the corrective disclosure. For the purposes of its loss causation analysis, the Court will refer to both of these disclosures collectively as the December 7 disclosure.

at [sic] to the possible financial consequences to the Company of that asbestos exposure." Further, Plaintiffs' reply brief, while briefly noting the December 4 filing, only attempts to link the December 7 disclosure to prior representations that Halliburton's asbestos reserves were "adequate," "prudent," and "conservative." As a result, the Court will treat only the December 7 disclosure as an alleged corrective disclosure. However, even assuming that Plaintiffs properly alleged that the December 4 filing also qualified as a corrective disclosure, the Plaintiffs' loss causation argument must still fail.

With respect to the December 4 filing, Nettesheim's report states that "this [September] verdict was known to the public before December 4. . . an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report." Plaintiffs' Complaint also admits that "a few analysts did find out about the large Texas verdict," and cites to the same Salomon Smith Barney report. Information already known to the market cannot actually affect the stock price because an efficient market will not respond to information that is already known.[59] As a result, the December 4 filing does not meet the loss causation requirements with respect to revelation of the September verdict. Additionally, the information about the judgment entered due to Dresser's breach of a purported settlement agreement qualifies as nothing more than new negative information, rather than a corrective disclosure, because there are no identifiable prior statements relating to any such settlement agreement.

Further, Plaintiffs cannot establish loss causation with respect to the December 4 disclosure because they have not shown that the filing had a *corrective* effect, as op-

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[59] *See id.* at 568.

posed to simply a *negative* effect, on the stock price.[60] If the release of negative information to the market "does not disclose the scheme [to drive up stock prices]," then the information "cannot correct the artificial inflation caused by the scheme."[61] Halliburton correctly argues that disclosures relating to asbestos verdicts, especially those revealed within days of judgment being entered, "merely confirmed the Company's previous and repeated warnings that a series of such results 'could materially impact' its expectations regarding resolutions of its asbestos claims." As previously stated, the Fifth Circuit is "unwilling to infer loss causation" from mere speculation of fraud.[62]

Nettesheim opines that "the Company released several pieces of negative news, all of which were concerning the asbestos claims," but does not allege that this information had a corrective effect on the stock price. The Court cannot simply speculate about previous fraudulent statements that may or may not have inflated the stock price, and that were allegedly later corrected by this December 4 disclosure. The Plaintiffs must prove that the disclosure actually revealed to the market prior fraud.[63]

The only identifiable misstatement that could relate to the December 4 disclosure, even though not even identified by Plaintiffs with respect to the December 4 filing, would be Lesar's statement on October 23, 2001, that there had been no "adverse developments" with respect to the Harbison-Walker situation, which ignored the September verdict that had been rendered. But the Decem-

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[60] *See id.* at 579 (citing *In re Initial Pub. Offering Sec. Litig.*, 339 F. Supp. 2d 261, 266 (S.D.N.Y. 2005)).

[61] *Id.*

[62] *Oscar*, 487 F.3d at 271.

[63] *See Greenberg*, 364 F.3d at 666.

ber 4 disclosure actually provides a justification for the delay in announcing the September verdict: while the jury returned its verdict in September 2001, the Court did not enter judgment against Halliburton/Dresser until November 29, 2001. The verdict was revealed a few days later in the December 4 filing. As a result, the December 4 filing reveals nothing fraudulent to the market, and the Plaintiffs have failed to demonstrate loss causation with respect to the December 4 filing.

With respect to the December 7 disclosure, Plaintiffs again fail to distinguish between the negative and corrective effects of the disclosure.[64] To establish loss causation, Plaintiffs must show that it was "more probable than not" that the decline in stock price was caused by the corrective portion of the disclosure, rather than the new information.[65] For example, in *Greenberg*, the corrective disclosure regarding the interoperability of routers also stated the company had lost one of its biggest customers.[66] The plaintiffs in *Greenberg* failed to establish loss causation because they did not demonstrate that the decline in stock price was caused by the disclosure regarding interoperability, rather than the loss of a major customer.[67]

There are two distinct components driving the decline in stock price following the December 7, 2001 disclosure: the corrective effect resulting from the alleged prior minimization of asbestos liabilities; and the negative effect following the announcement of a new asbestos verdict, rendered on December 5. Plaintiffs must demonstrate that it was "more probable than not" that the sub-

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[64] *See id.* at 665.

[65] *See id.*; *see also Flowserve*, 245 F.R.D. at 569.

[66] *Greenberg*, 364 F.3d at 666-67.

[67] *Id.* at 667.

sequent decline in stock price was caused by a *correction* of a prior inflated value, rather than constituting a normal market response to a sizeable adverse verdict.[68]

The December 7, 2001 disclosure references the recent December verdict, which was *new* negative information, unrelated to previous disclosures, and also negative information about the September verdict, which was already known to the market.[69] Plaintiffs make no effort to distinguish any *corrective* effects from the effects of new negative information. With respect to mixed disclosures, the plaintiff's burden is heightened—Plaintiffs must separate actual corrective effects from effects of new negative events.[70] Here, Plaintiffs merely point to a decline in Halliburton's stock price following the mixed disclosure and then presume loss causation. The Fifth Circuit has made clear that this is insufficient to carry the Plaintiffs' burden at the class certification phase.[71]

Plaintiffs argue that the December 7, 2001 disclosure corrects Halliburton's previous representations of its estimated asbestos liabilities as "manageable" and "a nuisance."[72] However, construing an adjustment of potential liability as inherently fraudulent would discourage companies from addressing changed conditions, for fear of

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[68] *See id.* at 666.

[69] As stated above, Halliburton filed a Form 8-K with the SEC on December 4 disclosing the jury verdict rendered against Dresser in September 2001. Plaintiffs also admit that "this verdict was known to the public before December 4. . . an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report."

[70] *Greenberg*, 364 F.3d at 666.

[71] *Id.*

[72] For example, on September 4, 2001, Lesar stated that Halliburton "takes our exposure seriously," but that it sees asbestos claims against the company as a "manageable problem."

exposing themselves to securities fraud lawsuits.[73] Even though Halliburton had previously warned investors that its asbestos reserves could possibly be affected by a series of high verdicts, Plaintiffs argue that Halliburton's disclosure of these new asbestos verdicts shows that the company's previous estimates were fraudulent. As noted earlier, the Court will not infer fraud where there is no evidence of a scheme to inflate the stock price.[74] Plaintiffs do not cite any analyst reports or other information indicating that the market perceived the December 7, 2001 disclosure as revealing fraud, rather than just delivering bad news. Without any evidence of a fraudulent scheme, Plaintiffs' mere "well-informed speculation" is, again, insufficient to establish loss causation.[75]

Plaintiffs have failed to establish loss causation with respect to any of the four disclosures relating to asbestos liabilities. Therefore, the Court cannot certify a class with respect to the asbestos claims.

II. Accounting Methodology

With respect to the accounting claims, Plaintiffs argue that Halliburton changed its accounting methodology sometime in late 1997 or early 1998, inflating its balance sheet by recognizing as revenue claims for cost overruns that had a low probability of collection. Plaintiffs claim that these actions were accompanied by changes to the language of Halliburton's financial statements, which did not comply with the requirements of generally accepted

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[73] *See Flowserve*, 245 F.R.D. at 577 (rejecting plaintiff's argument on the grounds that "in practical terms, if any corporate defendant ever files a restatement, it will virtually guarantee investors the ability to recoup for any loss").

[74] *Id.* at 579.

[75] *Oscar*, 487 F.3d at 271.

accounting principles, because the reasons for and impact of the changes were not adequately disclosed.

Plaintiffs allege in the Complaint that over a period of at least five years, dating back to 1993, "Halliburton had consistently represented that all *'anticipated' losses on contracts were provided for currently* and that revenues represented by cost overrun/change order charges, i.e., Unapproved Claims, *were recognized only when the customer had agreed to pay the Unapproved Claim.*"[76] Plaintiffs argue this means that:

> [B]efore an Unapproved Claim was resolved, the Company recorded losses caused by project cost overruns or unpaid Unapproved Claims. According to the company's stated accounting practice, only after the claim *was resolved with an agreement to pay* would the Company recognize revenue on the claim as an offset against the project's cost overruns.[77]

Plaintiffs claim that in late 1997 to early 1998, Halliburton secretly began to include in revenue amounts that customers had *not* agreed to pay, where Plaintiffs claim the likelihood of collection was "dubious," to offset and conceal cost overruns and unpaid Unapproved Claims, and to pad profit margins. Plaintiffs argue that as a result Halliburton's financial statements, which stated that claims were included as revenue only "when collection is deemed probable," in fact contained amounts not likely to be collected, thereby overstating Halliburton's revenue and artificially inflating its stock price.

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[76] Emphasis in original.

[77] Plaintiff's Fourth Amended Complaint, P. 137 (emphasis in original).

Plaintiffs cite Halliburton's statement, from a press release issued December 21, 2000, that it was taking a $120 million charge in the fourth quarter of 2000 as the requisite corrective disclosure. Plaintiffs argue that this fourth quarter charge was the manifestation of Halliburton's previous inclusion in revenue of claims with a low probability of collection. The statement itself attributed $95 million of the expected $120 million loss to uncollectable cost overrun claims. It attributed the uncollectable cost overruns to labor disturbances in Venezuela and West Africa, and also mentioned that cost overruns on seven other projects had not been resolved in Halliburton's favor, as was originally anticipated.

The first major flaw in Plaintiffs' argument is that Plaintiffs fail to identify specific misrepresentations "that are capable of moving the market."[78] Nettesheim simply did not identify any specific misrepresentations that correlate to the December 21, 2000 disclosure.[79] Nettesheim merely contends that the disclosure caused a company-specific decline in Halliburton's stock price that was unrelated to industry or market conditions. While *Nathenson* held that a plaintiff may rely on a decline in the stock price following a corrective disclosure to establish loss causation, *Greenberg* clarified that a plaintiff must still show the existence of earlier misrepresentations that actually moved the market.[80] Thus, when relying on a decline in stock price, Plaintiffs must still relate the disclosure causing the fall to an earlier misrepresentation that was corrected by the disclosure. Plaintiffs have identified no such earlier misrepresentation.

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[78] *See Flowserve*, 245 F.R.D. at 571.

[79] *See Greenberg*, 364 F.3d at 666.

[80] *Id.*; *Nathenson*, 267 F.3d at 418-19.

Along with failing to identify an earlier misrepresentation, Plaintiffs have commingled evidence of inflation of the stock price during the class period with impermissible evidence of inflation of the stock price prior to the class period. Specifically, any alleged misrepresentations made by Halliburton that may have actually moved the market could have occurred before the class period. If Halliburton changed its accounting practices in late 1997, as Plaintiffs contend, then the financial statements in late 1997 and 1998 would have inflated the stock price if they included in revenue claims not likely collectable. The class period in this case commences on June 3, 1999. Without accounting for possible inflation prior to the class period, any later financial statements reasserting the accounting methodology are at least partially and unquantifiably confirmatory in nature.[81] Confirmatory statements cannot support a showing of loss causation. Plaintiffs do not address the possibility that inflation in the stock price would have occurred, at least in part, before the beginning of the class period.

Plaintiffs attempt to meet the *Greenberg* requirement of pinpointing earlier misrepresentations that "actually moved the market" by citing language found in one of Halliburton's financial statements, and then repeated in later financial statements. The language of these financial statements is addressed in greater detail below. However, Plaintiffs fail to distinguish between confirmatory and non-confirmatory statements within these documents. The only alleged misrepresentation during the class period cited by Plaintiffs comes from Halliburton's 1999 Annual Report, issued in early April 2000:

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[81] *See Greenberg*, 364 F.3d at 665-66.

> All known or anticipated losses on contracts are provided for currently. Claims and change orders which are in the process of being negotiated with customers for extra work or changes in the scope of work are included in revenue when collection is *deemed probable*.

This passage cannot form the basis for an actionable misrepresentation for a number of reasons.

In *Flowserve*, Judge Boyle rejected "re-publications of financial statements, earnings projections, and confirmation of debt covenant compliance" as actionable statements capable of moving the market, because such material is confirmatory in nature.[82] Here, the republication of Halliburton's accounting methodology in its financial statements is similarly confirmatory.[83] Halliburton's 1998 Annual Report identically stated that "[a]ll known or anticipated losses on contracts are provided for currently." The 1998 Annual Report was filed on March 23, 1999—more than two months before the beginning of the class period. The alleged inflationary effects caused by the "all known or anticipated losses" language therefore occurred before the class period.

Plaintiffs do not allege that specific losses on contracts were incurred between the 1998 and 1999 annual reports, so that the 1999 report was somehow materially different from the first. The market will not "double-count" information it already knows.[84] Plaintiffs make no effort to distinguish between the confirmatory language and other non-confirmatory language in the 1999 Annual Report,

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[82] *See Flowserve*, 245 F.R.D. at 571.
[83] *See Greenberg*, 364 F.3d at 665-66.
[84] *Flowserve*, 245 F.R.D. at 568.

which precludes a finding of loss causation attributable to the language regarding current provision for losses.

Comparing the plain language of the 1999 Annual Report with the language of the 1998 Annual Report reveals that one additional sentence was added to the 1999 filing. The 1999 filing states that "[c]laims and change orders which are in the process of being negotiated with customers, for extra work or changes in the scope of work are included in revenue when collection is deemed probable," immediately after the "known or anticipated losses" language appears. However, Plaintiffs have not explained why this "deemed probable" language is not substantively encompassed within the previous confirmatory statement about "known or anticipated losses." Instead, Plaintiffs merely argue that as early as July 1999, "significant cost overruns and unapproved claims. . . were undermining Halliburton's earnings," without distinguishing the content and effect of the new language in the 1999 Annual Report from the "known or anticipated losses" language found in the earlier financial statements.

Therefore, Plaintiffs' position runs afoul of *Greenberg's* requirements in two respects. First, Plaintiffs fail to identify any specific misrepresentation that allegedly inflated the stock price beginning in July 1999. Instead, Plaintiffs offer only a conclusory statement that such inflation occurred. In doing so, Plaintiffs attempt to prove loss causation without ever showing that the company made material misrepresentations that affected the market, like those present in *Greenberg*.[86] It is insufficient to establish loss causation simply by proving that the stock

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[86] *Greenberg*, 364 F.3d at 661.

price declined after negative news, like that of a fourth quarter charge, was released.

Second, confirmatory positive statements do not actually affect the market.[86] The class period began on June 3, 1999. Plaintiffs allege that Halliburton's stock price was inflated in July 1999, without identifying a specific cause for that inflation. Any inflation could likely have been caused by an alleged misrepresentation made before the class period. To establish loss causation, Plaintiffs must cite actual misrepresentations made *during* the class period that were not confirmatory.[87]

Even if the Court were to look only at the 1999 Annual Report, the *only* alleged falsehood cited by Plaintiffs is in the fine print about accounting practices which had appeared in a prior financial statement, that "[a]ll known or anticipated losses on contracts are provided for currently." That is a "classic example[s] of confirmatory information."[88] Here, nothing in the record explains in what manner the language in the 1999 Annual Report is materially different from statements in any of Halliburton's previous financial statements with regards to misrepresenting Halliburton's accounting practices. The additional language in the 1999 Annual Report does not significantly alter the nature of the assurances found in the 1998 Annual Report, or in other prior financial statements. The comparison is analogous to false public announcements about the interoperability of routers that were present in *Greenberg*.[89]

Plaintiffs have not shown loss causation for a third critical reason: the alleged corrective disclosure on De-

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[86] *Id.* at 665-66.
[87] *See id.*
[88] *Flowserve*, 245 F.R.D. at 571.
[89] *See Greenberg*, 364 F.3d at 660.

cember 21 does not "specifically reveal" to the market any misrepresentation or fraud that may have appeared in Halliburton's prior financial statements.[90] On December 21, 2000, Halliburton issued a press release stating that $95 million of its $120 million fourth quarter loss was attributable to cost overruns. In *Flowserve*, Judge Boyle rejected the plaintiffs' argument that a failure to meet earnings forecasts rendered previous statements about historical financials internal auditing controls fraudulent.[91] While it is possible for the fraud to be revealed to the market indirectly, the plaintiff must make such a showing in the loss causation analysis.[92]

Halliburton's loss in the fourth quarter of 2000 does not establish loss causation without proof of a revelation of fraud by Halliburton or an indirect revelation of fraud to the market.[93] Halliburton's disclosure does not *directly* reveal a fraud; the disclosure reiterates that Halliburton had believed that collection of the cost overruns was probable and states that external factors, such as labor unrest in Venezuela and Africa, had contributed to the losses.

Where fraud is revealed to the market *indirectly*, plaintiffs must show that the market recognized a relationship between the disclosure and the indirectly-revealed fraud.[94] In this case, the Plaintiffs must demonstrate that the market recognized a relationship between the December 21, 2000 disclosure of the $120 million fourth quarter charge, attributed to cost overruns and labor unrest, and the 1999 Annual Report that stated:

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[90] *See id.* at 666.
[91] *Flowserve*, 245 F.R.D. at 578-79.
[92] *Id.* at 579.
[93] *See id.* at 578-79.
[94] *Id.*

> All known or anticipated losses on contracts are provided for currently. Claims and change orders which are in the process of being negotiated with customers for extra work or changes in the scope of work are included in revenue when collection is deemed probable.

Plaintiffs make no such showing here. There is no evidence that the market perceived a relationship between this fourth quarter charge and the new language in the 1999 Annual Report. Plaintiffs offer no evidence that Halliburton did not believe it was complying with proper accounting practices, nor do Plaintiffs contend that the market recognized such evidence and linked it to the December 21, 2000 disclosure, or to the 1999 Annual Report. Plaintiffs merely ask the Court to infer fraud from Halliburton's substantial fourth quarter charge.[96] This the Court cannot do.

The Plaintiffs' argument is simply a nuanced version of the "true financial condition" argument that Judge Boyle rejected in *Flowserve*.[96] Plaintiffs argue that Halliburton's financial statements, in the aggregate, misrepresented the true financial condition of the company and that the announcement of a fourth quarter loss served as a corrective disclosure of the company's true financial health. However, Plaintiffs cannot establish loss causation merely by pointing to lower financial projections and then concluding without proof that Halliburton's previous revenue statements were fraudulent. The burden of proving loss causation cannot be satisfied with such "well-informed speculation."[97]

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[96] *See Oscar*, 487 F.3d at 271.

[96] *Flowserve*, 245 F.R.D. at 573.

[97] *Oscar*, 487 F.3d at 271.

The Fifth Circuit has made plain that securities fraud suits are not an "insurance policy for investors," whereby Plaintiffs can simply "surmise[] what the market knew... with the benefit of hindsight and from the comfort of a litigation armchair."[98] In light of the failure of Plaintiffs to satisfy their burden on loss causation, class certification is denied with respect to the accounting methodology claim.

III. The Dresser Merger

Plaintiffs argue that in early 1998, Halliburton misstated the benefits of its acquisition of Dresser Industries, in order to inflate the price of Halliburton stock. Plaintiffs cite four disclosures as correcting the inflation caused by the alleged misstatements regarding Dresser, each addressed in greater detail below. First, on October 4, 1999, "Halliburton unexpectedly warned that its 1999 third-quarter earnings would be less than the previous estimates," caused in part by the lower than expected profits from the Dresser business units. Second, on January 5, 2000, two investment analysts lowered their estimates of Halliburton's annual earnings for 2000 and 2001, caused in part by "less powerful synergies from the Dresser merger." Third, on October 24, 2000, Halliburton CEO Lesar told analysts in a conference call that Halliburton planned a massive restructuring in light of operational problems and management inefficiencies caused by the Dresser merger. Fourth, Halliburton officially unveiled the restructuring plan on December 21, 2000, the same day it announced that it expected to incur a $120 million dollar charge in the fourth quarter of 2000, $95 million of which was attributed to accounting claims adjustments. The remaining $25 million in losses was at-

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[98] *Id.* at 574.

tributed to the costs of reorganization after the Dresser merger.

A. October 4, 1999 Disclosure

Plaintiffs have not established loss causation with respect to the October 4, 1999 disclosure because the underlying alleged misrepresentations are confirmatory and thus not actionable.[99] Plaintiffs point to statements made on July 22, 1999, and September 13, 1999, in which Halliburton executives estimated annualized savings of $500 million from the Dresser merger, as misrepresentations that actually moved the market.

Defendants correctly argue that these alleged misrepresentations were confirmatory, and thus not actionable, because on March 1, 1999, prior to the class period, Halliburton stated that: "[c]osts from the merger and the downturn in activity should yield over $500 million by the end of 1999. . ." An efficient market will not "double-count" the effects of a confirmatory positive statement, and inflate the stock price twice.[100] Plaintiffs argue that the March 1999 statement does not render the later statements confirmatory because it encompassed the Dresser integration as well as a "downturn," and thus did not *solely* address the Dresser merger.

The Court is not persuaded that the March 1999 statement and the later alleged misrepresentations about the Dresser merger are materially different such that the market would respond to the later statements about saving $500 million after it already responded to the March 1999 statement. Plaintiffs have provided no evidence that the content of the March 1999 statement would have caused the market to respond twice to the same informa-

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[99] *See Greenberg*, 364 F.3d at 665-66.

[100] *Flowserve*, 245 F.R.D. at 568.

tion about cost savings, just because it also noted a "downturn" when identifying the source of the $500 million savings. Thus, Plaintiffs cannot establish loss causation with respect to this issue because the actionable misrepresentations are confirmatory in nature.

Also, while Plaintiffs argue that attributing the savings to the Dresser merger alone somehow changed the market's perception of the Dresser merger, the alleged corrective disclosure also reveals nothing *fraudulent* about the statements.[101] Nettesheim states in her report that "[t]his is an instance where the Company released negative news, which concerned the lack of benefits arising from the Dresser merger." However, the mere release of negative information is simply not enough to prove that the previous positive statements were fraudulent. Plaintiffs cannot establish loss causation by speculating about fraud. A failure to meet earnings estimates does not show to the market the existence of a fraudulent scheme.[102] Since there is no evidence supporting an inference of fraud, and because the alleged misrepresentations were confirmatory in nature, the Court will not certify the class based on the October 4, 1999 disclosure.

B. January 5, 2000 Corrective Disclosure

The Court rejects class certification with respect to this disclosure because Plaintiffs again fail to show loss causation. Plaintiffs rely on two analysts' reduction of Halliburton's earnings estimates on January 5, 2000, in alleging loss causation for the stock decline that occurred that particular day. Plaintiffs allege that "[l]ooking behind the analysts' conclusions to the underlying data, Ms.

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[101] *See Greenberg*, 364 F.3d at 666.

[102] *Flowserve*, 245 F.R.D. at 579 (distinguishing such statements as negative rather than corrective disclosures).

Nettesheim concluded that 'a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger." Plaintiffs rely on the "July and September misrepresentations" which this Court in its earlier analysis found to be confirmatory and thus not actionable. Plaintiffs point to no misrepresentations in particular following the October 4, 1999 disclosure. Halliburton correctly argues that "[t]he first step is to isolate the alleged actionable, non-confirmatory misstatements." However, in this case Plaintiffs argue that the analysts' downgrading of Halliburton stock amounts to a new corrective disclosure without identifying any actionable misrepresentation.

Plaintiffs rely on the reports of two analysts: Carol Lau of Brown Brothers Harriman & Co., and K. Simpson of Merrill Lynch. K. Simpson attributed his downward adjustment to "reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America, and less powerful synergies from the Dresser merger than. . . envisioned." Plaintiffs cite no statements by Lau explaining her adjustment, and rely only on the existence of the adjustment as evidence of a corrective disclosure.[108]

Plaintiffs fail to establish loss causation with respect to this "disclosure." First, Plaintiffs fail to cite any action-

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[108] Nettesheim alludes to a "partial disclosure related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits realized from the Dresser merger as revealed in a conversation with analyst Carol Lau," but cites no source for or further information about this alleged conversation. The Court cannot establish a specific alleged misrepresentation or corrective disclosure without more.

able misrepresentation that correlates to it.[104] Plaintiffs cannot establish loss causation without such a showing. Instead, Plaintiffs rely on the same confirmatory statements that were supposedly corrected by the October 4, 1999 disclosure. However, Plaintiffs cannot establish loss causation by citing confirmatory information. Just as Plaintiffs' argument fails with respect to the October 4, 1999 disclosure, it also fails here.

Additionally, Plaintiffs do not cite any public release as correcting a misrepresentation, but rather point only to the analysts' adjusting their own earlier estimates of Halliburton's earnings. The Court cannot determine whether this "disclosure" specifically revealed a fraudulent scheme because Plaintiffs provided limited evidence about why these analysts changed their forecasts, and no evidence that the market perceived these adjustments as evidence of prior fraud.[105]

In *Oscar*, the court rejected the plaintiffs' approach of relying solely on analysts' opinions to show that a specific disclosure corrected a prior misrepresentation.[106] The *Oscar* court required that the plaintiffs' expert make some sort of "empirically-based showing that the corrective disclosure was more than just present at the scene."[107] Plaintiffs argue that in this case the two analysts' adjustments of their financial estimates prove that there must have been a corrective disclosure somewhere.

Plaintiffs offer no evidence of a fraudulent scheme, as required by *Oscar*. Plaintiffs cannot even claim to have the "well-informed speculation" which the court rejected

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[104] *See Greenberg*, 364 F.3d at 666.
[105] *See id.*
[106] *Oscar*, 487 F.3d at 261.
[107] *Id.*

in *Oscar*.[108] In *Oscar*, the plaintiffs also relied solely on analyst opinions, but the analyst commentary in *Oscar* at least provided concrete examples of disclosures that could potentially be perceived as corrective by the market.[109]

Plaintiffs simply speculate that Simpson's earnings adjustment was due to the Dresser merger. Although Simpson mentioned the Dresser merger as one of three reasons for his adjustment, Plaintiffs make no effort to distinguish between the Dresser issue and the two other reasons for the adjustment.[110] Nettesheim concedes that she did not distinguish between the effects of Simpson's concerns regarding oilfield spending and those regarding the Dresser merger. Furthermore, Nettesheim admits, "I do not have Simpson's breakout of his reduction of 2000 and 2001 earnings estimates between the segments. . ." As a result, Nettesheim failed to differentiate between not only the stated reasons for the rating cut, but also failed to account for long-term versus short-term adjustments to the earnings estimates in her analysis. This approach falls well short of *Oscar's* requirement that the Plaintiffs' expert make an empirically-based showing that the corrective disclosure was more than just present at the scene.[111]

The *Oscar* court's admonition that the class certification decision "bears due-process concerns for. . . [the] defendants" is especially pertinent here.[112] There, the court explained, "an empirical inquiry into loss causation better

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[108] *Id.*

[109] *Id.* at 270 (the analysts revealed that the company adjusted the line count between billing and order management platforms).

[110] *See Greenberg*, 364 F.3d at 666.

[111] *See Oscar*, 487 F.3d at 261.

[112] *Id.* at 271.

addresses these [due process] concerns than an impenetrable finding akin to a reasonable man assessment. And analyst speculation about materiality, while better informed than a layman, more closely resembles the latter."[113] This Court cannot simply infer loss causation without, at the very least "reference to. . . post-mortem data [the analysts] have reviewed or conducted" to support the determination, in this case, that Simpson's earnings adjustment was due to the Dresser merger. To hold otherwise would result in exactly the type of "impenetrable finding" the Fifth Circuit has warned against.

Simply put, Plaintiffs' burden of identifying corrective disclosures is not satisfied by citing the mere existence of an earnings adjustment by outside analysts. Analysts unaffiliated with Halliburton could have previously overestimated Halliburton's performance, and then a subsequent modification would certainly not qualify as a corrective disclosure. Once more, Plaintiffs attempt to trigger the presumption of reliance by simply offering evidence of a decrease in price following the release of negative information,[114] without citing any actionable misrepresentation or disclosure by Halliburton. Plaintiffs' reliance on the decline in Halliburton's stock price after analysts reduced their forecasts does not establish loss causation.

C. October 24, 2000 Corrective Disclosures

Plaintiffs have not established loss causation with respect to the October 24, 2000 disclosure. Unlike the prior disclosure, Plaintiffs satisfy the *Greenberg* requirement by identifying what they allege to be a prior misstate-

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[113] *Id.*

[114] *See Greenberg*, 364 F.3d at 665.

ment.[115] Plaintiffs cite a letter from Dick Cheney included in the 1999 Annual Report, released in April 2000, which told investors that "[t]he merger with Dresser Industries is now behind us. The potential rewards to our shareholders are vast." Then on October 24, 2000, Lesar stated that Halliburton planned to restructure its construction operations due to operational problems, management inefficiencies, and excessive costs related to the Dresser merger.

However, Plaintiffs fail to establish loss causation because nothing in the alleged corrective disclosure "specifically reveal[s]" to the market any fraudulent scheme.[116] Cheney's statement that the Dresser merger was "behind us" is not proven fraudulent based only on the fact that Halliburton restructured its construction operations six months later. Just as a failure to meet earnings expectations does not reveal misstatements in previous financial documents, a failure to meet business expectations will not reveal that prior optimistic expectations were *fraudulent*. Indeed, it is entirely possible that six months after the announcement of the completion of the Dresser acquisition, Halliburton executives realized that the business units were not functioning as well as anticipated. The burden falls on Plaintiffs to show that Lesar's statement communicated to the market that Cheney's previous statement about the Dresser merger was fraudulent, in order to prove loss causation. Because Plaintiffs fail to make such a showing, they have not established loss causation with respect to the October 24, 2000 disclosure.

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[115] *See id.* at 666.

[116] *Id.*

D. December 21, 2000 Disclosure

Plaintiffs allege that Halliburton's official unveiling of its Dresser restructuring plan on December 21, 2000, the same day it announced that it expected to incur a $120 million dollar charge in the fourth quarter of 2000, constitutes an actionable corrective disclosure. The disclosure blamed $95 million of the loss on cost overruns on fixed-price contracts, leaving $25 million attributable to the expected costs of the Dresser reorganization.

Plaintiffs have not established loss causation with respect to this disclosure. The announcement of the expected costs of reorganization did not "specifically reveal[]" to the market any fraudulent scheme.[117] The announcement of the loss attributable to restructuring is entirely consistent with Halliburton's October 24, 2000 statement that it planned to restructure. Despite Plaintiffs' claim that Halliburton "again surprised the market," Nettesheim recognized that the announcement "does not appear to have been a surprise or a concern to analysts as some charge was expected after the Company announced the restructuring plan in its third quarter earnings conference call."

The market will not "double-count" the negative effects of a restructuring plan that had already been made public. Plaintiffs do not argue that the formal announcement of the plan further changed the market's perception of Halliburton or that the expected cost of the restructuring had previously been fraudulently misrepresented. Any inflation in the value of Halliburton's stock price caused by Cheney's alleged misrepresentation would have been removed by the initial disclosure of the planned restructuring in October 2000.

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[117] *See Greenberg*, 364 F.3d at 666.

Additionally, the expected cost of the restructuring qualifies as a *negative*, as opposed to a *corrective* disclosure. The release of negative information to the market does not necessarily have a corrective effect. The information about the cost of restructuring did not *correct* any previously released information; it was simply negative information relating to the costs of the Dresser merger. In fact, this information actually comported with and elaborated upon Halliburton's prior disclosure that it planned to restructure the Dresser business units.

Because the announcement of the costs of restructuring confirmed the market's prior knowledge that Halliburton was planning to restructure, this announcement cannot support a finding of loss causation. Any corrective effect upon the price of Halliburton stock would have occurred with the disclosure on October 24, 2000, not with the formal confirmation two months later. Therefore, the Court will not certify a class with respect to the December 21, 2000 disclosure.

CONCLUSION

Plaintiffs have failed to establish loss causation with respect to any of the three issues in this lawsuit. For that reason, the Court will not certify the class. The Court reiterates that the Fifth Circuit has placed an extremely high burden on plaintiffs seeking class certification in a securities fraud case. Even though the Court finds that all other elements required for class certification under Rule 23 have been met in this case, it is unable to certify the class because of Plaintiffs failure to meet this stringent loss causation requirement.

SO ORDERED.

Signed this 4th day of November, 2008.

/s/ Barbara M.G. Lynn

BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX

FEDERAL RULE OF CIVIL PROCEDURE 23: CLASS ACTIONS

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue

repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action–giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a

proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant

seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as pro-vided in Rule 54(d)(2)(D).

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 11 2013
OFFICE OF THE CLERK

No. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR, PETITIONERS,
v.
ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this case present a proper vehicle for reconsidering the fraud-on-the-market presumption recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), even though Defendants conceded the efficiency of the market for Halliburton's stock and did not challenge *Basic* until nearly two years after this Court reversed the Fifth Circuit in this case in 2011.

2. Should this Court revisit its holding regarding the fraud-on-the-market presumption in *Basic*, even though Congress has amended the federal securities laws several times since *Basic* was issued without legislatively overruling *Basic*, and has considered but rejected a proposal to overrule *Basic*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, the Erica P. John Fund, Inc., formerly known as the Archdiocese of Milwaukee Supporting Fund, Inc., states that it has no parent corporation and no stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF APPENDICES vi

TABLE OF AUTHORITIES viii

I. INTRODUCTION 1

II. STATEMENT 6

A. Background 6

B. The Complaint In This Action 9

C. Asbestos Liability 9

D. Booking Revenue for Cost Overruns 11

E. The Dresser Merger 12

III. PROCEEDINGS BELOW 12

A. District Court Proceedings 12

B. Court of Appeals Proceedings 13

C. The Supreme Court 13

D. On Remand To The District Court 14

E. The Fifth Circuit Decision And Halliburton's Petition For Rehearing *En Banc* 15

F. Status of the Case 16

IV. REASONS FOR DENYING THE PETITION ... 16

A. The Fifth Circuit Properly Applied This Court's Holdings In *Amgen* And *EPJ Fund* and Ruled Correctly in this Case. 16

B. There is No Circuit Split 20

C. This Case Is Not a Proper Vehicle for Challenging *Basic* 22

1. Halliburton Has Conceded the Market for its Stock is Efficient, Thereby Negating the Basis for its Attack on *Basic* 23

2. Under This Court's Precedent, Halliburton Cannot Raise An Issue In The Second Petition That Was Open To Dispute In The First Petition 25

3. Halliburton Has Waived The Right To Seek To Overturn *Basic* Due To Its Failure To Offer That Argument In Timely Fashion 26

4. *Lebron* And Progeny Do Not Excuse Halliburton's Failure To Make A Timely Challenge To *Basic* 29

D. This Court's Holding In *Basic* Should Not Be Reconsidered 30

1. *Basic* Is A Seminal Decision That Has Been Reaffirmed By This Court And Repeatedly Endorsed By Congress, The SEC, And The U.S. Department Of Justice. 30

2. *Stare Decisis* Favors Preserving *Basic*. ..34

3. *Basic* Has Not Been Undermined By Economic Developments.....36

4. There Is No Basis For Amending *Basic*..40

V. CONCLUSION 41

TABLE OF APPENDICES

Page

APPENDIX A — EXCERPTS OF U.S. SUPREME COURT RECORD IN ERICA P. JOHN FUND, INC. V. HALLIBURTON CO., 131 S. CT. 2179 (2011) 1a

EXCERPT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED SEPTEMBER 17, 2007 ..... 2a

EXCERPT OF DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED NOVEMBER 16, 2007 ..... 10a

EXCERPT OF LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED DECEMBER 21, 2007 ..... 16a

EXCERPTS OF DEPOSITION OF LUCY ALLEN 20a

APPENDIX B — EXCERPT OF LETTER FROM BAKER BOTTS L.L.P. TO THE CLERK, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MARCH 4, 2013 ..... 34a

APPENDIX C — EXCERPT OF APPELLANTS' PETITION FOR REHEARING EN BANC, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 24, 2013 ..... 42a

TABLE OF AUTHORITIES

Page

Cases

Alleghany Corp. v. Breswick & Co.,
355 U.S. 415 (1958) 27

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,
133 S. Ct. 1184 (2013) ..... *passim*

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Celanese Corp. v. Martin K. Eby Const. Co., Inc.,
620 F.3d 529 (5th Cir. 2010) 26

Citizens United v. F.E.C.,
558 U.S. 310 (2009) 29, 30, 36

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 28

Duignan v. United States,
274 U.S. 195 (1927) 23

Dura Pharmaceuticals, Inc. v. Broudo,
544 U.S. 336 (2005) 7, 31, 32

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) ..... *passim*

F.D.I.C. v. Massingill,
30 F.3d 601 (5th Cir. 1994) 26

Falcon v. Gen. Tel. Co.,
815 F.2d 317 (5th Cir. 1987) 20

Franks Inv. Co. LLC v. Union Pacific R. Co.,
593 F.3d 404 (5th Cir. 2010) 27

GAMCO Investors, Inc. v. Vivendi, S.A.,
927 F. Supp. 2d 88 (S.D.N.Y. 2013) 22

Gen. Tel. Co. of SW v. Falcon,
457 U.S. 147 (1982) 28

Glover v. United States,
531 U.S. 198 (2000) 23

Illinois v. Illinois Central R. Co.,
184 U.S. 77 (1902) 26

In re Citigroup Inc. Sec. Litig.,
Case Nos. 09 MO 2070 (SHS), 07 Civ. 9901 SHS, 2013 WL 3942951
(S.D.N.Y. Aug. 1, 2013) 22

In re DVI, Inc. Sec. Litig.,
639 F.3d 623 (3d Cir. 2011), *abrogated by Erica P. John Fund, Inc. v. Halliburton Co.*,
131 S. Ct. 2179 (2011) 15, 21

In re Salomon Analyst Metromedia Litig.,
544 F.3d 474 (2d Cir. 2008), *abrogated by Erica P. John Fund, Inc. v. Halliburton Co.*,
131 S. Ct. 2179 (2011) 15, 20, 22

In re WorldCom, Inc. Sec. Litig.,
Case No. 02 Civ. 3288 (DLC), 2004 WL 831018
(2d Cir. Apr. 19, 2004) 35

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2007) 36

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 29, 30

Lowry v. Bankers Life & Cas. Ret. Plan,
871 F.2d 522 (5th Cir. 1989) 26

Merck & Co., Inc. v. Reynolds,
130 S. Ct. 1784 (2010) 34

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 33

Montejo v. Louisiana,
556 U.S. 778 (2009) 35

Morgan v. Swanson,
659 F.3d 359 (5th Cir. 2011) 26

Oscar Private Equity Invs. v. Allegiance Telecom, Inc., *abrogated by* 487 F.3d 261(5th Cir. 2007), *Erica P. John Fund, Inc. v. Halliburton Co.*,
131 S. Ct. 2179 (2011) 13

Payne v. Tennessee,
501 U.S. 808 (1991) 35, 36

Pearson v. Callahan,
555 U.S. 223 (2009) 35

Queran v. Jordan,
440 U.S. 332 (1978) 28

Schleicher v. Wendt,
618 F.3d 679 (7th Cir. 2010) 15, 21, 38

Shepard v. United States,
544 U.S. 13 (2005) 36

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
552 U.S. 148 (2008) 31

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
127 S. Ct. 2499 (2007) 32, 33

U.S. Dept. of Justice v. Landano,
508 U.S. 165 (1993) 31

United States v. Camou,
184 U.S. 572 (1902) 4, 25, 26

United States v. Gaudin,
515 U.S. 506 (1995) 35

United States v. Williams,
504 U.S. 36 (1992) 4, 23

Vasquez v. Hillery,
474 U.S. 254 (1986) 35

Watson v. United States,
552 U.S. 74 (2007) 34

Wal-Mart Stores Inc. v. Dukes,
131 S. Ct. 2541 (2011) 28

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 29, 30

Statutes

15 U.S.C. 78u-4(a)(3) 32

15 U.S.C. 78u-4(a)(6) and (e) 33

15 U.S.C. 78u-4(b)(1)-(2) 32

15 U.S.C. 78u-4(b)(3)(B) 33

15 U.S.C. 78u-4(c) 33

15 U.S.C. 78u-5 33

Private Securities Litigation Reform Act of 1995 (PSLRA),
Pub. L. No. 104-67, 109 Stat. 737 32

Rules

FED. R. CIV. P. 23 ..... *passim*

FED. R. CIV. P. 23(a) 12, 14

FED. R. CIV. P. 23(b)(3) 12, 14, 16

FED. R. CIV. P. 56 22

Rule 10b-5, 17 C.F.R. § 240.10b-5 ..... 7, 8, 37

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44 Loy. U. Chi. L.J. 1493, 1500 (2013) 24

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104th Cong., 1st Sess. (1995) 33

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35 J. Corp. L. 11 (2009) 40

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2009 Wis. L. Rev. 151 (1995)..... 33

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21 J. Applied Corp. Fin. 15 (2009) 39

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(Polinsky & Shavell, eds. 2007)..... 40

I. INTRODUCTION

This petition presents a case of déjà vu. Some of the arguments in Defendants' petition are little more than a thin repackaging of arguments previously presented to and rejected by this Court unanimously more than two years ago. The remaining arguments should have been presented then at the very latest, but were not raised for nearly two more years. All are meritless, and there is no reason for further review of the class certification order in this securities class action that has now been pending for well over a decade.

The last time this case was before this Court in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*EPJ Fund*"), this Court ruled 9-0 that plaintiffs in federal securities actions need not prove loss causation at class certification to invoke the fraud-on-the-market presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1984). On remand, the district court granted Plaintiff's motion to certify a class of Halliburton shareholders. The United States Court of Appeals for the Fifth Circuit unanimously affirmed that ruling. In their petition for rehearing *en banc* before the Fifth Circuit in 2013, Defendants abruptly shifted course and argued for the first time since this action began in 2002 that this Court's seminal decision in *Basic*, the cornerstone for modern private securities litigation, should be overruled. They also argued that the Fifth Circuit's opinion widened a pre-existing circuit split

between the Seventh Circuit and the Second and Third Circuits.

This case does not warrant the exercise of this Court's *certiorari* jurisdiction. As a preliminary matter, the Fifth Circuit, following this Court's decision in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), correctly held that Defendants could not introduce evidence of an alleged lack of price impact at class certification in an effort to rebut the fraud-on-the-market presumption in a case where they did not challenge the efficiency of the market for Halliburton's stock. The court reasoned that price impact evidence is common to the class and even a successful rebuttal will not cause individual issues to predominate. As the Fifth Circuit stated: "If Halliburton were to successfully show that the price did not drop when the truth was revealed, then no plaintiff could establish loss causation." Pet. App. 18a. As in *Amgen*, a successful rebuttal showing lack of price impact—like a showing of the lack of materiality—would prevent Plaintiff from establishing loss causation (as well as materiality, reliance, and damages), and so defeat the claims of all class members. The Fifth Circuit's decision below is consistent with this Court's precedents, does not conflict with any other circuit court opinion, and does not warrant review.

The purported circuit split that Defendants want this Court to resolve is non-existent. The cases that Defendants claim are in conflict *pre-date* this Court's opinion in *Amgen*, which resolved the split

which Defendants tout in an effort to gain *certiorari*. Defendants do not cite a single circuit court that has permitted the use of price impact evidence after this Court's opinion in *Amgen* to rebut the fraud-on-the-market presumption at class certification for the simple reason that there is none.

This case does not present a proper vehicle for overruling or even substantially modifying *Basic* not only because of a crucial concession by Defendants, but also due to procedural hurdles, which bar Defendants from mounting their challenge on this record. Defendants' contentions that *Basic* should be overturned or substantially modified both rest largely on their argument that the efficient market hypothesis has been discredited because efficiency is not a binary yes or no question; they contend a market can be efficient for processing certain types of information but not others. However, in this case, Defendants did not challenge Plaintiff's assertion that the market for Halliburton's stock was efficient and so conceded the same. In admitting the efficiency of the market for Halliburton's stock, Defendants conceded their argument, because an attack on *Basic* based on perceived flaws in market efficiency has no relevance in a case where the market for the stock is concededly efficient.

As to procedural bars, they are numerous. For example, this Court remanded this case with instructions that Defendants could raise any other objections to class certification they had "preserved." *EPJ Fund*, 131 S. Ct. at 2187. But Defendants failed to preserve a challenge to *Basic* because they did not

mount a challenge to *Basic* until after this Court had remanded the case. Nor did Defendants timely raise a challenge to *Basic* on remand, but rather did not do so until their petition for rehearing *en banc*. Under Fifth Circuit precedent, they were procedurally barred from raising a new issue in an *en banc* motion and so this issue was never properly raised below. Defendants are precluded by this Court's mandate from raising this issue on continued appeal of class certification as a result of their failure to have previously preserved the argument. Nor was it passed on by the district court or the Court of Appeals. Accordingly, this Court should adhere to its "traditional rule" and decline to grant *certiorari* because the issues raised in the petition were not "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).

Indeed, far from challenging *Basic*, between 2007 when the class certification motion was filed and 2013 when defendants sought rehearing *en banc* in the second appeal in this case, Defendants invoked *Basic* to argue that class certification should be denied. *See, e.g.*, Halliburton's Supreme Court Respondents' Brief *EPJ Fund* at 11-52. Allowing Defendants to shift course and raise an argument now that they could have raised the first time this case was before this Court "would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902). This Court should not condone such delaying tactics. Plaintiff and the Class have waited for their day in court long enough.

This Court should not reconsider the fraud-on-the-market presumption of reliance endorsed in *Basic* and certainly should not do so on this record. The fraud-on-the-market presumption of reliance has been repeatedly reaffirmed by this Court and is the foundation for modern, private securities litigation. Congress, which could have legislatively overruled use of the fraud-on-the-market presumption in any of the many changes to federal securities laws it has enacted over the past 25 years, has never done so. Indeed, even when the question was directly considered by Congress, it was rejected and the tenets of *Basic* left as the law of the land. Principles of *stare decisis*, especially in light of Congress's endorsement of the fraud-on-the-market presumption, weigh heavily against a judicial alteration of private securities law.

Significantly, neither the Securities and Exchange Commission ("SEC") nor the U.S. Department of Justice ("DOJ"), the two agencies charged with enforcing federal securities law, have called for repeal of the fraud-on-the-market presumption. Rather, the SEC and the DOJ have repeatedly stressed the importance of private securities litigation, made possible largely through the fraud-on-the-market presumption, as a complement to governmental enforcement efforts.

Basic's endorsement of the fraud-on-the-market doctrine does not, as Defendants claim, rest on outdated and discredited economic theory, but rather on Congressional policy as embedded in the Securities Exchange Act of 1934. Moreover, the

semi-strong efficient market hypothesis, which played only an ancillary role in the Court's adoption of the fraud-on-the-market theory in *Basic*, continues to enjoy widespread support among economists.

Finally, Defendants' alternative argument that *Basic* should be substantially modified by requiring Plaintiff to demonstrate price impact in order to invoke the fraud-on-the-market presumption is untenable. The argument cannot be raised on this record and has no relevance in this case because Halliburton previously disavowed that very argument in this Court, conceding that "a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant." *See EPJ Fund*, 131 S. Ct. at 2187. That argument also flatly contradicts this Court's holding in *Amgen* because it requires Plaintiff to prove that it will prevail as to reliance, not just that reliance will turn on common evidence. *See Amgen*, 133 S. Ct. at 1196.

II. STATEMENT

A. Background

This case is a securities class action brought on June 3, 2002 by the Archdiocese of Milwaukee Supporting Fund, Inc., now known as the Erica P. John Fund, Inc. (the "EPJ Fund" or "Plaintiff"), against the Halliburton Company and David J. Lesar, its president and chief executive officer (collectively, "Halliburton" or "Defendants"). The

EPJ Fund is a not-for-profit group that supports the outreach work of the Archdiocese of Milwaukee, with a special emphasis on inner-city educational programs and programs that serve persons with severe and persistent mental illness. The fourth amended complaint ("Complaint"), alleges that during the class period—June 3, 1999, to December 7, 2001—Halliburton violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

In order to recover in a private action under Section 10(b) and Rule 10b-5(b), a plaintiff must prove: (1) a material misrepresentation or omission by the defendant; (2) that the defendant acted with scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) plaintiff's reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation, meaning that defendant's misrepresentation or omission proximately caused plaintiff's loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

In *Basic*, 485 U.S. at 241-48, this Court addressed the manner in which plaintiffs in a private securities fraud suit could prove reliance through evidence common to the class, thereby allowing class certification under FED. R. CIV. P. 23. The Court recognized that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" often would "prevent[] [plaintiffs] from proceeding with a class action, since individual issues then would * * * overwhelm[] the

common ones." *Id.* at 242. The Court held that plaintiffs may overcome that obstacle by invoking a rebuttable presumption of reliance based on the fraud-on-the-market doctrine. *Id.* at 242-247.

Under that doctrine, the Court explained, "the market price of shares traded on well-developed markets reflects all publicly available information," including "any public material misrepresentations," and "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.* at 246-247. Public material misrepresentations in an efficient market are reflected in the stock's price and thus "an investor's reliance on any public material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247. Therefore, evidence regarding the applicability of that presumption will generally be common to all members of a properly defined class, and the case may proceed as a class action. *Id.* at 242, 248.

In *Amgen*, this Court addressed whether defendants could rebut the materiality of misstatements at class certification. The Court held they could not, because the failure to prove materiality would not lead to the predominance of individual issues for purposes of Rule 23. "Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims." *Amgen*, at 1191. Thus, there would be no

individual issues to predominate because the case would be over.[1]

B. The Complaint In This Action

The Complaint alleges that Halliburton violated federal securities laws by knowingly or severely recklessly falsifying Halliburton's financial results and knowingly or severely recklessly misleading the public about: (1) its liability for asbestos claims; (2) its probability of collecting revenue on unapproved claims on fixed-price construction contracts; and (3) the benefits of its merger with Dresser Industries ("Dresser").

C. Asbestos Liability

Halliburton made numerous public misrepresentations regarding its asbestos exposure. For example, on January 31, 2001, Halliburton represented that "prospective asbestos liabilities . . . should have minimal adverse impact on the company going forward." R4265.[2]

Most of Halliburton's asbestos liability derived from claims against Harbison-Walker Refractories Company ("Harbison-Walker"), a former subsidiary

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[1] Unless otherwise indicated, all internal citations are omitted and all emphasis added.

[2] References to "R" are to the corresponding pages to the record in *EPJ Fund*, 131 S. Ct. 2179; selected additional pages of the record following remand are reproduced at Respondent's Appendix ("Resp. App.").

of Dresser which Halliburton acquired in 1998. R4558. On June 28, 2001, Halliburton disclosed that Harbison-Walker needed assistance with more than 165,000 pending claims, and that Halliburton's net exposure would be $50-60 million. R4270-72. Halliburton's stock declined 4.6% the next day. The Complaint alleges that Halliburton knew that Harbison-Walker would require financial assistance, even before Halliburton disclosed that adverse news. R4575.

On August 22, 2001, Halliburton also said that "asbestos exposure concerns appear to be overblown" and that Halliburton's asbestos claims are a "manageable problem." R4276. On November 8, 2001, Halliburton stated that "open asbestos claims will be resolved without a material adverse effect on our financial position or the results of operations." R4596.

On December 7, 2001, Halliburton disclosed a $30 million asbestos verdict, issued on December 5 against Dresser, Halliburton's subsidiary. R6961-62, R7752-54. Halliburton's stock plummeted that day by 42.7%. R6963. Several analysts issued reports on December 7 that sounded the alarm about Halliburton's asbestos liability. TheStreet.com declared: "Halliburton Buried as Investors Stopped Believing." "Halliburton's share dove to nine-year lows . . . as investors lost faith in the company's claims." R4577, R6962.

Halliburton's own expert acknowledged that she was not aware of any other adverse news that

day, except a change in Moody's rating of Halliburton, which she admitted reflected recent information regarding Halliburton's asbestos exposure. Resp. App. 23a-26a.

D. Booking Revenue for Cost Overruns

During the class period, Halliburton booked unapproved claim orders from overages on fixed price contracts as revenue even though Halliburton knew its customers were not likely to pay for these claims. R4562-63. On March 14, 2000, Halliburton announced that its 1998 and 1999 revenues included $89 million and $98 million in unapproved claims, respectively. R7695. Halliburton knew those sums were not probable of collection. R4608-09. On April 26, 2000, Halliburton released its 2000 first quarter results, also falsely inflated by unapproved claims that Halliburton knew were not probable of collection. R4246, R4611.

In a December 21, 2000 press release, Halliburton disclosed it would take approximately a $95 million charge because "negotiations with customers regarding cost increases on seven . . . projects have not resulted in resolution of certain claims as originally anticipated." R6910, R7742-43. The next day, Halliburton's stock price declined 3.9%. R6912.

E. The Dresser Merger

The Complaint further alleges that Halliburton misrepresented the financial impact of the Dresser acquisition, touting efficiencies it knew would not be realized. On September 13, 1999, a year after the acquisition, an analyst reported that Lesar said regarding the merger, that "following further headcount reductions and significant consolidations, the company is now projecting annual benefits of $500 million." R4236. On December 21, 2000, the company disclosed it was taking a $120 million charge, with $25 million due to losses stemming from the Dresser merger, and the stock fell 3.9% the next day. R6903, R6912, R7742.

III. PROCEEDINGS BELOW

A. District Court Proceedings

On September 17, 2007, the EPJ Fund moved to certify a class of all persons and entities who purchased Halliburton's common stock during the class period. *See* Resp. App. 2a-9a. The EPJ Fund provided evidence that the proposed class met the requirements set forth in Fed. R. Civ. P. 23(a), and also satisfied the predominance requirement of Rule 23(b)(3). R6831-44. The EPJ Fund invoked the fraud-on-the-market doctrine, Resp. App. 4a-9a, and filed an expert report and event study in support of its motion.

Halliburton did not challenge the contention that the market for Halliburton's stock is efficient.

Resp. App. 10a-15a, 18a-19a n.8. Halliburton's own expert did not opine on the efficiency of the market for Halliburton's stock and did not even examine that issue. *Id.* 20a-23a. Rather, Halliburton argued that the EPJ Fund did not establish loss causation. *See, e.g.*, R7574-5, R7595.

The district court denied the motion solely because it found that the EPJ Fund had failed to prove loss causation by a preponderance of the evidence, Pet. App. 55a, 98a, as required by *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007), *abrogated by* this Court's *EPJ Fund* opinion. The court expressly acknowledged that "[a]bsent this requirement," it "would [have] certif[ied] the class." Pet. App. 55a.

B. Court of Appeals Proceedings

Citing *Oscar*, the Fifth Circuit affirmed the order denying class certification, holding Plaintiff had failed to prove loss causation by a preponderance of the evidence, as required under controlling Fifth Circuit precedent. Pet. App. 32a-34a, 54a-47a, *rev'd by EPJ Fund*, 131 S. Ct. 2179. The court noted that Halliburton had conceded the efficiency of the market, stating the parties "do not dispute the efficiency of the market[.]" Pet. App. 35a.

C. The Supreme Court

This Court reversed the Fifth Circuit in a unanimous opinion authored by Chief Justice Roberts. The Court held that securities fraud

plaintiffs need not prove loss causation to obtain class certification. *EPJ Fund,* 131 S. Ct. at 2183. The Court held that the Fifth Circuit requirement "is not justified by *Basic* or its logic." *Id.* This Court explained: "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 2186. This Court vacated the Fifth Circuit's opinion, and remanded the case, stating: "To the extent Halliburton has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand." *Id.* at 2187.

D. On Remand To The District Court

In its supplemental brief to the district court on remand, Halliburton did not contest the requirements of Rule 23(a), which it previously conceded had been met. R10684. Nor did it claim that Plaintiff had failed to prove that the market for Halliburton's stock was efficient, which it had previously conceded as well. R10685.

On January 27, 2012, the court certified the class. The court noted that it would have certified the class previously but for the Fifth Circuit requirement on loss causation, which the Supreme Court had stricken. Pet. App. 27a. The court again found that Plaintiff had met the requirements of Rule 23(a). *Id.* 27a-30a. The court also held that Plaintiff met the requirements of Rule 23(b)(3): "The fraud-on-the-market theory applies to this case, so

proof of each individual class member's reliance is not required." *Id.* 30a.

E. The Fifth Circuit Decision And Halliburton's Petition For Rehearing *En Banc*

On April 30, 2013, the Fifth Circuit unanimously affirmed the district court's order, rejecting Halliburton's contention that it should be able to rebut the fraud-on-the-market presumption at class certification with evidence allegedly showing a lack of price impact. On May 24, 2013, Halliburton filed a petition for rehearing *en banc*. In its petition, it argued that the Fifth Circuit's decision deepened a circuit split between the Seventh Circuit in *Schleicher v. Wendt*, 68 F.3d 679 (7th Cir. 2010) and the Second and Third Circuits' opinions in *In re Salomon Analyst Metromedia Litig.*, 544 F3d 474, 484 (2d Cir. 2008) and *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011). Halliburton also argued in the last page and a half of its petition that *Basic*'s presumption of reliance should be overruled, but did not argue it should be modified. Resp. App. 45a-46a. That was the first time Defendants challenged *Basic* since this litigation began in 2002. On June 11, 2013, the Fifth Circuit denied the petition. No member of the panel or active Fifth Circuit Judge called for an *en banc* vote. Pet. App. 24a.

F. Status of the Case

Discovery is proceeding. The district court set a November 2014 deadline for summary judgment motions and a May 2015 trial date. Under the Court of Appeals' decision, Halliburton may present its rebuttal evidence regarding price impact at summary judgment and at trial.

IV. REASONS FOR DENYING THE PETITION

A. The Fifth Circuit Properly Applied This Court's Holdings In *Amgen* And *EPJ Fund* and Ruled Correctly in this Case.

Relying on this Court's 6-3 opinion in *Amgen*, the Fifth Circuit correctly determined that Defendants may not present evidence of an alleged lack of price impact at class certification to rebut the fraud-on-the-market presumption because such a rebuttal will not cause individual issues to predominate. The court correctly found that evidence of price impact or the lack thereof will be common to the class and so subject to a class-wide analysis. Pet. App. 17a-18a. The Court also found that the absence of price impact will not cause individual questions of law or fact to predominate for purposes of Rule 23(b)(3). *Id.* at 19a-20a. On the contrary, absent evidence of price impact, class members will not be able to demonstrate loss causation and the claims of all class members will fail on the merits "because they could not establish an essential element of the fraud action." *Id.* 18a.

The court recognized that price impact evidence offered by Halliburton is both similar to and offered for much the same reason as the materiality evidence considered by the Supreme Court in *Amgen*. *Id.* 18a-19a n.10. The court acknowledged that Halliburton claimed it was "questioning reliance and not materiality," found "there is a fuzzy line between price impact evidence directed at materiality and price impact evidence directed at reliance," *id.*, and concluded:

> Because *Amgen* determined that defendants are not permitted to use evidence of no price impact to rebut materiality (and thereby rebut the fraud-on-the-market theory) at class certification, it would be anomalous to permit Halliburton to nonetheless use evidence of no price impact to "generally" rebut the fraud-on-the-market theory at class certification.

Id.[3]

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[3] Because Amgen conceded that the market for its securities is efficient, *Amgen*, 133 S. Ct. at 1193-94, 1197, this Court did not consider what evidence was relevant to determining market efficiency. That issue is not presented here either because Halliburton did not contend the market for its stock was not efficient. *See supra* at 13-14. As the Fifth Circuit noted, "[W]hile rebuttal evidence concerning an issue which *is* relevant at class certification—

In an effort to distinguish *Amgen*, Halliburton strains to conjure up a scenario where an individual plaintiff could proceed with its claim after a proposed class failed to establish price impact at class certification. *See, e.g.*, Halliburton Supp. Br. at 7, *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013) ("in the absence of price distortion there is at least some possibility that individual plaintiffs could prove actual, as opposed to presumed, reliance on alleged misrepresentations."), Resp. App. 39a. However, this Court has noted that such unreasonable scenarios did not alter its analysis. *See Amgen*, 133 S. Ct. at 1197 ("No doubt a clever mind could conjure up fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning). But such objectively unreasonable reliance does not give rise to a Rule 10b–5 claim."). Simply put, without evidence of price impact, Plaintiff could not establish reliance, materiality, loss causation, and damages, and the Fifth Circuit correctly followed this Court's precedents in rejecting a challenge to certification

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such as market efficiency—would seemingly be relevant to the question of common question predominance and therefore admissible at class certification, that question is not before us and nor was it before the *Amgen* Court. Pet. App. 11a n.4 (emphasis in original).

based on an alleged lack of impact on stock prices at class certification under the facts of this case.

"Merits questions may be considered—only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1195. Halliburton's argument constitutes the "free-ranging merits inquiry" that this Court expressly prohibited because a lack of price impact does not show that individual issues predominate. Rather, failure of proof on price impact "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196.

Halliburton contends that the Fifth Circuit erroneously concluded that "*Amgen* determined that defendants are not permitted to use evidence of no price impact to rebut materiality * * * at class certification." Pet. 29-30 (quoting Pet. App. 18a-19a n.10). This Court determined that Amgen could not rebut materiality at class certification, and the logic of the Court's opinion does not turn on whether the rebuttal was with price impact evidence or not. *See Amgen*, 133 S. Ct. at 1203 ("*Amgen*'s evidence was offered to rebut the materiality predicate of the fraud-on-the-market theory").

The conflict of Defendants' claims with both the record and this Court's *EPJ Fund* opinion is even more direct. There is no dispute that Halliburton's stock dropped more than 42% on December 7, 2001, when the company disclosed an adverse asbestos

verdict. Halliburton's alleged lack of price impact evidence is not evidence that Halliburton's stock price did not plummet that day. Rather, Halliburton's evidence concerns what caused its stock price to drop and whether the news was unexpected, in other words whether it constituted a corrective disclosure.[4] In a case like this one where the allegations are not that the misrepresentations caused the stock price to rise, but rather that they maintained the price, a determination that the price fell because of a corrective disclosure necessarily leads to an inference that the price was previously artificially inflated by the misrepresentation. Thus, in this case, there is no meaningful difference between proof of loss causation, prohibited by this Court's decision in the *EPJ Fund* case, and proof of price impact (or proof of lack of price impact), which Halliburton seeks here.

B. There is No Circuit Split

Halliburton claims that the Fifth Circuit opinion in this case deepened a circuit split between the Second Circuit decision in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008) and Third Circuit decision in *In re DVI, Inc. Sec.*

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[4] In its petition, Halliburton repeatedly relies on alleged factual findings by the courts below. However, because the Court of Appeals opinion was vacated and the district court opinion was based on a flawed legal framework, those alleged factual findings are a nullity. *See Falcon v. Gen. Tel. Co.*, 815 F.2d 317, 320 (5th Cir. 1987).

Litig., 639 F.3d 623, 638 (3d Cir. 2011) on one hand, and the Seventh Circuit decision in *Schliecher v. Wendt*, 618 F.3d 679 (7th Cir. 2010) on the other hand. Pet. 30-32. Halliburton fails to recognize that this Court's opinion in *Amgen* resolved the purported split Halliburton advances. Both the Second and Third Circuit decisions allowing use of price impact evidence at class certification *predate* this Court's *Amgen* opinion were abrogated by this Court's *EPJ Fund* decision. Halliburton identifies no circuit that has allowed the use of price impact evidence post-*Amgen* to rebut the fraud-on-the-market presumption at class certification, and there is none. The circuit split Halliburton cites does not exist.

Amgen held that rebuttal evidence insofar as it would negate materiality (and by implication any element of Plaintiffs' claim) is "a matter for trial," referencing *Basic*, and stating:

> We recognized as much in *Basic* itself. ***A defendant could "rebut the [fraud-on-the-market] presumption of reliance," we observed in* Basic, *by demonstrating that "news of the [truth] credibly entered the market and dissipated the effects of [prior] misstatements." 485 U.S. at 248-249. We emphasized, however, that "[p]roof of that sort is a matter for trial" (and presumably also for a summary-judgment motion under Federal Rule of Civil Procedure 56).*** *Id.* at 249 n.29.

Amgen, 133 S. Ct. at 1204. Any reading of the Second and Third Circuit cases to permit rebuttal at class certification with evidence common to the class, and which would cause all class members' claims to fail, is not good law. Indeed, district courts in the Second Circuit have recognized that *In re Salomon* is no longer controlling precedent. *See, e.g.*, *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013); *In re Citigroup Inc. Sec. Litig.*, Case Nos. 09 MO 2070 (SHS), 07 Civ. 9901 SHS, 2013 WL 3942951, at *28 (S.D.N.Y. Aug. 1, 2013).

There is no need for this Court to exercise *certiorari* jurisdiction, as the Courts of Appeals are united in rejecting the use of price impact evidence at class certification under the facts that have arisen to date.

C. This Case Is Not a Proper Vehicle for Challenging *Basic*

Contrary to Halliburton's incredible assertion, this case does not "present[] an ideal vehicle for the Court to reconsider *Basic*." Pet. 23. Quite to the contrary, even if this Court were inclined to revisit *Basic*, this case presents a particularly inappropriate vehicle for doing so. Not only has Halliburton conceded that the market for its stock is efficient, thereby undercutting the predicate for its own attack on *Basic*, Halliburton has also repeatedly waived the argument that *Basic* should be overruled or modified and is procedurally barred on multiple independent grounds from seeking to raise that argument now. Further, neither of the courts below passed on the

issue. Accordingly, the Court should apply its "traditional rule" and decline to grant *certiorari* because the issues raised in the petition were not "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)); *see also Glover v. United States*, 531 U.S. 198, 204 (2000).

1. Halliburton Has Conceded the Market for its Stock is Efficient, Thereby Negating the Basis for its Attack on *Basic*

Even though Halliburton argues that market efficiency is not a binary question and contends that *Basic* should be reversed or substantially modified, based largely on that argument, Pet. 13-19, it has not challenged the finding that Halliburton's stock trades in an efficient market, and so has conceded the efficiency of that market. But if the market for Halliburton's stock is efficient, any attack on *Basic* based on alleged inefficiencies in the stock market, whether seeking to reverse *Basic* or substantially modify it, has no application in this action.

Halliburton cites much the same economic research that *Amgen* did. Given Halliburton's concession that the market for its stock is efficient, which mirrors a comparable concession by Amgen regarding the efficiency of the market for its stock, what this Court said in *Amgen* is equally applicable here: "In any event, this case is a poor vehicle for exploring whatever implications the research Amgen cites may have for the fraud-on-the-market

presumption recognized in *Basic*."[5] *Amgen*, 133 S. Ct. at 119 n.6.

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[5] Halliburton repeatedly cites the writings of Professor Donald C. Langevoort in support of its challenge to the efficient capital market hypothesis. Pet. 13-14, 16, 19-20, 23-24. In *Amgen*, Justice Thomas in his dissent and Justice Alito in his concurrence, also cite Langevoort in questioning the efficient market hypothesis. *See Amgen*, 133 S. Ct. 1206, 1208 n.4, (Thomas, J., dissenting); *id.* at 1204 (Alito, J., concurring). However, in a forthcoming article, *Amgen and the Fraud- on-the-Market Class Frozen in Time?*, Georgetown Law Faculty Publications, Public Law Research Paper No. 13-58, 10 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2281910, Langevoort states that he does not believe this Court should reconsider *Basic*'s presumption and that the inevitable imperfections in the functioning of the capital markets do not "undermine[] a presumption of reliance that is based either on the relative wisdom of passivity or an entitlement to assume stock price integrity." *Id.* at 17. Similarly, Halliburton cites Barbara Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1500 (2013) (Pet. 16-17) as "repudiate[ing] *Basic*'s economic premise". Black, however, writes that the "debate over competing economic theories, while important and interesting, has *nothing to do with the continuing viability of the fraud-on-the-market presumption*." *Id.* at 1503-4.

2. Under This Court's Precedent, Halliburton Cannot Raise An Issue In The Second Petition That Was Open To Dispute In The First Petition

Under this Court's precedent, a party on a second appeal to the Supreme Court is precluded from raising issues that were or could have been raised in the first appeal. As this Court has explained: "None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902).

In the initial appeal, the petitioner was a private individual challenging a denial of his claim to certain land; in the second appeal, the petitioner was the United States. And just as in this case, the successive petitions were filed by different parties. Moreover, the argument that the United States wanted to make in the second petition, that the land grant was invalid for vagueness, is an argument that the government could have, but did not make, in seeking to affirm the ruling at issue in the first appeal. *See generally Camou*, 184 U.S. at 572-73. As the Court noted, "everything involving the question of validity . . . might be deemed to have been determined on the first appeal." *Id.* at 574. This Court should follow its prior reasoning and not

open the floodgates to the creation and litigation of new arguments on appeal which could or should have been raised before—especially not on the instant record—because that would foster the "endless litigation," specter first recognized in *Camou*. *See also Illinois v. Illinois Central R. Co.*, 184 U.S. 77, 91– 92 (1902) (cautioning against entertaining successive appeals of legal questions open to dispute in an initial appeal).

3. Halliburton Has Waived The Right To Seek To Overturn *Basic* Due To Its Failure To Offer That Argument In Timely Fashion

Like other circuits, the Fifth Circuit will not hear an issue on appeal if it was not raised in the district court, absent extraordinary circumstances. *See Celanese Corp. v. Martin K. Eby Const. Co., Inc.*, 620 F.3d 529, 531 (5th Cir. 2010). Nor will the Fifth Circuit entertain a new issue in a petition for panel rehearing. *See F.D.I.C. v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 525 (5th Cir. 1989). Similarly, the Fifth Circuit will not consider new issues in an *en banc* appeal. *See Morgan v. Swanson*, 659 F.3d 359, 405-07 (5th Cir. 2011); *Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 409 (5th Cir. 2010). Thus, Halliburton's attempt to raise a challenge to *Basic* for the first time in its petition for rehearing *en banc* was procedurally improper, and does not suffice to press the issue below.

This procedural bar has special bite here because when this Court reversed the Fifth Circuit in 2011 and remanded this case, the Court stated: "To the extent Halliburton ***has preserved any further arguments against class certification***, they may be addressed in the first instance by the Court of Appeals on remand." *See EPJ Fund*, 131 S. Ct. at 2187. It is undisputed, however, that Halliburton did not seek to overturn *Basic* or urge that the holding of *Basic* be modified until its petition for rehearing *en banc* to the Fifth Circuit in the *second* appeal regarding certification in this case. Halliburton did not raise the arguments it now posits in derogation of *Basic* before this Court the first time around—not in its brief in opposition, nor in its supplemental brief in opposition, nor in its merits brief, nor even in oral argument. Accordingly, this record does not properly pose the question Defendants seek to litigate for the first time in this Court, and Defendants are procedurally barred from raising a challenge to *Basic* at this stage because they did not preserve any such argument. *See Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415, 416 (1958) (reversing the lower court and remanding "for consideration by that court of the only claim that was left open at this Court's prior disposition of this litigation"); *see also Queran v. Jordan*, 440 U.S. 332, 346 n.18 (1978) (court may consider only those "matters left open by the mandate of this Court").

There is no excuse for Halliburton's failure to raise a timely challenge to *Basic*, which had been

applied and criticized for almost 20 years by 2007 when Plaintiff originally moved for class certification. Another eight years of appellate litigation was conducted *in this case* before May 2013 when Halliburton *first* challenged *Basic* in its Fifth Circuit petition for rehearing *en banc*.

This Court's intervening cases also do not excuse Halliburton's failure. *Amgen* merely confirmed *Basic*'s assertion that rebuttal of the presumption was generally for trial. *Amgen*, 133 S. Ct. at 1204. *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), held plaintiffs must "demonstrate" compliance with Rule 23, but prohibited merits examinations at class certification not tied to Rule 23, as Halliburton seeks to do here. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) required "evidentiary proof" at class certification that damages could be determined with common evidence, but not that plaintiffs would prevail on the merits. Moreover, as Halliburton notes, Pet. 2, this Court held as early as *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 160 (1982) that "actual, not presumed conformance with [Rule 23] remains indispensable." Thus, Halliburton's belated attack on *Basic* is nothing more than an opportunistic change in strategy. *See* Pet. 12 (citing concurring and dissenting opinions in *Amgen*).

Having hitched its defense to the right established in *Basic* to rebut the fraud-on-the-market presumption, it is much too late in this race for Halliburton to switch horses now.

4. *Lebron* And Progeny Do Not Excuse Halliburton's Failure To Make A Timely Challenge To *Basic*

Halliburton contends, citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) and *Citizens United v. FEC*, 558 U.S. 310, 330-331 (2010), that it was not required to raise a challenge to *Basic* below because Halliburton is presenting "'not a new claim * * * but a new argument to support what has been [Petitioner's] consistent claim,' namely that class certification should be denied." Pet. 23 n.6 (quoting *Lebron*, 513 U.S. at 379). Those cases do not help Halliburton because Halliburton has not made any ***claim*** here. As this Court said: "Our traditional rule is that '[o]nce a ***federal claim*** is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron*, 513 U.S. at 379 (quoting *Yee v. Escondido, Cal.*, 503 U.S. 519, 534 (1992)). Here, the only claims in this case were brought by Plaintiff for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Halliburton has merely opposed class certification. No Supreme Court case applying this doctrine has construed the term "claim," to mean "argument" or "issue." *See Citizens United*, 558 U.S. 310 (party bringing First Amendment claim may provide an alternate argument supporting its claim); *Lebron*, 513 U.S. at 379 (same); *see also Yee*, 503 U.S. at 533 (party with taking claim may offer alternative argument

supporting its claim."). Under Halliburton's exaggerated reading of these cases, parties could always advance a newly minted argument on appeal as long as the argument was in support of the same general objective they had previously pursued. That is not the law.

D. This Court's Holding In *Basic* Should Not Be Reconsidered

The fraud-on-the-market presumption, adopted by this Court in *Basic*, has been repeatedly endorsed by this Court, Congress, the SEC, and the DOJ and enjoys widespread support among economists. This Court should decline Halliburton's invitation to abandon twenty-five years of established precedent and eliminate or hamstring the ability of private parties to bring securities fraud actions.

1. *Basic* Is A Seminal Decision That Has Been Reaffirmed By This Court And Repeatedly Endorsed By Congress, The SEC, And The U.S. Department Of Justice.

This Court has repeatedly endorsed *Basic*'s reliance analysis since the decision was handed

down in 1988. *See U.S. Dept. of Justice v. Landano*, 508 U.S. 165, 174 (1993) (fraud-on-the-market presumption supported by considerations of "fairness, public policy, and probability, as well as judicial economy"); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (citing *Basic* as "nonconclusively presuming that the price of a publicly traded share reflects a material misrepresentation and that plaintiffs have relied upon that misrepresentation as long as they would not have bought the share in its absence"); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008). "[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public."); and *Amgen*, 133 S. Ct. 1193 (reaffirming *Basic*'s fraud on the market analysis). In 2011, this Court unanimously reaffirmed *Basic*'s fraud-on-the-market analysis. *See EPJ Fund*, 133 S. Ct. at 1184.

The fraud-on-the-market presumption is crucial to private securities actions, as this Court has repeatedly noted, *EPJ Fund*, 131 S. Ct. at 2185 (citing *Basic*, 485 U.S. at 242, 245), and meritorious private security fraud actions are "an essential supplement to criminal prosecutions and civil enforcement actions brought[.]" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007); *see also Amgen*, 133 S. Ct. at 1201 ("private securities litigation furthers important public policy interests."); *Dura*, 544 U.S. at 345 (private securities actions "maintain public confidence in the marketplace."); *Basic*, 485 U.S. at 231 (a private

securities action "constitutes an essential tool for enforcement of the 1934 Act's requirements").

Congress has recognized that private securities litigation "promotes public and global confidence in our capital markets and helps to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." *Joint Explanatory Statement of the Committee of Conference on H.R. 1058 (Joint Explanatory Statement)* at 31, reprinted in 2 U.S.C.C.A.N. 730 (104th Cong., 1st Sess. 1995).

While Congress has repeatedly acted to make needed adjustments in federal securities law governing private actions, it has directly considered *and rejected* the extreme step of eliminating the presumption created by *Basic*. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress responded to perceived abuses in private securities fraud actions by, *inter alia*, establishing procedures for appointment of lead plaintiffs and lead counsel in class actions, 15 U.S.C. 78u-4(a)(3); tightening pleading requirements, 15 U.S.C. 78u-4(b)(1)-(2); mandating a discovery stay pending resolution of a motion to dismiss, 15 U.S.C. 78u-4(b)(3)(B); creating a safe-harbor for forward-looking statements, 15 U.S.C. 78u-5; authorizing sanctions for abusive litigation, 15 U.S.C. 78u-4(c); and limiting damages and attorney's fees, 15 U.S.C. 78u-4(a)(6) and (e). *See Tellabs*, 551 U.S. at 319-322. Three years later, Congress enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112

Stat. 3227, to prevent private plaintiffs from proceeding under state law to circumvent the PSLRA requirements. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-83 (2006).

As this Court recognized in *Amgen*, Congress, while "taking steps to curb abusive securities-fraud lawsuits, rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen*, 133 S. Ct. at 1201. "The initial version of H.R. 10, 104th Cong., 1st Sess. (1995), an unenacted bill that, like the PSLRA, was designed to curtail abuses in private securities litigation, 'would have undone *Basic*[.]'" *Id.* (citing and quoting Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 153, and n.8.)." In the *Common Sense Legal Reform Act: Hearings Before the Subcomm. on Telecomm. and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess., 92, 236–237, 251–252, 272 (1995), "witnesses criticized the fraud-on-the-market presumption and expressed support for H.R. 10's requirement that securities-fraud plaintiffs prove direct reliance." *Amgen*, 133 S. Ct. at 1201. Tellingly, Congress rejected that bill and the testimony of those witnesses and chose not to overrule *Basic*. In *Amgen*, this Court properly deferred to Congress, *id.*, and should do so here. *See Watson v. United States*, 552 U.S. 74, 82-83 (2007) ("this long congressional acquiescence [14 years] has enhanced even the usual precedential force we accord to our interpretations of statutes").

The SEC and DOJ also recognize the importance of private securities litigation. *See, e.g.*, Brief of the U.S. as *Amicus Curiae* in Support of Respondent at 1, *Amgen Inc.*, 133 S. Ct. 1184 (2013) ("Meritorious private securities-fraud actions, including class actions, are an essential supplement to criminal prosecutions and SEC enforcement actions."); Brief of the U.S. as Amicus Curiae Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) ("Meritorious private securities-fraud actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the United States and the Securities and Exchange Commission (SEC).").

The SEC has stressed the centrality of the fraud-on-the-market presumption to private enforcement of the securities laws: "While the Commission is not required to show reliance in its own enforcement actions, the Commission believes that the proper interpretation and application of the fraud-on-the-market presumption is important to the effective enforcement of the federal securities laws.'" *E.g.*, Brief of SEC as Amicus Curiae at 3, *In re WorldCom, Inc. Sec. Litig.*, Case No. 02 Civ. 3288 (DLC), 2004 WL 831018 (2d Cir. Apr. 19, 2004).

2. *Stare Decisis* Favors Preserving *Basic*.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986)). Here, *stare decisis* weighs heavily in favor of continued adherence to the fraud-on-the-market presumption endorsed in *Basic*.

Halliburton argues that "*stare decisis* considerations support overruling *Basic* without further delay[,]" Pet. 24-25, relying *solely* on cases involving constitutional rulings,[6] but the strength of *stare decisis* principals is at its nadir in constitutional cases "because in such cases correction through legislative action is practically impossible[.]" *Payne*, 501 U.S. at 827. By contrast, this Court has recognized that "stare decisis in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2007). Where, as here, Congress has acquiesced in and endorsed the Court's interpretation of federal securities law, *stare decisis* principles carry particular weight. *Id.*; *see also Shepard v. United States*, 544 U.S. 13, 23 (2005). Congress specifically

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[6] *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (whether plaintiff properly alleged constitutional violation); *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009) (right to counsel); *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (right to jury trial); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (constitutionality of death penalty); *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (equal protection).

considered overruling the fraud-on-the-market presumption but decided not to do so. That is an additional and weighty reason for this Court to continue to adhere to *Basic*.[7]

In considering whether "special justification" exists to overrule this Court's precedent, relevant factors "include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Citizens United*, 558 U.S. at 363. Those factors weigh heavily in favor of preserving *Basic*. Not only is *Basic* a twenty-five-year-old established precedent, *Basic*'s holding has also been repeatedly affirmed by this Court, and investors, the SEC, and the DOJ securities have come to rely upon private actions, facilitated by the fraud-on-the-market presumption. *See supra* at 30-35.

3. *Basic* Has Not Been Undermined By Economic Developments.

Halliburton claims that *Basic* should be overruled or modified because its underlying economic rationale is no longer viable. Halliburton is mistaken on two fronts. First, this Court based its adoption of the fraud-on-the-market presumption in

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[7] Halliburton argues that *stare decisis* concerns are at their nadir in cases "involving procedural and evidentiary rules." Pet. 25 (*citing Payne*, 501 U.S. at 828). The fraud-on-the-market presumption, however, is "a substantial doctrine of federal securities-law." *See Amgen*, 133 S. Ct. at 1193.

Basic primarily on congressional policy. "The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act. In drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets[.]" *Basic*, at 245-46; *see also* H.R. Rep. No. 1382, 73d Cong., 2nd Sess. 1934 (legislative history of Securities Exchange Act of 1934) ("The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite intricacies of security value, truth does find relatively quick acceptance on the market."). This Court further stated that the fraud-on-the-market presumption was supported by considerations of "fairness, public policy, and probability, as well as judicial economy[.]" *Basic*, 485 U.S. at 245. Economic theory provided a secondary, not primary role in the Court's decision to endorse the fraud-on-the-market presumption, because "recent empirical studies have tended to confirm Congress' premise[.]" *Id.* at 246. The Court specifically rejected the contention that it was adopting a particular view of market rationality. *Id.* at 246 n.24, 248 n.28.

Second, though economic theory has continued to evolve, the semi-efficient market hypothesis continues to enjoy widespread support among economists. *See, e.g.*, Brief of Financial Economists as *Amici Curiae* in Support of Respondent at 13,

Amgen, ("economic evidence that markets may process different sorts of information at different rates does not undermine *Basic*'s presumption."); Brief of Financial Economists as Amici Curiae in Support of Petitioner at 15, *EPJ Fund* ("Despite the anomalies that have been discovered, the major U.S. securities markets are typically efficient enough to justify the limited presumptions at issue here—that is, that a false statement will impact price at least to some degree . . . In sum, Semi Strong Efficient Market Hypothesis ("SSEMH") has been subjected to perhaps the most intensive and extensive testing of any hypothesis in all of the social sciences—and this extraordinary scrutiny has confirmed the strong empirical support for the theory."); *see also Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, J.) ("Many economists think that the strong form of the [efficient capital market] hypothesis has been refuted, but the weak and semi-strong forms are widely accepted. And the fraud-on-the-market doctrine rests on the semi-strong form.").[8]

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[8] Most economists generally support the SSEMH. Dariusz Wojcik, Nicholas Kreston & Sarah McGill, *Freshwater, Saltwater, and Deepwater: Efficient Market Hypothesis versus Behavioral Finance*, Oxford University School of Geography and the Environment Working Paper No. 12-03 (February 21, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2008788 (general predominance among academics of view that markets are

informationally efficient and a recent analysis of the finance literature concludes that "BF (Behavioral Finance) lags behind EMH (Efficient Market Hypothesis) in terms of the quantity, dynamics, scope," and SSEMH remains the "benchmark" for academic economists); BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET, 269 (10th ed. 2011) (modern financial markets are "amazingly successful devices for reflecting new information rapidly. The response time may not be immediate; sometimes there is underreaction for a short period. But by and large, prices reasonably reflect whatever public knowledge there is about each [publicly traded] company."); *id.* at 268-69 (both academic research and practical experience "resoundingly confirm" the validity of SSEMH); Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?*, 21 J. Applied Corp. Fin. 15 (2009) (As a practical matter, the idea that prices efficiently incorporate information is an indispensable foundation for how we organize the real world, and although not entirely free of anomalies, the anomalies that have been demonstrated are sufficiently limited to not impact real world behavior and reliance on SSEMH); Esther Bruegger & Frederick Dunbar, *Estimating Financial Fraud Damages with Response Coefficients*, 35 J. Corp. L. 11, 46 (2009) ("[M]ost academic studies accept the hypothesis that capital markets are efficient."); Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in *Handbook of Law and Economics*, 948 n.1 (Polinsky & Shavell,

4. There Is No Basis For Amending *Basic*.

Halliburton contends that *Basic* should be modified "to require plaintiffs to prove price impact in order to invoke the presumption in the first place." Pet. 24. Under that approach, Plaintiff would be required to prove at class certification, not simply that reliance will turn on common evidence, but also that Plaintiff would prevail on the merits in establishing reliance, contrary to this Court's recent opinion. *See Amgen*, 133 S. Ct. at 1196 (at class certification, plaintiffs "need not, at that threshold, prove the predominating question will be answered in their favor").

Moreover, Halliburton previously disavowed before this Court the very argument it seeks to untimely raise here. *See EPJ Fund*, 131 S. Ct. at 2187 n.*. ("According to Halliburton, a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendants.")

Finally, this Court, in holding that Plaintiff need not establish loss causation to invoke the fraud-on-the-market presumption, has also effectively held that Plaintiff does not have to establish price impact either, at least in a case where the

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eds. 2007) (Empirical support for the theory has been confirmed by "perhaps the most intensive and extensive testing of any hypothesis in all of the social sciences").

misrepresentations maintained the stock price, because in such cases there is virtually no difference between proof of loss causation and proof of price impact. Halliburton's argument for substantially modifying *Basic* also fails for the same reason its quest to overrule *Basic* should fail.

V. CONCLUSION

This Court should deny the petition for a writ of *certiorari*.

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APPENDIX

APPENDIX A — EXCERPTS OF U.S. SUPREME COURT RECORD IN ERICA P. JOHN FUND, INC. V. HALLIBURTON CO., 131 S. CT. 2179 (2011)

- **EXCERPT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED SEPTEMBER 17, 2007**

- **EXCERPT OF DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED NOVEMBER 16, 2007**

- **EXCERPT OF LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED DECEMBER 21, 2007**

- **EXCERPTS OF DEPOSITION OF LUCY ALLEN**

Appendix A

EXCERPT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED SEPTEMBER 17, 2007

Master Docket No. 3:02-CV-1152-M

CLASS ACTION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., *et al.*, On Behalf of itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY, *et al.*,

Defendants.

This Document Relates to:

ALL ACTIONS.

LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Appendix A

[i] **TABLE OF CONTENTS**

TABLE OF AUTHORITIES ii

INTRODUCTION.....1

SUMMARY OF CLAIMS.....3

PROPOSED CLASS REPRESENTATIVES 7

ARGUMENT.....8

A. Legal Standards for Class Certification Pursuant to Fed. R. Civ. Proc. 23 8

B. The Proposed Class Satisfies the Requirements of Rule 23(a) 10

1. Numerosity 10

2. Commonality 11

3. Typicality 12

4. Adequacy 13

C. This Action Satisfies Rule 23(b)(3) 14

1. Common Questions of Law or Fact Predominate.....15

2. The Issue of Reliance Will Not Defeat Certification.....16

Appendix A

a. Halliburton's Common Stock Traded in an Efficient Market 16

b. Loss Causation 19

3. The Class Action is Superior to Other Available Methods For the Fair and Efficient Adjudication of This Action 23

CONCLUSION 24

* * *

[16] 2. *The Issue of Reliance Will Not Defeat Certification*

Lead Plaintiff relies on the fraud-on-the-market theory recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) for of a class-wide presumption of reliance. The fraud-on-the-market presumption provides that:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. at 247.

Under the Fifth Circuit's recent interpretation of *Basic*, in order to avail upon the fraud-on-the-market

presumption, plaintiffs must show that Halliburton stock traded on an efficient market and that the corrective disclosure affected the stock price. *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261. The *Allegiance* court made clear however, that plaintiffs need not quantify damages, or prove that some percentage of the drop was attributable to the corrective disclosure, but need only offer some empirically based showing that "the corrective disclosure was more than just present on the scene." *Id.* at 271. Once the proposed Class establishes entitlement to the fraud-on-the-market presumption of reliance, Defendants can rebut that presumption only "by showing that the nondisclosures did not" affect the Halliburton's stock price. *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990).

a. *Halliburton's Common Stock Traded in an Efficient Market*

The court in *Unger v. Amedisys*, 401 F.3d 316 (5th Cir. 2005), expanding upon the five factors recognized by *Cammer v. Bloom*, 711 F. Supp. 1276 (D.N.J. 1989), identified eight factors for determining market efficiency: (1) average weekly trading volume expressed as a percentage of total outstanding shares; (2) number of securities analysts following and reporting on the stock; (3) extent to which market makers and arbitrageurs trade in the stock; (4) [17] Company's eligibility to file SEC registration Form S-3 (as opposed to Form S- or S-2); (5) existence of empirical facts "showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price;" (6) Company's market capitalization; (7) bid-ask

spread for stock sales; and (8) float, the stock's trading volume without counting insider-owned stock. *See also, Bell*, 422 F.3d at 313. Under each of these factors it is clear that the market for Halliburton stock was efficient. Report, ¶¶ 9-24.

Factor 1: Volume

Halliburton's stock traded at an average weekly volume of over 16,796,502 shares during the Class Period. Report, ¶ 22. Weekly trading volume for Halliburton was on average, 3.8% of the outstanding shares, significantly more than the 2% volume courts have found sufficient to raise a "strong presumption" of market efficiency for stocks traded on the NASDAQ, and more than the 1% volume courts have deemed sufficient for stocks traded on the NYSE. Report, ¶ 21, fn.16.

Factor 2: Analyst Coverage

Securities analysts from several firms covered and reported on Halliburton during the Class Period.[6] Such

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6. Halliburton was covered by at least ABN Amro Bank N.Y. U.S.A; A.G. Edwards & Sons, Inc.; Argus Research Corporation; Bear, Stearns & Co., Inc.; Brown Brothers Harriman & Co.; Capital One Southcoast, Inc; CIBC World Markets Corp.; Deutsche Bank Securities Inc.; ING Financial Markets USA; Jefferies & Company, Inc.; Johnson, Rice & Co.; Painewebber Inc.; PNC Institutional Investment Service; Prudential Equity Group, Inc.; RBC Capital Markets; Sanford C. Bernstein & Co., Inc.; Smith Barney Citigroup; Southwest Securities; Stephens Inc.; SunTrust Robinson Humphrey Capital Markets; UBS (US); and Wachovia Securities.

expansive analyst coverage is an indicator of market efficiency. Report, ¶ 27.

Factor 3: Opportunity for Arbitrage

For stocks traded on the NYSE, the function of market makers—that is, to ensure the competitive, orderly and efficient market for securities, is performed by a single specialist. [18] Report, ¶ 28. Specialists achieve this function by performing four critical roles: (1) as an auctioneer, continually showing the best bids and offers, and maintaining order in the crowd; (2) as an agent for SuperDot orders (direct electronic routing system to and from the trading floor) as well as for brokers; (3) as a catalyst for order flow by informing interested parties of items available in the market; and (4) as a principal, where the specialist has an obligation to enter into a transaction using its own capital if there is a willing buyer or seller with no counterparty in the marketplace. Specialists thus facilitate continuous trading during market hours. Report ¶ 29. As with the market makers, the role of the specialist assures the existence of arbitrage opportunities. Report, ¶ 31. As evidenced by the level of short interest, the short-selling of Halliburton's stock was not constrained during the Class Period, and arbitrage opportunities could be exploited, which is evidence in support of market efficiency. Report, ¶¶ 32-37.

Factor 4: Form S-3 Eligibility

The Company was eligible to file an SEC registration Form S-3 during the Class Period. Indeed, Halliburton filed an amended Form S-3 before the Class Period, on

September 25, 1998, and during the Class Period, filed a Form S-3 on December 3, 2001. Thus, this factor supports a finding of market efficiency. Report, ¶¶ 38-39.

Factor 5: Cause and Effect Relationship

The cause and effect relationship between unexpected information released to the market and movement of the stock price is the essence of an efficient market and the foundation for the fraud-on-the-market theory. *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 508 (1st Cir. 2005) (stating that the cause and effect relationship between pricing and new information is implicit in an efficient market). The movement of Halliburton's stock price during the Class Period when unexpected news was disseminated shows that Halliburton's stock traded in an efficient market. Report, ¶¶ 40-46.

[19] *Factor 6: Market Capitalization*

During the Class Period, the market capitalization for Halliburton stock ranged from $5.1 billion, on the last day of the Class Period, to a Class Period high of $24 billion. Report, ¶ 47. Even at the lower end of this range, Halliburton's market capitalization supports a finding that the market for Halliburton stock was efficient. Report, ¶ 48.

Factor 7: Bid/Ask Spread

Bid/ask spreads are a measure of transaction costs; low transactions costs indicate that arbitrage opportunities can be exploited readily. Report, ¶ 49. During the Class

Period, the average bid/ask spread as a percentage of the mean bid/ask price for Halliburton was 0.22%; the average for Halliburton's competitors was 0.36%. Such a low bid/ask spread indicates that arbitrage opportunities could be exploited, which is evidence of market efficiency. Report, ¶ 50.

Factor 8: Public Float

Courts have held that a large float percentage (percentage of shares held by the public) can be an indicator of market efficiency. *Unger*, 401 F.3d at 323; *Bell*, 422 F.3d 307 and 313, n. 10. During the Class Period, there were between 429.0 million and 445.5 million shares of Halliburton stock outstanding, of which approximately 99% were held by the public. This large public float indicates an efficient market. Report, ¶ 51.

Each of the *Unger* factors supports the conclusion that Halliburton stock traded in an efficient market. In addition, Halliburton's listing on a national exchange; the presence of sophisticated investors; and, the coverage of Halliburton by wire services, financial press, and general media also support a finding of market efficiency. Report, ¶¶ 52-64.

b. *Loss Causation*

The Fifth Circuit, in *Oscar Private Equity Investment v. Allegiance*, recently held that to avail itself of the benefits of the fraud-on-the-market presumption of reliance at the class . . . .

* * * *

Appendix A

EXCERPT OF DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED NOVEMBER 16, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf Of Itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY and DAVID J. LESAR,

Defendants.

DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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[i] **TABLE OF CONTENTS**

TABLE OF AUTHORITIES iii

LEAD PLAINTIFF'S BURDEN OF PROOF 1

BACKGROUND 4

I. The only two alleged class period representations regarding the Dresser merger merely repeated information disclosed to the market before the class period 5

II. Halliburton's disclosures regarding accounting for unapproved claims were not accompanied by any decline in Halliburton's stock price 5

III. Halliburton accurately disclosed its asbestos liability for pending claims 8

ARGUMENT.....10

I. Class certification must be denied because AMSF has failed to prove loss causation 10

A. AMSF failed to prove that any class period misrepresentation inflated Halliburton's stock price 12

B. AMSF does not prove any link between a potentially actionable, nonconfirmatory misrepresentation and corrective disclosure that reveals its falsity and causes a decline in the stock price 13

1. Nettesheim failed to isolate any actionable misrepresentations, and AMSF's reliance on confirmatory and other nonactionable statements to support loss causation is contrary to Fifth Circuit authority 14

2. Nettesheim's claimed corrective disclosures do not reveal the falsity of any prior misrepresentation and therefore do not support loss causation 16

C. AMSF provides no empirical evidence that the alleged corrective disclosures, as opposed to other unrelated news, caused a significant amount of the stock price decline 21

D. Nettesheim neither links the eight alleged "corrective disclosures" to previously released nonconfirmatory information nor provides empirical evidence that they caused a significant portion of the decline in stock price. 22

II. A class should not be certified as to Lesar because AMSF has not and cannot prove loss causation as to any misrepresentation attributed to him 31

III. Proposed class representatives Murphey and AMSF are neither typical nor adequate 32

A. Rule 23(a)'s requirements for typicality and adequacy 32

[ii]

B. Murphey is neither typical nor adequate as required by Rule 23(a) 34

1. Murphey cannot satisfy the typicality requirement 34

2. Murphey cannot satisfy the adequacy requirement 35

C. AMSF cannot satisfy the typicality and adequacy requirements 37

1. AMSF's complete reliance on money managers renders it atypical and/or inadequate 37

2. AMSF Is Not an Adequate Representative of the Putative Class 39

CONCLUSION 40

CERTIFICATE OF SERVICE 41

* * *

Appendix A

EXCERPT OF LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION, DATED DECEMBER 21, 2007

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., *et al.*, On Behalf of itself and All Others Similarly Situated,

Lead Plaintiff,

v.

HALLIBURTON COMPANY, *et al.*,

Defendants.

LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION

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Additional counsel appear on signature page

* * *

[5]

II. LEAD PLAINTIFF HAS SATISFIED THE REQUIREMENTS OF RULE 23(b)(3)

Certification under Rule 23(b)(3) requires a plaintiff to establish that issues common to the class will predominate over issues affecting any individual class member, and

that a class action is superior to other available methods of adjudication. Defendants do not challenge that the class action mechanism is the superior vehicle for resolving the securities fraud claims alleged by Plaintiff in the Complaint. Defendants' sole challenge is that Plaintiff has failed to establish entitlement to rely on the fraud-on-the-market presumption, and therefore, that individual issues of reliance will predominate. Defendants are wrong.[7]

A. *Defendants Overstate Plaintiffs' Class Certification Burden.*

Pursuant to the Fifth Circuit's recent decision in *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261 (5th Cir. 2007), and as discussed in *Ryan v. Flowserve Corp.*, 245 F.R.D. 560 (N.D. Tex. 2007), in order to prevail upon the fraud-on-the-market presumption, a Plaintiff must now establish loss causation.[8] While *Allegiance*

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7. Defendant David J. Lesar ("Lesar") cites no authority for his position that the class cannot be certified against him under these circumstances. Indeed, the authority is to the contrary. Courts in this circuit routinely certify securities fraud class actions against corporations and their officers collectively. *See e.g., Feder v. Elec. Data Syst. Corp.*, 429 F.3d 125 (5th Cir. 2005) (affirming certificationof class action by securities purchaser against corporation and its former CEO and CFO). Moreover, as shown below, the relevant misrepresentations were either authorized by Lesar, or made directly by him.

8. Defendants' Response does not dispute that the stock of Halliburton trades on an efficient market. An efficient market is by definition one in which "it is assumed that all public information concerning a company is known to the market and reflected in

raised the bar for class certification, it does not raise it to the extent that Defendants suggest.

1. The Impact of Defendants' Fraud Is Demonstrated Through Showing a Material Price Decline Following Partial Disclosure of the Fraud.

Defendants argue that to show loss causation Plaintiff must show a statistically significant price increase following a misrepresentation.[9] However, both *Greenberg v.* . . . .

* * * *

---

the market price of the Company's stock." *Greenberg Crossroads Systems, Inc.*, 364 F.3d 657, 661, n.6 (5th Cir. 2004) (*citing Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975)).

9. For instance, Defendants state: . . . .

Appendix A

EXCERPTS OF DEPOSITION OF LUCY ALLEN

[Allen]

* * *

[42] . . . economic loss in general terms.

Q. Assuming that that's accurate, why is looking at analyst reports important to that loss causation analysis?

A. Looking at analyst reports is one way of looking at what information is out there in the market.

Q. What is another way of looking at what information is out there in the market other than analyst reports?

A. Well, I think a look at information that's out there in the market you want to look at just analyst reports, you want to look at news stories and what the company is saying and information that is out there, public information. So one of the — what plaintiffs are doing in this case is using the fraud on the market theory and are claiming that Halliburton's stock price traded in an efficient market during the class period. If it trades in an efficient market, then the information is quickly impounded into the stock price, publicly information is quickly impounded in the [43] stock price. So it's helpful to look at what public information is out there. And that's the sort of analysis that Ms. Nettesheim is trying to support in her report.

Appendix A

Q. You used the term efficient market in that last answer, what does efficient market mean, as you use the term?

A. It means a number of different things. The efficient market that Ms. Nettesheim has tried to prove is sometimes called the semi-strong form of the efficient market hypothesis, It's the public information is quickly impounded into the stock price.

Q. In the work that you did, did you reach a conclusion one way or another as to whether the market for Halliburton stock was an efficient market, as you use that term?

A. I did not study whether the market for Halliburton was efficient or not. I was not asked to conduct that analysis.

Q. And would I be correct in saying that as you sit here now, you simply do not have a view one way or the other as to [44] whether the market for Halliburton stock is or is not efficient, as you use that term?

A. I would say that's correct.

Q. Prior to your work on this matter, had you attempted to make assessments as to whether the market for a particular stock was or was not efficient, as you use that term?

A. I've done some work before in analyzing market efficiencies, issues related to market efficiencies previously.

MR. BOIES: Can you read my question back.

(Record read.)

Q. What I'm asking is not have you done some work in the area, it's whether you've made an attempt to determine whether the market for a particular stock was or was not efficient, have you done that?

A. I don't know that I ever actually said precisely the market was or was not efficient or any one particular stock.

Q. Whether or not you've actually said it, have you ever done an analysis to determine it?

[45] A. As I said, I've analyzed issues related to market efficiency. So I have analyzed reports sometimes where an expert claims that there is information that supports market efficiency, but I don't believe I have ever—the question of yes, no, market efficiency, I don't think I have, in fact, ever addressed that question specifically.

Q. I think I understand that, I want to be sure. You understand that one of the things that Ms. Nettesheim did was to reach a conclusion as to whether, in her view, the market for Halliburton stock was or was not efficient?

A. Yes, that's my understanding.

Q. Have you ever tried to do that?

A. I don't think so, no.

Q. Let me go back to the matters that you considered in preparing your report. At the time you prepared your report, were you aware of statements that Halliburton had made concerning its asbestos exposure?

A. I'm sorry, can you repeat that.

* * *

[98] . . . Halliburton's stock price?

A. Around the time—around this time in December, I believe the price of Halliburton stock was falling because of uncertainty regarding asbestos and the change in the asbestos environment, as well as some recent and unexpected verdicts and judgments that related to Halliburton. And I also believe that there is at least some commentary from the analyst that the market reaction around the time was an overreaction, particularly the reaction around the December—around December 7.

Q. Did you reach any judgment or conclusion as to whether the market reaction was, in your terms, an overreaction?

A. I noted that there was a lot of commentary about it being an overreaction. So a lot of the analysts thought that it was an overreaction. I didn't particularly, other than noting that, make a determination about that.

Q. Other than noting that a lot of analysts in your testimony said that, you [99] didn't reach any conclusion

yourself about whether or not the drop in stock price in around December 7 was an overreaction?

A. I would say that's correct.

Q. Now, I asked you about the drop in price on December 7, and you said around this time various things were happening.

Did anything happen on December 7, that in your judgment caused the price of Halliburton stock to decline precipitously?

A. Let me just look back on that because—according to Ms. Nettesheim, there was a jury award of 30 million, a verdict against Dresser. I'm not sure if that actually came out on December 7. I think it actually came out earlier than that.

Q. Have you finished your answer?

A. Yeah. I'm just looking to see if I say it in my report. I know that some of the dates that Ms. Nettesheim claims are alleged curative disclosures that relate to verdicts and judgments on asbestos, the verdict or judgment didn't actually come out on the date that she claims. It actually came out a [100] couple of days earlier and I'm trying to see if this is one of those dates.

Q. My question to you is whether you have a judgment or conclusion as to whether anything happened on December 7 that caused Halliburton stock price to decline precipitously on that date?

A. Well, something that did happen, I believe on December 7, is that Moody's does downgrade them, downgrades Halliburton. And I think that is a negative piece of information regarding Halliburton.

Q. When did Moody's downgrade Halliburton, as you understand it?

A. I believe it's on December 7.

Q. Were they downgrading stock or the debt, as you understand it?

A. It's a credit rating, so it's usually the debt.

Q. What was the credit rating before and after what you say was this downgrade?

A. What was the actual change? I have a story here that changed the rating outlook from stable to negative.

[100] Q. Is it your understanding that stable and negative are Moody ratings?

A. They are ways that Moody—yes, not like the A, B type ratings but stable and negative are terms that Moody, yes, rates companies by, that's my understanding.

Q. Moody's has published ratings of company's debt, correct?

A. Yes.

Q. And those ratings of companies' debt are in the form of letter grades, correct?

A. Yes.

Q. And when Moody's talks about something be stable or negative, what they're doing is predicting changes in the ratings, the letter ratings, correct?

A. I don't know if — I'm not sure that's how I would describe it.

Q. Would you describe Moody's ratings as including references to stable and negative, if you would fine, I'm just trying to get your testimony about it?

A. Sometimes you talk about the

* * *

[114] Q. And that none of those companies is Halliburton?

A. Correct.

Q. And that the decline in Halliburton stock over those three trading days is nowhere mentioned in your report, correct?

A. I don't know if the decline is nowhere mentioned in my report, it's not on that table.

Q. Do you know what Halliburton's decline was over the three trading days that you selected?

A. Do I know as I sit here? No.

Q. If you can tell me by looking at your report, please do so, and tell me what pages you are referring to?

A. I don't think I have Halliburton's stock price.

Q. In your report, is that what you're saying?

A. Correct.

Q. In preparing your report even though you didn't put it in the report, in preparing your report, did you know what [115] Halliburton stock price decline had been over the combination of the three trading days that you reference here?

A. I certainly looked at Halliburton stock prices and the commentary from the analysts about the stock price movement. I don't know if I made an exact calculation of those three days.

Q. You made an exact calculation of those three days for these four other companies?

A. That's right. And actually the story may— that I show may, in fact, tell you what Halliburton stock price reaction is.

Q. What story is that?

A. I think I reference a news story that says that other—the Reuters News article—I don't show the whole Reuters News article.

Q. What Reuters News article are you pointing to?

A. I'm referring to what's referenced on page 39, Reuters News December 10, 2001, anxious investors sell stock of asbestos [116] defendants.

Q. And that report, at least as you've quoted it here says, that on December 10, Monday, other companies facing asbestos claims saw their stock price driven down because of the verdict against Halliburton, correct?

A. Correct.

Q. And that happened on Monday December 10, correct?

A. What happened?

Q. The reference here?

A. The article is on Monday, December 10, correct.

Q. And the article is talking about Monday, December 10, correct, when it says, the verdict spurred continued anxiety on Monday driving down shares of a disparate group of other companies facing asbestos claims, correct?

A. Correct. I'm not sure if—again, it's not—it does mention Monday, continued anxiety on Monday, so perhaps it mentioned prior anxiety on Friday.

[117] Q. You say perhaps, you mean the portions you didn't quote?

A. Correct, I don't.

Q. Do you know whether it did or not?

A. I don't, as I sit here. I did review this story again just yesterday but I don't recall.

Q. As you understand it, did anything other than the issue of asbestos exposure contribute to the decline in Halliburton stock on the three days that you have identified, three trading days that you identified in early December 2001?

A. I think the movement was primarily due to issues relating to asbestos and uncertainty and changing asbestos environment and this verdict. So I didn't see evidence of other new information and the Moody's downgrade, other new information affecting Halliburton's stock price.

Q. Now, the Moody's downgrade, was that, in your view, related to the information regarding asbestos exposure that was revealed in early December 2001?

[118] A. I think it's related to information regarding asbestos. I don't think it's related to the plaintiffs'

allegations in this matter. So I don't think the cause of the Moody's downgrade is curative of plaintiffs' alleged misrepresentations in this matter. I think it is related to asbestos.

Q. And what do you understand the plaintiffs' claim of misrepresentations about asbestos to be?

A. I think I have a quote about that in my report.

Q. Let me just try to get it in your own words right now.

What, as you sit here now, do you understand the basic allegation of the plaintiffs to be about the misrepresentation concerning asbestos exposure?

A. My understanding is that there was the reserves were—that at the beginning of the class period, the reserves that Halliburton had set on their books were misleading and known to be not true by [119] Halliburton.

Q. Do you understand that the plaintiffs make any other assertion of misrepresentations relating to asbestos?

A. Well, my understanding is that the plaintiffs' motion for class certification summarizes the allegations as relating to the asbestos reserves.

Q. My question is whether you understand plaintiffs to make any other allegation about asbestos misrepresentations other than what you've just said which is the beginning of the class period the reserves—

A. I think it's throughout the class period as well.

Q. At the beginning and throughout the class period, the reserves were inadequate.

As you understand it, did the plaintiffs make any other allegations or misrepresentations concerning asbestos?

A. I believe they fall into that same general category.

Q. What is the same general category?

A Of the inadequacy or the misleading [120] nature of the asbestos reserves.

Q. As you understand it, do the plaintiffs claim that one of the misrepresentations that Halliburton made was the assertion that Halliburton insurance should cover the majority of any future claims relating to asbestos?

A. That's not my understanding.

Q. Was it your understanding or is it your understanding that one of the misrepresentations that plaintiffs rely on is that Halliburton asserted in July of 2001 that the reserves, as added to by Halliburton at that time, represented their best judgment as to the potential exposure that Halliburton faced from asbestos?

MR. STERLING: Objection. Form of the question.

MR. RONQUILLO: Same objection.

A. That's my understanding that the claim was that was their best judgment for the pending claims.

Q. Is it your understanding that that's what the plaintiffs are alleging?

[121] A. Yes. And that's how the reserves were set, were based on the expected value, projected value of pending claims.

Q. And did you actually personally review what Halliburton said about asbestos exposure in its reserves?

A. In their filings? Yes, I did.

Q. And in their conference calls with analysts?

A. Yes. I tried to look at all statements regarding asbestos throughout the alleged class period that was in the market, as well as what the company said.

Q. Let me ask you to look at page 121, paragraph 177 of the complaint. This references a July 26, 2001 UBS Warburg analyst report.

Do you see that?

A. Yes.

Q. Did you look at that analyst report among the analyst reports you looked at?

A. I believe I did look at that.

Q. At the last three lines in the paragraph relate to a statement Mr. Lesar

* * * *

APPENDIX B — EXCERPT OF LETTER FROM BAKER BOTTS L.L.P. TO THE CLERK, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MARCH 4, 2013

BAKER BOTTS L.L.P. [LETTERHEAD]

[1] March 4, 2013

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BY E-FILING

Mr. Lyle W. Cayce
Clerk, U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Letter Brief in No. 12-10544; *Erica P. John Fund, Inc. v. Halliburton Co.* (set for oral argument on March 6, 2013 before Davis, Graves, and Higginson, JJ.)

Dear Mr. Cayce:

The above-captioned case is set for oral argument on March 6, 2013 before Judges Davis, Graves, and Higginson. The panel directed the parties to file letter briefs of no more than seven pages addressing the Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085, 2013 WL 691001 (Feb. 27, 2013) (attached).

Appendix B

SUMMARY

The Supreme Court's rationale in *Amgen* confirms Halliburton's argument that a defendant must be allowed to rebut the fraud-on-the-market presumption, at the class-certification stage, with evidence that the alleged misrepresentations did not distort the market price. *Amgen* held that a plaintiff need not prove materiality in order to obtain class certification under the fraud-on-the-market theory, nor may a defendant defeat class certification by offering evidence that the alleged misrepresentations were not material. Materiality and price distortion are distinct concepts. The Supreme Court has expressly reserved the issue whether a defendant may rebut the presumption at the class-certification stage by showing the absence of market-price distortion, *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186-87 (2011) ("*EPJ Fund*"), and its opinion in *Amgen* likewise did not address that issue.

The Court's reasoning in *Amgen* shows why price distortion—unlike materiality—must be considered at the class-certification stage. The Court declined to consider proof of materiality at class certification because materiality is an *element* of a Rule 10b-5 claim. Thus, if the alleged misrepresentation is immaterial, no plaintiff can ever succeed on an individual claim. Materiality, therefore, is not part of a plaintiff's Rule 23(b)(3) burden to show that common issues predominate because the absence of materiality will cause *all* individual plaintiffs' claims to fail as a matter of law.

Appendix B

* * *

. . . . . .

> [6] Materiality thus differs from the market-efficiency and publicity predicates *in this critical respect*: While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class.

Id. at **10-11 (emphasis added) (citations omitted). The Court concluded that "[b]ecause a failure of proof on the issue of materiality, unlike the issues of market efficiency and publicity, does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification." *Id.* at *11.

Finally, the Court reasoned that rebuttal evidence pertaining to materiality is irrelevant to class certification for the same reason that a plaintiff is not required to prove materiality in order to obtain certification. "[J]ust as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." *Id.* at *15. The Court explained that *Basic* had considered the precise type of materiality evidence

proffered by Amgen and held that "proof of that sort was a matter for trial" or summary judgment. *Id.* at *15 & n.11. Consequently, the Court concluded that the district court "correctly reserved consideration of Amgen's rebuttal evidence for summary judgment or trial." *Id.*

B. It is undisputed that a defendant may rebut the presumption of reliance by showing that the alleged misrepresentations did not distort the market price. *See Basic*, 485 U.S. at 248. The question here is whether such evidence, when presented, must be considered at the class-certification stage. Because price distortion is in all critical respects analogous to market-efficiency and publicity—and different from materiality—*Amgen*'s rationale dictates that courts must consider rebuttal evidence pertaining to price distortion at the class-certification stage.

Under the *Amgen* framework, price-distortion evidence is central to whether a plaintiff can satisfy its burden to show that common questions predominate over individual ones, as required by Rule 23(b)(3). Indeed, throughout the entire *Amgen* analysis recounted above, one could substitute the words "price distortion" for the words "publicity and market efficiency" without changing the meaning of the Court's opinion.

Price distortion, unlike materiality and loss causation—which are off limits at class certification—is not an "indispensable element" of a Rule 10b-5 claim. *Amgen*, 2013 WL 691001, at *4 (listing elements); *EPJ Fund*, 131 S. Ct. at 2187 ("[L]oss causation is a familiar and

distinct concept in securities law; it is not price impact."). Instead, price distortion—like market efficiency and publicity—is principally relevant to whether an alleged misrepresentation has been transmitted through the market price, such that the class can be said to have relied on [7] the misrepresentation by relying on the market price. It makes perfect sense to group price distortion with publicity and market efficiency.

Because price distortion is not an essential element of a Rule 10b-5 claim, a successful rebuttal showing on price distortion would not automatically "end the case for one and for all" as a matter of law. *Amgen*, 2013 WL 691001, at *8. A price-distortion rebuttal would simply eliminate one *means* of proving the reliance element—the presumption of classwide reliance on a distorted market price. *See id.* at **10-11 (same for absence of publicity and market efficiency). A plaintiff who cannot show reliance via market-price distortion could still prevail by showing that "she was personally aware of the defendant's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Id.* (internal quotation marks omitted) (same for absence of publicity and market efficiency). Such a plaintiff is identically situated to a plaintiff who cannot prove the public character of the misrepresentation—and therefore necessarily cannot show that the misrepresentation affected the market price. *See EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 871 (3d Cir. 2000) (plaintiff sufficiently alleged a 10b-5 claim against a publicly traded company even though it "d[id] not base its claim on public misrepresentations or omissions that affected the price of the stock"). The

Court declared that such a plaintiff could nonetheless bring an individual claim by showing actual reliance on the misrepresentation. *Amgen*, 2013 WL 691001, at *10.

What the Court in *Amgen* said about materiality simply cannot be said of price distortion—that "[a] failure of proof on the issue . . . establishes as a matter of law that the plaintiff cannot prevail on the merits of her Rule 10b-5 claim." *Id.* at *11; *see also id.* at *8 (Without proof of materiality, "*no claim would remain* in which individual reliance issues would predominate.") (emphasis added).

Unlike with materiality, in the absence of price distortion there is at least some possibility that individual plaintiffs could prove actual, as opposed to presumed, reliance on alleged misrepresentations. The absence of price distortion "leaves open the prospect of individualized proof of reliance" but defeats a class-wide claim. *Id.* at *11. Though individual claims may remain, the absence of price distortion defeats Rule 23(b)(3) certification for precisely the same reasons that the absence of market efficiency and publicity does.

As Halliburton has explained in its prior briefing, once the Fund established the necessary class-certification requisites of publicity and market efficiency (as it did here), Halliburton bore the initial rebuttal burden to make "any showing" severing the link between the misrepresentation and the market price. Halliburton made such a rebuttal by demonstrating the absence of price distortion. Therefore, under Federal Rule of Evidence 301, the Fund had the ultimate burden of proving that

the alleged misrepresentations in fact distorted the market price. Because the Fund failed to prove that any of Halliburton's alleged misrepresentations distorted the market price, individual issues of reliance predominate over common ones. For this reason, the Fund has failed to carry its burden under Rule 23(b)(3), and the class must be decertified.

[8] Sincerely,

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APPENDIX C — EXCERPT OF APPELLANTS' PETITION FOR REHEARING *EN BANC*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 24, 2013

Case No. 12-10544

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERICA P. JOHN FUND, INCORPORATED,
formerly known as Archdiocese of Milwaukee
Supporting Fund, Inc., *On Behalf of Itself and
All Others Similarly Situated,*

Plaintiff-Appellee

v.

HALLIBURTON COMPANY AND DAVID LESAR,

Defendants-Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
No. 3:02-CV-1152-M (Lynn, J.)

**APPELLANTS' PETITION FOR
REHEARING *EN BANC***

Appendix C

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Appendix C

[v] TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

CERTIFICATE OF COMPLIANCE WITH RULE 35(b)(1) iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

ISSUES PRESENTED 1

FACTUAL AND PROCEDURAL BACKGROUND ..1

ARGUMENT 3

I. The panel misinterpreted the Supreme Court's recent decision in *Amgen* 3

A. *Amgen* does not address price-impact rebuttal 3

B. The panel erroneously held that *Amgen*'s rationale precludes price-impact rebuttal at the class-certification stage 4

II. The panel improperly overruled circuit precedent without unequivocal direction from the Supreme Court 10

III. The panel decision deepens a circuit split 13

IV. *Basic*'s presumption of reliance should be overruled 14

CONCLUSION 15

CERTIFICATE OF SERVICE 17

* * *

[14] . . . the contrary. *Schleicher v. Wendt*, 618 F.3d 679, 687-88 (7th Cir. 2010).[5]

A case of this importance—that is on remand from the Supreme Court; that interprets a recent Supreme Court opinion; that purports to overrule circuit precedent; and that implicates a circuit split—warrants the full court's review.

IV. *Basic*'s presumption of reliance should be overruled.

In *Amgen*, four Justices signaled a willingness to revisit *Basic*'s core holding that plaintiffs may invoke a presumption of reliance under the fraud-on-the-market theory. *See* 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., dissenting). As Justice Alito noted, "more recent evidence suggests that the [*Basic*]

5. The Supreme Court disapproved of the Second and Third circuits' requirement that plaintiffs prove materiality to obtain class certification, *Amgen*, 133 S. Ct. at 1194, but did not address those circuits' separate holdings that a defendant may defeat class certification by showing the absence of price impact.

presumption may rest on a faulty economic premise." *Id.* at 1204. Moreover, allowing plaintiffs to obtain class certification based upon a "presumption" of classwide reliance is at war with the Court's recent holding that plaintiffs must "prove . . . *in fact*" that common issues predominate in order to obtain class certification. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The *Basic* presumption's conflict with modern class-certification principles is cast in especially sharp relief by the panel's holding, which renders [15] *Basic*'s "fundamental premise" irrebuttable at the class-certification stage.[6] A fictional "presumption" of common reliance, which is largely immune from challenge at the class-certification stage, cannot coexist alongside *Wal-Mart*'s insistence that "[a] party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]." *See id.*

Similarly, *Basic* features a judicially created presumption layered onto a judicially created cause of action, when more recent doctrine favors leaving such innovation to Congress. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008). Finally, *stare decisis* concerns are at their nadir "in cases such as the present one involving procedural and evidentiary rules." *Payne v. Tenn.*, 501 U.S. 808, 828 (1991). *Basic*'s presumption of classwide reliance is ripe for reconsideration in this case.

---

6. *See EPJ Fund*, 131 S. Ct. at 2186 (referring to "*Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price*").

Appendix C

CONCLUSION

The Court should grant the petition for rehearing *en banc.*

REPLY BRIEF

RECORD AND BRIEFS

No. 13-317

Supreme Court, U.S.
FILED
OCT 29 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
I. *Basic* Should Be Overruled Or Modified	1
A. No "preservation" problem impedes reconsideration of *Basic*	1
B. None of the Fund's other arguments presents any meaningful challenge to certiorari	5
II. A Post-*Amgen* Circuit Split Persists Over Price-Impact Rebuttal	9

TABLE OF AUTHORITIES

Page

CASES

Amgen, Inc. v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) ..... *passim*

Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988) 2, 3

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) ..... *passim*

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 9

Citizens United v. *FEC*, 558 U.S. 310 (2010) 3

Erica P. John Fund, Inc. v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) 3, 7, 10, 11

GAMCO Investors, Inc. v. *Vivendi, S.A.*, 927 F. Supp. 2d 88 (S.D.N.Y. 2013) 11

In re Citigroup Inc. Sec. Litig., __ F. Supp. 2d. __, 2013 WL 3942951 (S.D.N.Y. Aug. 1, 2013) 11

In re Salomon Analyst Metromedia Litig., 544 F.3d 474 (2d Cir. 2008) 11

Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 2, 3

Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 8

TABLE OF AUTHORITIES—Continued

Page

Musick, Peeler & Garrett v. *Emps. Ins. of Wausau*, 508 U.S. 286 (1993) 8

Pearson v. *Callahan*, 555 U.S. 223 (2009) 8, 9

PGA Tour, Inc. v. *Martin*, 532 U.S. 661 (2001) 3

Rodriguez de Quijas v. *Shearson/Am. Express*, 490 U.S. 477 (1989) 3

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 8

United States v. *Camou*, 184 U.S. 572 (1902) 3

Yee v. *Escondido*, 503 U.S. 519 (1992) 2

MISCELLANEOUS

Bernard et al., *Challenges to the Efficient Market Hypothesis: Limits to Applicability of Fraud-on-the-Market Theory*, 73 Neb. L. Rev. 781 (1994) 6

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY FOR PETITIONERS

Nothing in the Fund's response prevents this Court from reconsidering *Basic* and conforming its holding to congressional intent, modern economics, and this Court's recent Rule 23 case law. Nor does the Fund justify ignoring the circuit split over price-impact rebuttal that the Court declined to reach the first time these parties were before it, and which *Amgen* left unresolved.

I. *BASIC* SHOULD BE OVERRULED OR MODIFIED

A. No "preservation" problem impedes reconsideration of *Basic*

1. Halliburton did not need to raise the validity of *Basic* with any lower court or in its response to the Fund's earlier petition to this Court. Br. in Opp. 25-30. The Fund cannot contradict this Court's repeated articu-

lation of the "traditional rule * * * that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)). Indeed, new arguments can even contradict old arguments, as in *Lebron* itself, where "Lebron did not raise this [new] point below; indeed, he expressly disavowed it in both the District Court and the Court of Appeals." *Id.* at 378. The Court readily permitted this "alternative argument," because it was "not a new claim * * *, but a new argument to support what has been his consistent claim," *id.* at 379.

With *Lebron* foreclosing its most direct path to urging denial, the Fund contends that Halliburton somehow has been litigating for years without making "any ***claim***" whatsoever. Br. in Opp. 29 (double emphasis in original). The Fund apparently believes that only plaintiffs have "claims" that can be supported by new arguments: "Here, the only claims in this case were brought by Plaintiff for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934." *Ibid.*

Unsurprisingly, no case supports the Fund's oddly constricted view of federal litigation. To the contrary, the *Lebron-Yee* line of cases makes clear that, for purposes of evaluating when new arguments are proper, both plaintiffs and defendants play by the same rules. *Yee*, for example, cites *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988). The Court there addressed a defendant's ability to raise new arguments, describing Bankers Life's challenge to a punitive-damages award as a "federal claim it now urges us to resolve." *Id.* at 77. It suggested no distinction between plaintiffs and defendants; whether *any* party could pursue additional arguments depended on preservation of

that party's "federal question." *Id.* at 78 n.2. Accord *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001) (allowing defendant to raise a new argument in support of an "issue" that "was raised in the lower courts").

The "federal question" Halliburton has consistently pressed is that class certification is improper because individual issues predominate. That *Basic* should be overruled or modified is one of several arguments Halliburton has made to support that overarching federal claim. See *Citizens United* v. *FEC*, 558 U.S. 310, 329-331 (2010) (entertaining challenge to governing precedent, despite petitioner accepting precedent's validity below, because it was "a new argument to support what has been a consistent [First Amendment] claim").[1]

2. It follows that Halliburton was not required to ask the lower courts to overrule *Basic*. No lower court has any discretion to do so. See *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989). Unsurprisingly, *none* of the Fund's waiver cases faulted a party for failing to ask a lower court (or this Court in a previous

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[1] The Fund cites two 111-year-old cases holding that parties cannot relitigate "the *same questions*" in consecutive cases in this Court. Br. in Opp. 25-26 (quoting *United States* v. *Camou*, 184 U.S. 572, 574 (1902)) (emphasis added). But the "question" in *EPJ Fund* was whether plaintiffs must prove loss causation at class certification—a question Halliburton does not seek to relitigate. When the Fund brought its petition in *EPJ Fund*, the class had never been certified, and the "question" presented did not encompass all potential challenges to a hypothetical future certification. Thus, nothing prevents Halliburton from raising those challenges now. Likewise, this Court's reference in *EPJ Fund* to "arguments" Halliburton had "preserved" referred only to the "remand" to the "Court of Appeals," 131 S. Ct. at 2187. See Br. in Opp. 27. *EPJ Fund* did not constrain Halliburton from making new arguments against certification on remand to the district court, given the new legal landscape, much less to the Fifth Circuit or this Court in future appeals, as specifically allowed by *Lebron*.

appeal) to overrule Supreme Court precedent. After all, adding one sentence to a lower-court opinion summarily refusing to overrule *Basic* would hardly produce a better vehicle for this Court to resolve the question presented. Halliburton *did* raise *Basic*'s validity in its *en banc* petition below, following the serious misgivings recently expressed in *Amgen, Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). But it did not *need* to, and it properly presented that question in its petition here.

3. Nor does Halliburton's concession that its "stock trades in an efficient market," Br. in Opp. 23, bar this Court from reconsidering *Basic*. As with any large, NYSE-traded company, it would have been futile for Halliburton to contest that its stock meets *Basic*'s binary, yes-or-no market-efficiency test. Halliburton does not seek to relitigate that question. Instead, Halliburton challenges the validity of retaining a classwide-reliance presumption triggered by a universally condemned binary market-efficiency test.

Modern economics teaches that *some* markets are *somewhat* efficient *some* of the time with respect to *some* information. With no confidence that a given misrepresentation was reflected in the market price, it makes scant sense to presume that investors relied upon that misrepresentation just because the purchased stock trades in a well-developed market. See Pet. 16-17. This speculative presumption of common reliance issues cannot satisfy this Court's Rule 23 cases. Nor should it be allowed to substitute for the traditional eyeball-reliance requirement imposed by the common law and analogous federal securities statutes.

Thus, Halliburton proposes that the *Basic* presumption be overruled altogether or replaced with a presumption triggered by a showing that the alleged misrepresentations actually distorted the market price. Halliburton

ton's concession that its stock meets the flawed binary test for market efficiency cannot prevent Halliburton from challenging whether that very test is an adequate foundation for the legal edifice built upon it, much less from raising other arguments for why the *Basic* presumption should be overruled.

4. *Amgen* does not support the Fund's vehicle argument. In *Amgen*, no party asked the Court to revisit *Basic*. 133 S. Ct. at 1193 n.2. The Court declined to entertain concerns about the non-binary nature of market efficiency because Amgen "never clearly explain[ed] how this research on *market efficiency* bolsters its argument that courts should require precertification proof of *materiality*." *Id.* at 1197 n.6. Thus, after reviewing Amgen's concession of market efficiency, the Court "f[ou]nd nothing in the cited research that would support requiring precertification proof of materiality in this case." *Ibid.* Halliburton, by contrast, has squarely questioned *Basic*'s continuing vitality on multiple grounds, including that the presumption should no longer be based upon an outdated binary conception of market efficiency.

B. None of the Fund's other arguments presents any meaningful challenge to certiorari

1. Although the Fund feels obliged to defend *Basic*, it dodges the economic consensus by counterfactually claiming that *Basic* "based its adoption of the fraud-on-the-market presumption * * * primarily on congressional policy." Br. in Opp. 36-37. But *Basic*'s (and the Fund's) gauzy invocations of congressional "policy" cannot hide its marked departure from statutory text and legislative history, or its inconsistency with this Court's otherwise-customary reluctance to expand the judicially inferred 10b-5 cause of action. As Justice White's dissent, the petition, and the Former SEC Commissioners' *amicus* brief all demonstrate, the four-Justice *Basic* majority improperly substituted nascent economic theory for tra-

ditional legal analysis. While that theory was "characterized [before *Basic*] as having 'more solid empirical evidence supporting it . . . [than any] other proposition in economics,'" Bernard et al., Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-on-the-Market Theory, 73 Neb. L. Rev. 781, 782 (1994) (citation omitted), it now faces widespread criticism. Because neither congressional intent nor economic consensus supports *Basic*'s core holding—and because *Basic*'s presumption of classwide reliance conflicts with this Court's recent class-action decisions—*Basic* is ripe for reconsideration.

The Fund ultimately does not contest the economic analysis described by Halliburton. See Pet. 13-18. Instead, the Fund simply asserts that "the semi-efficient market hypothesis continues to enjoy widespread support among economists." Br. in Opp. 37. Halliburton need not dispute that limited statement to observe, as many scholars have, that there is no economic basis to treat markets in particular securities in a binary fashion, as either "efficient" or "inefficient." See Pet. 16-17. Nor is there any legal basis to derive a classwide presumption of reliance from such a flimsy premise, without at least inquiring into whether the market price was actually distorted. Yet this is how *Basic* is applied, and the Fund neither denies nor defends it.

The Fund notes that two scholars, while critical of *Basic*'s economic analysis, personally support continuing to apply *Basic*'s presumption for public-policy reasons. See Br. in Opp. 24 n.5. But it favors Halliburton, not the Fund, that scholars supporting expansive liability regimes nonetheless candidly attack *Basic*'s economic foundations; it is akin to an admission against interest. See Pet. 16. This Court may use scholarship to inform itself, but need not adopt the political views of the scholar.

2. The Fund spends less than two pages disputing Halliburton's alternative view that *Basic* should be amended to require plaintiffs to prove price impact before invoking the presumption of classwide reliance. Such a modification would not impermissibly require plaintiffs to prove that they "would prevail on the merits in establishing reliance" at the class-certification stage. Br. in Opp. 40. Halliburton's proposal would simply ensure that there is a distorted market price which *could* plausibly serve as a stand-in for *common* reliance on the misrepresentation. Without that showing, individual plaintiffs could still prevail on the merits by proving that they were aware of, and actually relied on, the misrepresentation. Halliburton's approach accords with *Amgen*'s insistence that plaintiffs prove publicity and market efficiency before class certification. See Pet. 27-30.

The fact that a plaintiff might choose to prove price impact by pointing to price declines following corrective disclosures, Br. in Opp. 40-41, hardly means that requiring proof of price impact is barred by *EPJ Fund*'s holding that a plaintiff cannot be required before certification to prove the distinct element of "loss causation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) ("[L]oss causation is a familiar and distinct concept in securities law; it is not price impact."). Nor is Halliburton's acceptance that *Basic*, as *currently* written, treats price-impact as a rebuttal issue inconsistent with asking that the Court modify *Basic* to bring it into line with recent case law that places the initial Rule 23(b)(3) burden squarely on the plaintiff. See Br. in Opp. 40.

3. The Fund relies heavily on *stare decisis*. See Br. in Opp. 34-36. It simply declares that a decision creating a judicially mandated presumption (that is in practice virtually irrebuttable), layered on top of a judicially implied cause of action, is just as entitled to *stare decisis* as any decision construing a statute's text. Br. in Opp. 33,

35. Halliburton has emphasized that, because *Basic*'s presumption is wholly a creature of the judiciary and partially procedural in nature, the judiciary has a responsibility to correct its own work and not just leave it to Congress to act. Pet. 25.

That argument draws strong support from this Court's decisions interpreting the Sherman Act. Because that statute delegates broad, common-law power to the judiciary, the Court more readily revisits its Sherman Act precedents. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act."); *id.* at 20-22 (overruling 29-year-old precedent and citing several overrulings of Sherman Act decisions); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899-900 (2007) (overruling century-old precedent in part because "respected authorities in the economics literature suggest the *per se* rule is inappropriate"). The Court's common-law exegesis of the 10b-5 cause of action justifies a similarly relaxed mode of *stare decisis*. See *Musick, Peeler & Garrett* v. *Emps. Ins. of Wausau*, 508 U.S. 286, 292 (1993) (noting that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes").

The Fund mistakenly asserts that Halliburton's petition relied solely on "constitutional" cases, where *stare decisis* concerns are lessened. Br. in Opp. 35. In fact, in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), the Court overruled the judicially-created "order of battle" for addressing qualified-immunity claims not because it was tangentially related to the Constitution, but because it had been "questioned by Members of the Court in later decisions," "departure would not upset expectations," and "experience has pointed up the precedent's shortcomings." *Id.*

at 233, 235. The Court explained that "judge made rule[s]" do not "implicate the general presumption that legislative changes should be left to Congress" because "any change should come from this Court, not Congress." *Id.* at 233-234. That guidance applies with full force here.

4. The Fund goes too far in proclaiming that this Court and Congress have "endorsed" *Basic*'s presumption of reliance. This Court has never before considered a challenge to the continuing validity of *Basic*'s presumption. Nor has the Court confronted the growing tension between *Basic*'s presumption of common reliance with the Rule 23 requirement that common-issue predominance be proven, not presumed—a tension the Fund barely mentions. Compare Pet. 21-23 with Br. in Opp. 28.

It similarly "'does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it,'" because it is "'"impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation."'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (citations omitted). Congressional inaction cannot justify judicial refusal to reexamine judge-made causes of action or judicially-created presumptions.

II. A POST-*AMGEN* CIRCUIT SPLIT PERSISTS OVER PRICE-IMPACT REBUTTAL

Apart from reconsidering *Basic*, an important circuit split independently merits this Court's review. The Fund cannot dispute that the Second and Third Circuit cases cited by Halliburton allow defendants to rebut the presumption before certification by showing the absence of price impact, while the Seventh and (now) Fifth Circuits do not. The Fund claims instead that *Amgen* "resolved" the split. Br. in Opp. 21.

1. *Amgen* simply does not address the "price impact" issue this Court specifically reserved in *EPJ Fund*, 131 S. Ct. at 2186-2187, or the pre-existing circuit split on that issue. Rather, the Court strictly limited its analysis and holding to the distinct concept of materiality—whether the misrepresentation significantly altered the total mix of information about the stock. Amgen did not present evidence pertaining to market price, and the Court did not resolve the price-impact issue *sub silentio*.

Indeed, *Amgen*'s rationale supports allowing price-impact rebuttal. The Fund defends the court of appeals' reasoning that price impact, like materiality, is a class-wide showing, the absence of which supposedly causes all claims to fail on the merits. But, like the court of appeals, the Fund has no response to Halliburton's demonstration that price impact is identical for Rule 23 purposes to publicity and market efficiency—factors that must be considered at the class-certification stage under *Amgen*. See Pet. 28-29. One need not conjure up "fantastic scenarios," Br. in Opp. 18, to imagine an individual shareholder who cannot show price impact or publicity yet can prevail on the merits of a 10b-5 claim; courts have already identified them. See *Amici* Br. of Chamber of Commerce et al. 22-23 (citing cases). That is why this Court allowed pre-certification consideration of publicity. *Amgen*, 133 S. Ct. at 1199. The same reasoning compels considering price impact.

2. The Fund incorrectly contends that "there is no meaningful difference" between Halliburton's price-impact evidence and evidence pertaining to loss causation. Br. in Opp. 20, 40-41. But this Court easily distinguished between Halliburton's "price impact" argument, which it declined to reach, and the Fifth Circuit's "loss causation" requirement, which the Court rejected. *EPJ Fund*, 131 S. Ct. at 2186-2187. Moreover, the court of appeals did not refuse to allow Halliburton's rebuttal evidence on

the ground that it was loss-causation evidence barred by *EPJ Fund*; it held as a matter of law that "price impact" rebuttal is not permitted at class certification because it is a classwide showing which allegedly causes all claims to fail on the merits. Pet. App. 17a-19a. That holding is wrong, and squarely conflicts with Second and Third Circuit precedents, and with the rationale of *Amgen*.

The Second and Third Circuits' allowance of price-impact rebuttal remains good law in those important jurisdictions.[2] The split is therefore enduring and, as *amici* explain, consequential. If defendants are deprived of the ability to rebut *Basic*'s "fundamental premise" of price distortion (*EPJ Fund*, 131 S. Ct. at 2186) at class certification, the once-rebuttable presumption of reliance will be impregnable. Class certification will be virtually automatic in any case brought against an NYSE-listed company that survives a motion to dismiss. And the promise of rebuttal at summary judgment or trial will be illusory for defendants who will be forced to settle. That result cannot be reconciled with Rule 23, the Securities Exchange Act, or *Basic* itself.

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[2] The Fund misleadingly states that "district courts in the Second Circuit have recognized that *In re Salomon* is no longer controlling precedent." Br. in Opp. 22. But the cited cases merely recognize that *Amgen* overruled *Salomon*'s requirement that plaintiffs prove materiality to obtain class certification; they say nothing about *Salomon*'s distinct holding that defendants may defeat class certification by showing the absence of price impact. See *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 n.76 (S.D.N.Y. 2013) ("Until recently, plaintiffs in this Circuit also had to show materiality in order to proceed with a class action on a fraud on the market theory. * * * [*Amgen*] holds that proof of materiality is not a precondition to class certification."); *In re Citigroup Inc. Sec. Litig.*, __ F. Supp. 2d __, 2013 WL 3942951, at *28 n.1 (S.D.N.Y. Aug. 1, 2013) ("The U.S. Supreme Court has since held that securities fraud plaintiffs need not prove that the misrepresentations are material at the class certification stage.").

Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae states that it does not have any parent corporation and that no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. This Court's More Recent Decisions Regarding Securities Liability Have Made *Basic* And Its Presumption Of Reliance Outliers. 6

A. *Basic*'s Presumption of Reliance Is Out of Step With This Court's Decisions in *Central Bank*, *Stoneridge*, and *Janus* Defining What Conduct Is Actionable Under the Securities Law. 7

B. *Basic*'s Presumption of Reliance Is Inconsistent With *Dura*'s Clarification of What Is Required To Establish Loss Causation. 13

II. *Basic*'s Presumption Of Reliance Has A Detrimental Effect On Accountants—Non-Issuers Required To Make Public Statements—And Deters Conduct That Would Otherwise Promote The Securities Law's Goals. 15

III. While *Basic*'s Presumption Of Reliance Should Be Discarded, At A Minimum, Defendants Should Be Permitted To Rebut It During Class Certification. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 15

Alexander v. Sandoval,
532 U.S. 275 (2001) 11

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 21

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 14

Bridge v. Phoenix Bond & Indem. Co.,
553 U.S. 639 (2008) 14

Central Bank of Denver, N.A.
v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) ..... *passim*

Cleary v. Perfectune, Inc.,
700 F.2d 774 (1st Cir. 1983) 7

Corr. Servs. Corp. v. Malesko,
534 U.S. 61 (2001) 11

Credit Suisse Sec. (USA) LLC v. Billing,
551 U.S. 264 (2007) 17

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457 F. Supp. 1380 (S.D.N.Y. 1978) 7

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544 U.S. 336 (2005) ..... *passim*

Edwards & Hanly
v. Wells Fargo Sec. Clearance Corp.,
602 F.2d 478 (2d Cir. 1979) 7

In re Enron Corp. Sec., Derivative & "ERISA" Litig.,
511 F. Supp. 2d 742 (S.D. Tex. 2005) 3

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522 F.3d 836 (8th Cir. 2008) 14

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131 S. Ct. 2296 (2011) 4, 5, 9, 11

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502 F.2d 731 (10th Cir. 1974) 7

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555 U.S. 223 (2009) 19

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430 U.S. 462 (1977) 15

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375 U.S. 180 (1963) 15

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452 F.3d 1040 (9th Cir. 2006) 8

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131 S. Ct. 2541 (2011) 12

Statutes & Regulation

15 U.S.C. § 78j-1 2

15 U.S.C. § 78t(e) 8

17 C.F.R. § 210 (2001) 3

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S. Rep. No. 104-98 (1995) 16

Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945 (1993) 18

STATEMENT OF INTEREST[1]

The American Institute of Certified Public Accountants ("AICPA") is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries and a 126-year heritage of serving the public interest. AICPA members represent many areas of practice, including public accounting, business and industry, government, education, and consulting.

Although no member of the AICPA is a party to this case, issues surrounding this Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and its fraud-on-the-market presumption of reliance have a distinct impact on and are of paramount importance to the AICPA and its membership. Accounting firms are frequently named as defendants in securities fraud cases. While securities suits against non-issuers decreased in the years immediately following this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), securities class actions against accounting firms remain commonplace.

This Court's decisions in cases such as *Central Bank* have thus not eliminated the common practice of naming accounting firms as co-defendants in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

private securities suits. That is largely because of the combined effect of regulatory requirements that compel accounting firms to make certain public statements and *Basic*'s presumption of reliance. Unlike other non-issuers that can now generally avoid being named as defendants in private securities suits under § 10(b) because of decisions such as *Central Bank* and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)—*viz.*, underwriters, attorneys, and ratings agencies—federal law compels accounting firms to make public statements. Every public company must file with the SEC an annual financial statement that has been audited by a certified public accountant. *See* 15 U.S.C. § 78j-1 (mandating and setting standards for annual audit). These audits are governed by an extensive body of detailed requirements and typically result in very specific public statements by the audit firm.

When *Basic*'s presumption of reliance is combined with the statements required under the current federal regulatory scheme, it is difficult for accounting firms to avoid being named as a co-defendant when an audit client suffers the kind of price decline that makes a securities class action all but inevitable. Plaintiffs often reflexively allege that the audit report issued on a public company's financial statements was false and misleading and thereby violated § 10(b) of the Securities Exchange Act and Rule 10b-5. The possibility that investors actually relied on distinct representations of the issuer—for example, concerning an upcoming product launch—is irrelevant at the certification stage because of the *Basic* presumption.

A fair number of these allegations survive a motion to dismiss despite the heightened pleading requirements of the PSLRA, and although auditors might well defeat these allegations at a later stage of the proceedings (*e.g.*, summary judgment after discovery, or trial), the cost and risk of attempting to do so can be extraordinarily high. And unlike an issuer that generally faces potential liability only for its own shares, accounting firms face liability for statements about the whole range of their audit clients.[2] Moreover, new proposed regulatory requirements suggest that this dynamic may be exacerbated. The trend is for regulators to impose more requirements on accountants to make additional public statements, which can only increase the number and cost of claims against accounting firms, and ultimately the cost of audit services.[3]

These factors, as well as the changed nature of securities doctrine discussed below, strongly counsel in favor of abandoning *Basic* and its presumption of

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[2] Unlike underwriters, federal accounting independence rules prevent accountants from limiting their liability through indemnification agreements, *see* 17 C.F.R. §§ 210-240 (2001), and unlike rating agencies, accounting firms have not secured First Amendment protection for their public statements, *see, e.g.*, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005).

[3] *See, e.g.*, Public Company Accounting Oversight Board, *Proposed Auditing Standard Regarding the Auditor's Report and the Auditor's Responsibilities Regarding Other Information* (Aug. 13, 2013), http://pcaobus.org/Rules/Rulemaking/Docket034/Release_2013-005_ARM.pdf (proposing, among other things, an expansion of the auditor's report to include critical audit matters).

reliance or, at a minimum, allowing that presumption to be rebutted at the class certification stage.

SUMMARY OF ARGUMENT

The presumption of reliance this Court adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), has no place in the § 10(b) private cause of action as this Court has refined it over the last quarter century. In the years since *Basic*, in decisions such as *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), and *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), this Court has made clear that defendants in private securities fraud suits are responsible only for those fraudulent statements and actions which they themselves direct to the public. At the same time, in decisions such as *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-43 (2005), this Court has emphasized that market declines themselves do not warrant legal damages. Like other legal claims, plaintiffs bringing a claim under federal securities laws can recover only for the damage that a defendant actually caused them. Thus, while plaintiffs could once lump all defendants and all statements together under an aiding and abetting liability theory, and all market declines together as claimed damages, current doctrine requires proof of every element of a § 10(b) action for each distinct statement of each defendant.

In the wake of these developments, *Basic* is outdated and out of place. A presumption that treats

all speakers and statements alike is incompatible with a doctrine that mandates that an individual defendant can be liable only for what he or she actually says, and only to the extent that the defendant's statement caused the plaintiff's injury. And such a presumption cannot be squared with this Court's acknowledgement in *Stoneridge* and *Janus* that the judicially created § 10(b) cause of action should be given "'narrow dimensions,'" *Janus*, 131 S. Ct. at 2301-02, or the common-law origins of the § 10(b) action, *Dura*, 544 U.S. at 343-44.

The combined effect of *Basic* and the federal law requirements that accounting firms provide audit reports makes accountants easy targets for securities plaintiffs even when plaintiffs ultimately could not satisfy the elements of a § 10(b) action for the accountants' distinct statements. In the absence of *Basic*, private securities plaintiffs seeking to name an accounting firm as a defendant would need to show that they relied on the accountants' statements, not just those of the issuer. That requirement could make class certification more difficult and thus discourage plaintiffs from naming accountants as co-defendants when doing so is unwarranted. But *Basic* eliminates that check and increases the likelihood that an accountant will be added as a co-defendant when the stock price of a company it has audited precipitously declines. As a result, accountants may be hesitant to provide audit services to risky companies—the precise companies where audits could be most critical. *See Central Bank*, 511 U.S. at 189. This in turn undermines the achievement of the transparency and "'full disclosure'" that the securities laws seek to achieve. *Basic*, 485 U.S. at 234.

This Court's more recent precedent and the threat that *Basic* presents to fostering disclosure, coupled with the recognition that reliance is an "essential element of the § 10(b) private cause of action," *Stoneridge*, 552 U.S. at 159, make the need for reconsideration of *Basic* and its presumption plain. But, at a minimum, this Court should hold that defendants can rebut the presumption of reliance at the class certification stage. As this Court has recognized in prior cases, class actions create the very real risk of *in terrorem* settlements that bear no real relationship to the merits of the underlying claims. Allowing rebuttal of the *Basic* presumption at the class certification stage will help mitigate the risk of such settlements.

ARGUMENT

I. This Court's More Recent Decisions Regarding Securities Liability Have Made *Basic* And Its Presumption Of Reliance Outliers.

The securities law landscape has changed substantially since the Supreme Court decided *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). When *Basic* was decided, businesses of all stripes were lumped together as defendants in private securities fraud cases even though many of them had never themselves made any relevant public statement. Moreover, in the pre-*Basic* era (and for several years after *Basic*), plaintiffs often made loose allegations of misconduct and claims for damages under a relatively amorphous cause of action.

All of this has now changed. In the twenty-five years since *Basic*, this Court has clarified that only

those entities that direct fraudulent statements and actions at the public can be held liable for securities fraud, and only for the damages those statements caused. And it has repeatedly emphasized that the judge-made § 10(b) cause of action should be narrowly construed and should reflect the cause of action's common-law origins. *Basic* and its presumption of reliance are of a piece with the earlier regime in which all the defendants' statements were lumped together and claims and damages were assessed under an amorphous standard. Doctrinal developments since *Basic* have rendered the presumption an anachronism.

A. *Basic*'s Presumption of Reliance Is Out of Step With This Court's Decisions in *Central Bank*, *Stoneridge*, and *Janus* Defining What Conduct Is Actionable Under the Securities Law.

The nature and scope of civil claims under the federal securities law has changed fundamentally since this Court's decision in *Basic*. When *Basic* was decided, individuals and entities that aided and abetted a violation of the securities law could be held liable in private suits for the issuer's misstatements. *See, e.g.*, *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 485 (2d Cir. 1979); *Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 740 (10th Cir. 1974); *Cumis Ins. Society, Inc. v. E.F. Hutton & Co.*, 457 F. Supp. 1380, 1386 (S.D.N.Y. 1978); *see also* Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 Alb. L. Rev. 637, 662 (1988);

David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy* In Pari Delicto, *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597 (1972). This Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), sought to end that practice. The *Central Bank* Court held that "only the making of a material misstatement (or omission) or the commission of a manipulative act" was proscribed by § 10(b), and that "proscription does not include giving aid to a person who commits a manipulative or deceptive act." *Id.* at 177-78. It is now black letter law that private plaintiffs may not recover from defendants that aided and abetted a securities law violation, but did not themselves commit a violation. That does not mean that third-parties are free to aid and abet securities fraud. But when Congress expressly considered the matter, it granted the SEC the authority to police secondary actors, rather than create a private cause of action that reached aiding and abetting. *See* 15 U.S.C. § 78t(e) (directing prosecution of aiders and abettors by the SEC).

The plaintiffs' bar strongly resisted *Central Bank* and went to great lengths—which were successful in some circuits—to re-establish a form of aiding and abetting liability under the rubric of "scheme liability." *See, e.g., Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir. 2006). In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), this Court reaffirmed that liability in a private § 10(b) action depends on the defendant's own misrepresentations. *Stoneridge* rejected the theory that defendants that allegedly enabled an

issuer's misleading statements, but who did not themselves actually make any public statement, are primary violators. Reaffirming *Central Bank*, the Court stated that were it to adopt such a "construction of § 10(b), it would revive in substance the implied cause of action against all aiders and abettors" it had previously extinguished. *Id.* at 162-63. The Court emphasized that Congress had expressly addressed secondary liability, and addressed it through expanded SEC authority, and not via an expanded private action. *Id.* at 158.

The Court took all this one step further in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). There, this Court reiterated "that the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it." *Id.* at 2302-03. In recognition of that fact, the Court held that merely providing information that another entity uses in a public statement cannot, without more, give rise to a private cause of action for securities fraud. *Id.*

Against this backdrop, *Basic*'s presumption of reliance is an anachronism. When every plaintiff could recover against every defendant for any defendant's statement, sorting out which plaintiffs relied on which statements was unnecessary. But when liability turns on the distinct statements of specific defendants, as is now the case, that presumption makes little sense.

This Court's emphasis that a defendant's liability turns on its own statements and not those of its co-defendants presupposes the possibility that a plaintiff could rely on one defendant's

misrepresentation, but not the other. For example, in a case involving multiple allegedly fraudulent statements by the issuer, some of which are related to audited financial statements, and some of which involve the launch date of a new product, there is no basis for holding an audit firm liable for a purchaser who relies on the latter statements. Absent the *Basic* presumption, the need to allege and ultimately prove reliance on each defendant's specific statement or statements could preclude class certification and deter class action counsel from adding the audit firm as a co-defendant as a matter of course. Reliance is traditionally viewed as an individualized issue, and the possibility that some class members could rely on one defendant's statement but not another defendant's statement complicates matters further. But the *Basic* presumption allows such issues to be swept aside on the assumption that all purchasers relied on the market and the statements that were priced into the stock. In light of doctrinal developments since *Basic*, there is no justification for holding an auditor liable for the losses of a purchaser who relied on the issuer's distinct statement (or vice-versa).

Basic is also at odds with *Stoneridge* and *Janus* at a more fundamental level. *Stoneridge* expressly acknowledged that the "§ 10(b) private cause of action is a judicial construct" and that, as such, "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." 552 U.S. at 164-65. The Court stressed that "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Id.* And, as noted, *Stoneridge* emphasized that Congress

remains able to intervene and employ tools—such as expanded SEC jurisdiction—that are unavailable to judges administering a judge-made cause of action. *Id.* at 158. *Janus* repeated *Stoneridge*'s concern regarding the judicial creation of private causes of action and noted that the Court was "mindful that [it] must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus*, 131 S. Ct. at 2301-02 (quoting *Stoneridge*, 552 U.S. at 165-67); *see id.* at 2303 ("Our holding also accords with the narrow scope that we must give the implied private right of action."). The Court's modern impulse to construe the § 10(b) action narrowly is of a piece with the Court's modern reluctance to create new implied causes of action or to expand existing ones. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (refusing to create an implied cause of action for damages against private entities that engaged in alleged constitutional deprivations while acting under color of federal law).[4]

The continued application of *Basic*'s presumption of reliance is inconsistent with the now repeated acknowledgement that implied causes of action

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[4] To be sure, the Court was already cutting back on the practice of recognizing new implied causes of action at the time *Basic* was decided. But this Court's decisions since *Basic* have emphasized that such implied causes of action, including under § 10(b), must be narrowly construed.

generally, and the § 10(b) cause of action specifically, must be narrowly construed. The creation of a presumption of reliance, a presumption with no grounding in common-law fraud actions, *see infra* p. 14, is a particularly muscular exercise of judicial law-making. The presumption does far more than simply round out a previously recognized private cause of action. The inevitable result of a presumption of reliance is the creation of a broader cause of action, and one more amenable to class treatment. In the absence of such a presumption, plaintiffs in individual securities cases would need to prove they actually relied on the statements at issue, and class plaintiffs would need to establish that the reliance issue was an issue common to the class (and then prove actual reliance). The application of the *Basic* presumption makes it easier to file and litigate securities cases and, as described *infra* to obtain judgments (or unjustified settlements), making the presumption irreconcilable with the narrow construction of the cause of action this Court's post-*Basic* precedent requires.[5]

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[5] *Basic* is also out of step with the Court's modern insistence that class actions are simply a procedural mechanism to aggregate individual claims that by their nature are amenable to class treatment, as opposed to manipulating the substance of claims to make them fit within the class-action device. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *see also* Pet. Br. at 25-26.

B. *Basic*'s Presumption of Reliance Is Inconsistent With *Dura*'s Clarification of What Is Required To Establish Loss Causation.

In parallel to the further refinement of what specific actions by defendants can warrant liability in a private securities action, this Court has provided greater clarity on the exact elements that a plaintiff must plead and prove in such an action. As the Court explained in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-43 (2005), a plaintiff has to do more than establish that the price of a security was inflated on the day it was purchased to show that it was injured by a defendant's statement. The Court explained that when the "purchaser subsequently resells [its] shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 342-43. Accordingly, pursuant to *Dura*, a plaintiff must account for "the tangle of factors affecting price" and prove that the misrepresentation *caused* the loss, not merely that it "touches upon" the loss. *Id.* at 343.

As with the increased clarity of what conduct is actionable under the securities law, *Basic*'s sweeping presumption of reliance is in tension—if not direct conflict—with *Dura*'s basic requirement to show loss causation. There is no justification for requiring that a plaintiff bringing a claim under the federal

securities laws prove that the defendant's own statement caused its injury (like any other plaintiff), while allowing that same plaintiff to presume its own reliance on the same statement.

Dura's emphasis on the common law origins of private securities fraud actions as part of its reasoning further undermines *Basic*'s presumption of reliance. "Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions," *id.* (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744 (1975)), and common-law fraud and securities fraud share the same basic elements. It is black letter law that "reliance is an element of a common-law fraud" or deceit action. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656 (2008).

There is, of course, no presumption in the common-law fraud or deceit context remotely analogous to that announced in *Basic*. To the contrary, reliance must be proved, not presumed, and reliance is widely understood to be an individualized element of a common-law fraud action. *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d 836, 839 (8th Cir. 2008). And while, by its very nature, a judicially-created cause of action will require courts to round out the cause of action to allow it to function, a presumption with no common-law roots goes well beyond filling in the details. There is no valid basis for watering down one of the essential elements of the common-law deceit claim on which the judicially-fashioned civil securities fraud claim is based.

II. *Basic*'s Presumption Of Reliance Has A Detrimental Effect On Accountants—Non-Issuers Required To Make Public Statements—And Deters Conduct That Would Otherwise Promote The Securities Law's Goals.

That *Basic* should be reconsidered is further underscored by the role it plays in undermining the securities law's broader goals. As *Basic* itself pointed out, the Court has "recognized time and again" that one of the "'fundamental purpose[s]' of the various Securities Acts" was to promote "'a philosophy of full disclosure . . . .'" 485 U.S. at 234 (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)); *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) (same); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977) (same). The accounting profession plays a critical role in facilitating such disclosure by auditing many financial statements issued by public companies. Regulators demand that auditors make their statements public, and those demands are likely to increase. The broad class-action liability that the presumption of reliance perpetuates threatens the willingness and ability of accounting firms to engage in these audits.

Basic eliminates an important counterweight that would otherwise deter plaintiffs from adding accounting firms and other non-issuers as co-defendants when there is no reasonable basis for doing so. But for *Basic* and its presumption, multiplying the number of defendants makes it more likely that individualized issues like reliance will

predominate. The need to show that class members relied distinctly on the issuer's statements (which often address matters unrelated to any audited financial statements) and the auditor's opinion (when there is a very real prospect that some class members relied only on the former, some on the latter, some on a mix and some on unrelated factors) would provide a built-in disincentive for adding an accounting firm as a co-defendant unless the facts warranted. But *Basic* and its presumption obscure the need to show actual reliance, and make it unduly easy for plaintiffs to include a host of co-defendants in private securities fraud suits.

There are already numerous incentives to include accounting firms as defendants without regard to their ultimate responsibility for the plaintiffs' injuries. As numerous commentators have recognized, accountants and accounting firms are inviting "deep pockets" in private securities fraud suits. *See, e.g.*, S. Rep. No. 104-98, at 9 (1995) (noting that "professionals are prime targets of abusive securities lawsuits" and that "[t]he deeper the pocket, the greater the likelihood that a marginal party will be named as a defendant"). In many cases, the issuer responsible for the allegedly misleading financial statements has gone bankrupt or become otherwise judgment-proof, leaving the accountant as the only entity from which plaintiffs can hope to recover their investment losses. *See* Daniel L. Brockett, *Line Between Primary and Secondary Liability Still Blurred in Securities Cases*, 50 Fed. Law. 29, 30 (2003).

Moreover, an accountant's prospects of being named as a defendant in a private securities fraud case are orders of magnitude greater than the prospects of other non-issuers or any given issuer. As noted, accounting firms have no option but to make public statements. While other non-issuers can respond to the incentives of *Central Bank* and *Stoneridge* by refraining from making public statements, for accounting firms such statements are mandated by federal law. And an issuer typically makes representations (and potential misrepresentations) about only its own affairs. Not so with accounting firms. Audit firms audit and report on the financial condition of a diverse array of audit clients, such that it is all but inevitable that some portion of those clients will experience the kind of precipitous decline in share price that virtually guarantees securities litigation.

In light of these dynamics, allowing accountants and accounting firms to be caught up in securities class actions—essentially because they issued an audit statement—threatens the widespread availability of the audit services on which the securities laws' goals of transparency and "'full disclosure'" depend. *Basic*, 485 U.S. at 234. This Court has repeatedly recognized as much. *See Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007) (unduly expansive securities laws may cause auditors to "act in ways that will avoid not simply conduct that the securities law forbids . . . but also a wide range of . . . conduct that the securities law permits or encourages"). What is more, the impact will likely be greatest on the companies that could benefit the most from a robust audit. As this Court

recognized in *Central Bank*, unduly broad liability theories may make it "difficult" for "newer and smaller companies . . . to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." 511 U.S. at 189.

Even where litigation risk does not cause accountants and accounting firms to forego providing their much-needed services, those risks will be reflected in the price of audit services. *See* Jamie Pratt & James D. Stice, *The Effects of Client Characteristics on Auditor Litigation Risk Judgments, Required Audit Evidence, and Recommended Fees*, 69 Acct. Rev. 639, 655 (1994). This outcome runs directly counter to the consumer-protection focused aims of the federal securities laws. *See Central Bank*, 511 U.S. at 189 ("[I]ncreased costs incurred by professionals . . . may be passed on to the[professional's] client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." (citing Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 948-66 (1993))).

III. While *Basic*'s Presumption Of Reliance Should Be Discarded, At A Minimum, Defendants Should Be Permitted To Rebut It During Class Certification.

This Court has unequivocally stated that "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b)

private cause of action." *Stoneridge*, 552 U.S. at 159. The notion that reliance can be presumed, rather than proved, is an anomaly that involves a muscular exercise of fashioning a judicial cause of action. Whatever its merits at the time it was decided, subsequent developments, both factual and doctrinal, strongly counsel in favor of doing away with *Basic*'s presumption of reliance. Stare decisis is never an inexorable command, and it has less force in the context of a judicially-created cause of action, where there has already been a deviation from the normal separation of powers arrangement under which only Congress may create new causes of action. *See Stoneridge*, 552 U.S. at 164-65. Moreover, subsequent doctrinal developments represent one of the accepted justifications for reconsidering precedent. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009).

Petitioners have demonstrated at length that the factual and economic premises underlying *Basic* have been eroded. Pet. Br. 14-25 (discussing critiques of *Basic*). But, as explained above, the legal foundations of *Basic* have been equally undermined in the last twenty-five years. The plaintiffs' need to demonstrate reliance, and the other elements of a modern § 10(b) action, based on each individual statement of each defendant, make the *Basic* presumption highly anomalous. The presumption of reliance obviates the need for a plaintiff to demonstrate that they relied on the auditor's statement as opposed to an issuer's statement about a new product launch, which cannot be reconciled with the requirement that a plaintiff establish the

"essential element" of reliance. *Stoneridge*, 552 U.S. at 159.

The general problems with the theory underlying *Basic*'s presumption of reliance are exacerbated further by the way the presumption operates in practice. Whatever this Court's original intention, the *Basic* presumption of reliance has become largely non-rebuttable. *See, e.g.*, Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act* 46-47 (Rock. Ctr. for Corp. Governance, Working Paper No. 150, 2013), http://ssrn.com/abstract=2317537; Patrick Hall, *The Plight of the Private Litigation Securities Reform Act in the Post-Enron Era: The Ninth Circuit's Interpretation of Materiality in* Employer-Teamster v. America West, 2004 B.Y.U. L. Rev. 863, 870-71 & n.46 (2004). Accordingly, it has played a critical part in the development of exactly the type of downside insurance scheme this Court has repeatedly warned against. *Dura*, 544 U.S. at 345 ("the statutes make these . . . actions available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause") *Cf. Basic*, 485 U.S. at 252 (White, J., joined by O'Connor, J., concurring in part and dissenting in part) ("[A]llowing recovery in the face of affirmative evidence of nonreliance—would effectively convert Rule 10b–5 into a scheme of investor's insurance. There is no support in the Securities Exchange Act, the Rule, or our cases for such a result" (internal quotation marks and citations omitted)).

This Court's more recent precedent, *Basic*'s adverse impact on desirable accounting activity, the current understanding of how information and the market interact, and two and a half decades of experience all counsel in favor of jettisoning *Basic*'s presumption of reliance. But, at a minimum, this Court should hold that the presumption of reliance can be rebutted at the class certification stage. Otherwise, most defendants will never get a chance to rebut it.

The potential for a disastrous damages award, even if very remote, creates overwhelming pressure to settle claims without regard to their merit once a class is certified. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (class actions create risk of *in terrorem* settlements); *Stoneridge*, 552 U.S. at 163 ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."). Accountants and accounting firms, as well as other non-issuers, more often than not "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, 511 U.S. at 189. Permitting rebuttal of reliance early on at the certification stage will help reduce the number of these *in terrorem* settlements and the corresponding harm to wrongly named defendants.

CONCLUSION

This Court should overrule *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and hold that securities plaintiffs are required to prove, rather than presume,

reliance. In the alternative, this Court should hold that *Basic*'s presumption of reliance can be rebutted at the class certification stage.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMGEN INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *BASIC* HAMPERS INNOVATION BY IMPOSING LARGE COSTS ON PHARMACEUTICAL AND BIOTECHNOLOGY COMPANIES 3

II. *BASIC*'S PERNICIOUS EFFECTS HAVE BEEN EXTENDED BEYOND THE SECURITIES CONTEXT 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Page(s)

Amgen Inc. v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) 1, 5

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 1, 2, 5

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 6

Erica P. John Fund, Inc. v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) 5

Harris v. *Amgen, Inc.*, ___ F.3d ___, 2013 WL 5737307 (9th Cir. Oct. 23, 2013) 1, 5, 6

STATUTES

15 U.S.C. § 78m 4

OTHER AUTHORITIES

Amgen, *Science-Pipeline*, http://www.amgen.com/science/pipe.html 4

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Page(s)

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Stabile, Susan J., *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. Rev. 71 (2002) 6

INTEREST OF AMICUS CURIAE

Amgen Inc. is the world's largest independent biotechnology company. Amgen discovers, develops, manufactures, and delivers innovative human therapeutics to treat patients suffering from cancer, kidney disease, rheumatoid arthritis, bone disease, and other serious illnesses. To develop these therapies, Amgen spends billions of dollars on research and development.[1]

Amgen has a significant interest in ensuring that rules governing securities class actions are fair and sensible. As a large, publicly traded company, Amgen has been the target of several securities class actions, currently including proceedings on remand from this Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Although these lawsuits almost invariably lack merit, the costs of defending them can be enormous, and those costs impair innovation in new human therapies. This Court's decision in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), has substantially increased these societal costs.

Amgen has a second particular interest in urging the Court to overrule *Basic*: In a case brought against Amgen, the Ninth Circuit sua sponte extended the *Basic* presumption to lawsuits brought under the Employee Retirement Income Security Act (ERISA). *See Harris* v. *Amgen, Inc.*, ___ F.3d ___, 2013 WL 5737307 (9th Cir. Oct. 23, 2013) (op. on reh'g). A failure to overrule *Basic* now will encourage other courts to follow the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amgen and its counsel made any monetary contribution to the preparation or submission of this brief. The parties have filed blanket letters of consent with the Court.

Ninth Circuit's lead in improperly extending *Basic* to other substantive areas of law.

SUMMARY OF ARGUMENT

Amgen endorses petitioners' arguments for overruling *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). In particular, Amgen agrees that experience has shown that the theoretical underpinnings of *Basic* are unsound and that absent the *Basic* presumption there would still be adequate mechanisms (such as individual actions by large institutional investors) to deter and remedy genuine misconduct. Amgen writes to add two points.

First, well over two decades of experience under *Basic* have made clear that the presumption enables meritless class litigation that imposes substantial costs on American business. In the pharmaceutical and biotechnology fields, these costs are particularly significant because they translate into less spending on research and development of important new public-health products. The specter of litigation also tends to dampen the type of inventive risk-taking by companies that often produces the most spectacular and beneficial advances—but that can also produce a sharp stock drop (and inevitably, in the *Basic* regime, a flood of lawsuits) when it fails to meet expectations.

Second, the mischief of the *Basic* presumption is spreading beyond the securities context, underscoring why the overruling of *Basic* cannot wait. Recently, the Ninth Circuit borrowed the *Basic* presumption from federal securities law and applied it to ERISA litigation, relieving plaintiffs of the obligation to show reliance on allegedly false statements. That decision is indefensible in itself, as Amgen will explain in a soon-to-be-filed petition for a writ of certiorari. For example,

studies show that a critical assumption underlying the *Basic* presumption—that investors rely on the market price when making investment decisions—is exceedingly tenuous in the ERISA context. For present purposes, the Ninth Circuit's decision illustrates the potential for *Basic* to spread to and confuse other substantive areas of law.

ARGUMENT

I. THE *BASIC* PRESUMPTION HAMPERS INNOVATION BY IMPOSING LARGE LITIGATION COSTS ON PHARMACEUTICAL AND BIOTECHNOLOGY COMPANIES

This Court's 4-2 decision in *Basic* to relieve plaintiffs of the need to prove individual reliance has enabled securities class actions to become a multi-billion dollar industry. More than 3,050 private securities-fraud class actions were filed between 1997 and 2002, and between 2002 and 2004, such lawsuits made up approximately 47 percent of all class actions in federal court. *See* Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act* 1 & n.1, 6 (Rock Ctr. for Corp. Governance Working Paper, Aug. 28, 2013).[2]

The economic burdens of marginal securities-fraud cases are well documented, but they are particularly damaging to society when brought against pharmaceutical and biotechnology companies. The public depends on these companies to develop innovative remedies for serious illnesses. Amgen, for example, has developed therapies for many hard-to-treat diseases, therapies that have been used to treat over 25 million patients. And more innovative therapies are in the pipeline. *See*

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[2] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317537&download=yes.

Amgen, *Science-Pipeline*, *at* http://www.amgen.com/science/pipe.html (last visited Jan. 6, 2014).

Research and development, however, requires a massive and sustained commitment of economic resources. It takes 10-15 years and approximately one billion dollars to bring a product to market; most products are abandoned at some point during this process, either because the drug under development fails to achieve its goals or because safety concerns outweigh any benefits. The costs of defending and settling meritless securities class actions leave less available for investment in research and development.

Securities-fraud litigation also tends to repress innovation directly, along with public disclosures about that innovation. Developing new products and technologies involves risk, especially in the time- and cost-intensive biotechnology and pharmaceutical industries. But when a publicly traded company pursues a risky undertaking that fails to meet expectations, a sharp stock drop typically follows. And such a drop almost invariably engenders securities class actions, because plaintiffs can always allege that some earlier statement was misleading or some piece of information should have been disclosed sooner. By relieving plaintiffs of the need to prove a critical element of a securities-fraud claim, *Basic* encourages such lawsuits and thus contributes to this direct stifling of innovation.

Basic reduces companies' voluntary disclosure of information as well, in derogation of Congress's desire to foster openness and transparency. *See, e.g.*, 15 U.S.C. § 78m (requiring certain disclosures by securities issuers). Because "plaintiffs' lawyers can base accusations of misconduct on management's own voluntary disclosures," "it is better to say less to avoid an-

other lawsuit." Bratton & Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 114 (2011). This is not a new notion; Justice White's dissent in *Basic* noted that "observers in this field have acknowledged that the fraud-on-the-market theory is at odds with the federal policy favoring disclosure." 485 U.S. at 259 (White, J., dissenting) (citing Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 457-459 (1984)).

There is no justification for continuing to impose all of these costs, given the growing understanding that the *Basic* presumption rests on an economic theory that is imprecise and often inapplicable to particular cases, yet as a practical matter not open to refutation. *See Amgen, Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1208 n.4 (2013) (Thomas, J., dissenting). The solution is to overrule *Basic* and require investors alleging securities fraud to satisfy the same reliance requirement that other plaintiffs alleging fraud have always had to prove. *See Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011).

II. *BASIC*'S PERNICIOUS EFFECTS HAVE BEEN EXTENDED BEYOND THE SECURITIES CONTEXT

Overruling *Basic* is especially important now because it is spreading beyond the securities-law context. In *Harris* v. *Amgen, Inc.*, ___ F.3d ___, 2013 WL 5737307 (9th Cir. Oct. 23, 2013) (op. on reh'g), the Ninth Circuit sua sponte applied the *Basic* presumption in a class action brought under ERISA. The plaintiffs alleged that Amgen and others had violated a fiduciary duty of care in connection with the management of employer-sponsored pension plans. *See id.* at *1, *14. Notwithstanding that the named plaintiffs apparently

did not buy or sell Amgen stock during the class period—and thus could not even maintain a securities-fraud claim, *see Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975)—the Ninth Circuit held that the putative plaintiff class did not need to establish that any member of the class "actually relied" on any alleged misrepresentation affecting Amgen's stock, *Harris*, 2013 WL 5737307 at *15. Citing *Basic*, the court saw "no reason why ERISA plan participants ... should not be able to rely on the fraud-on-the-market theory in the same manner" as securities-fraud plaintiffs. *Id.*

The Ninth Circuit's decision to apply *Basic* in the ERISA context is unfounded. For one thing, empirical research indicates that investors' reliance on pricing information is reduced when investment options are limited, as is often true with participant-directed ERISA plans. *See* Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. Rev. 71, 87 (2002) ("[P]articipant investment decisions ... do appear to be influenced by the investment options offered by plan sponsors."). Thus, instead of relying on price information to make investment decisions—as the fraud-on-the-market theory presumes investors who are trading in an unrestricted market do—plan participants' investment decisions are influenced by the parameters of the plan itself. Likewise, studies show that employees tend to invest in their employer's stock out of a sense of loyalty and confidence in their company, despite pricing indications to the contrary. *See id.* at 90-92; *see also* Benartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 68 (2007) ("[E]mployees do not correctly understand the economic value of [their] company stock."). Moreover, employers often provide incentives for employees to invest in company stock (such as employer matches),

and the tax code does as well, *see* Benartzi et al., *supra*, at 50-51. These incentives further dilute the relevance of price in many employees' retirement-investment decisions. In short, a critical assumption underlying the Court's decision in *Basic*, that investors rely on the market price when making investment decisions, is much more dubious (if not wholly unwarranted) in the ERISA context.

Amgen will address the various errors in the Ninth Circuit's decision in its forthcoming petition for review of that decision. For present purposes, *Harris* underscores the need for this Court to reconsider the *Basic* presumption in order to avoid encouraging other courts to follow the Ninth Circuit's lead and improperly extend the judicially created presumption of reliance into other areas of the law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-317

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,

Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Court Should Grant Certiorari to Overrule or Modify the Presumption of Reliance Endorsed in *Basic Inc. v. Levinson* 5

A. *Basic*'s fraud-on-the-market presumption has generated excessive costs for businesses and harmed capital markets 6

B. The Court should revisit *Basic* and reconsider the role that efficient-market theory may properly play in class certification 15

1. Courts have struggled to apply the *Basic* framework in a consistent and coherent manner 16

2. Subsequent economic studies of how markets function have called into question *Basic*'s binary approach to market efficiency 17

Table of Contents

Page

3. Reconsideration of *Basic*'s presumption will not impair reasonable reliance expectations or implicate principles of *stare decisis*.....19

II. The Court Should Grant Review to Resolve the Circuit Split Regarding the Use of Price Impact Evidence at Class Certification to Rebut the *Basic* Presumption of Reliance 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) ..... *passim*

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 9

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485 U.S. 224 (1988) ..... *passim*

Berks Cnty. Emp. Ret. Fund v. First Am. Corp.,
734 F. Supp. 2d 533 (S.D.N.Y. 2010) 23

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989) 7

Central Bank of Denver, N.A. v.
First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 15

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 12, 20

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235 F.3d 865 (3d Cir. 2000) 23

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In re Polymedica Sec. Litig., 432 F.3d 1 (1st Cir. 2005) 16

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Page

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618 F.3d 679 (7th Cir. 2010) 8, 10, 16, 21

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552 U.S. 148 (2008) 9

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131 S. Ct. 2541 (2011) 22

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STATUTES AND RULES

15 U.S.C. § 78j(b) 6

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Fed. R. Civ. P. 23 ..... 2, 5, 21

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Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America (the "Chamber") and the National Association of Manufacturers (the "NAM"). Both have a significant interest in the interpretation and enforcement of the federal securities laws and in the rules governing class actions in private securities litigation.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. The Chamber's members transact business in countries around the world. An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and the courts. The Chamber actively participates as *amicus curiae* in various class-action appeals, including recently in this Court.

The NAM is the preeminent association of U.S. manufacturers and the largest industrial trade association in the country. Its members include more than 12,000 manufacturing companies, and it represents the interests of small and large manufacturers in every industrial sector and in all 50 States. The NAM regularly participates as

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1. All parties were timely notified of *amici*'s intent to file this brief and have consented to this filing in letters on file with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

amicus curiae in cases raising issues that affect the ability of U.S. manufacturers to stay competitive, promote economic growth, and create jobs.

The Chamber and the NAM have a keen interest in this case because private securities class action litigation puts a significant burden on American businesses and adversely affects access to capital markets. Experience with the application of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), in the lower courts shows that the fraud-on-the-market theory approved in *Basic* has inflicted tremendous costs on public companies and their shareholders without producing corresponding benefits to investors. Recognizing the economic drag engendered by frivolous securities fraud litigation, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737, "to curb abusive securities-fraud lawsuits." *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013). However, Congress in the PSLRA did not address the relationship between Rule 23 of the Federal Rules of Civil Procedure and the judicially created presumption of reliance endorsed in *Basic*. *See* 133 S. Ct. at 1212 n.9 (Thomas, J., dissenting). The present case offers a timely and well-suited opportunity for this Court to revisit the basis for the presumption and its interaction with the class certification procedure.

SUMMARY OF ARGUMENT

The Court should grant the petition for a writ of certiorari and reconsider the fraud-on-the-market theory endorsed in *Basic Inc. v Levinson*. The Court should also grant review on the second question presented in the

Petition and resolve the division that exists in the courts of appeals over whether a defendant in a securities fraud suit may rebut *Basic*'s presumption of reliance at the class certification stage and defeat class treatment with evidence that the alleged misrepresentation did not impact the market price of the stock at issue.

Basic endorsed the use of the fraud-on-the-market theory as a means of establishing the reliance element in a securities fraud class action, but, as the dissent feared, *Basic*'s approach has generated doctrinal confusion as courts struggle to apply the framework consistently. Moreover, the approach courts have taken to the fraud-on-the-market theory has provided securities fraud plaintiffs with a free pass to class certification in many cases, leading to excessive litigation and *in terrorem* settlements. This excess of securities class action litigation has inflicted a tremendous drain on U.S. public companies and their investors, both through the costs of litigation and settlements and through insurance costs associated with carrying securities fraud insurance. For all these costs, the securities fraud framework employed following *Basic* has not brought material benefits to investors; it has simply resulted in the shift of money from one set of investors to another.

The Court should revisit *Basic* and reconsider the fraud-on-the-market doctrine, which has bred confusion in the courts and resulted in significant costs to investors and businesses. The rebuttable presumption of reliance endorsed in *Basic* is a judicially created procedural device designed to facilitate class-wide proof of an element of a claim that itself arises from a judicially inferred private right of action. The policy considerations on which this

procedural device is based are subject to the Court's reconsideration, and the inconsistent application of the doctrine in the lower courts ensures that no significant reliance interests will be at stake in this reconsideration. Further, *Basic* arose out of a judicial interpretation of economic theory (the efficient-market hypothesis) that has been called into serious doubt by subsequent economic studies. By granting certiorari, the Court can consider whether and, if so, to what extent *Basic*'s presumption should survive in light of the significant developments that have occurred since 1988 in our understanding of how markets operate.

The Court should also grant certiorari to resolve the circuit split regarding the use of price impact evidence to defeat class certification in securities fraud cases. The Fifth Circuit below, in contrast to the approach taken by the Second and Third Circuits, prohibited the use of price impact evidence at the class certification stage to rebut the fraud-on-the-market presumption of reliance. Rebutting the presumption with a showing that the alleged misrepresentation did not actually impact the stock's trading price would establish that reliance cannot be proven on a class-wide or common basis for all plaintiffs and would therefore mean that individual questions of reliance will predominate, thus defeating class treatment. Prohibiting the defendant from making that showing can effectively determine the outcome of securities litigation by giving plaintiffs a ready-made path to class certification and settlement. In concluding that price impact evidence could not be presented, the Fifth Circuit applied logic that would lead to inconsistent results if applied to other types of evidence—for example, evidence regarding publicity of disclosures. The Fifth Circuit's approach also stands

at odds with the approach the Second Circuit has used successfully for years. This Court should grant review to resolve the split and determine whether the Fifth Circuit erred in concluding that petitioners could not introduce price impact evidence at the class certification stage.

ARGUMENT

I. The Court Should Grant Certiorari to Overrule or Modify the Presumption of Reliance Endorsed in *Basic Inc. v. Levinson*

As Congress recognized with the passage of the PSLRA, the presumption of reliance endorsed in *Basic* has enabled a wave of frivolous class action litigation that bears little relation to any underlying culpability and that is all-too-often aimed only at extracting large settlements from insured businesses by the threat of class-wide damages. Despite the Court's assurance in *Basic* that the presumption of reliance is supposed to be "rebuttable," and notwithstanding the securities fraud pleading reforms enacted in the PSLRA, many lower courts continue to apply *Basic* in a manner that allows plaintiffs to make what is effectively an *irrebutable* showing of fraud-on-the-market to obtain class certification under Rule 23. With easy, virtually guaranteed class certification, strike suits continue, bringing more harm than benefit to the shareholders whose interests the securities laws were intended to serve.

The Court should therefore revisit *Basic* and reconsider whether plaintiffs may satisfy Rule 23(b)(3) with respect to the reliance element of a securities fraud claim based merely on a showing that they traded stock

in a "well-developed" market around the time of the alleged public misrepresentations. In its opinion below, the Fifth Circuit applied this Court's decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), to hold that the *Basic* presumption is effectively irrefutable for class certification purposes. This case exemplifies how *Basic* has spawned wasteful litigation founded on unquestioned adherence to a court-sanctioned efficient-market theory that today's economists increasingly reject.

A. *Basic*'s fraud-on-the-market presumption has generated excessive costs for businesses and harmed capital markets.

Basic permits plaintiffs a rebuttable presumption to establish the reliance element of a securities fraud lawsuit brought under the implied private right of action of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.[2] While plaintiffs were traditionally required to prove reliance in fraud cases with evidence that they were personally aware of the alleged material misrepresentation and specifically acted on it, *Basic* substituted for the traditional showing of reliance the presumption that the market price of any stock that is traded in "an impersonal, well-developed market for securities" "reflects all publicly available information," including "any material misrepresentations," and that

2. A Rule 10b-5 claim requires proof of: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance by the plaintiff on the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Amgen*, 133 S. Ct. at 1192.

investors who buy or sell the stock in such a market intrinsically do so "in reliance on the integrity" of the stock's market price. *Basic*, 485 U.S. at 246-47; *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011). To gain the benefit of this rebuttable presumption on the merits of a securities fraud claim, a plaintiff must show that: (1) the defendant's alleged misrepresentation was made publicly; (2) the alleged misrepresentation was material; (3) the relevant security traded in an efficient market;[3] and (4) the plaintiff traded in the security between the time when the alleged misrepresentation was made and the time when the truth was revealed. *See* 485 U.S. at 248 & n.27. Essentially, the *Basic* doctrine entitles plaintiffs to rely on the market price of any security traded in a market that a court determines was "efficient." *See* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 160, 171 (2009).

Establishing the predicate for application of the fraud-on-the-market theory is the ticket to class certification for most plaintiffs in securities fraud suits because it enables common, class-wide proof of reliance, an element of the securities fraud claim that would otherwise require individualized proof inconsistent with class treatment. *See Basic*, 485 U.S. at 242. However, as a result of this Court's recent holding in *Amgen* that plaintiffs need not prove materiality at the class certification stage, plaintiffs

3. Under *Basic*, there are multiple factors courts consider in determining whether the relevant stock was traded in an "efficient market," with one typical factor being whether information about the stock was both widely available and rapidly and accurately reflected in the stock price. *See Cammer v. Bloom*, 711 F. Supp. 1264, 1276 n.17, 1281 (D.N.J. 1989) (citing *Basic*, 108 S. Ct. at 991 & n.24).

now may obtain class certification based on the *Basic* presumption of reliance by establishing only three of the four requirements for fraud-on-the-market: (1) publicity, (2) market efficiency, and (3) trade timing. *See Amgen*, 133 S. Ct. at 1199.

The direct result of *Basic* (now compounded by *Amgen*) is that plaintiffs claiming securities fraud obtain class certification as a matter of course in nearly any case where the relevant security was traded in large volumes on an established exchange—requirements that are easily met for the stock of most large companies. *See, e.g.*, *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, MDL No. 1658, 2013 WL 396117, at *11 (D.N.J. Jan. 30, 2013) (declining to consider defendant's challenge to market efficiency because Merck stock trades on the NYSE and is one of the stocks in the Dow Jones Industrial Average). Even before this Court's decisions in *Amgen* and *Erica P. John Fund*, when courts at times permitted defendants to contest materiality or loss causation at the class certification stage, 75 percent of decided certification motions in securities litigation resulted in certification of a class. *See* Renzo Comolli et al., NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* 20 (2013) (examining 2000 to 2012), http://www.nera.com/nera-files/PUB_Year_End_Trends_1.2013(2).pdf; *see also Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010) (noting that plaintiffs need not establish loss causation or materiality at class certification and describing the process as "routine" when a suitable class representative comes forward).

Basic's presumption therefore subjects businesses to the serious prospect of frivolous strike suits using

easily obtained class certification as a threat to extract settlement. This Court has recently noted the extent to which improper class certification perversely pressures defendants to settle even meritless lawsuits. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (class actions create risk of *in terrorem* settlement); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.").

Indeed, when the Second Circuit in 2008 rejected a defendant's concern that "any person who posts material misstatements about a company on the internet could end up a [securities fraud] defendant," it did so based on the belief that "the law guards against a flood of frivolous or vexatious lawsuits," because, prior to class certification, (1) plaintiffs must show materiality, (2) defendants may rebut the presumption of fraud-on-the-market by showing absence of price impact, and (3) forward-looking statements of prediction or opinion are not actionable under the securities laws. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2d Cir. 2008). The first safeguard identified by the Second Circuit has since been eliminated by the holding in *Amgen*, and the second is now threatened by opinions like the Fifth Circuit's in this case.

Without the safeguards at class certification of inquiry into materiality or price impact, settlement is the only reasonable option for many securities fraud defendants. As is true in other class action settings, virtually no securities fraud cases are tried to verdict, with more than

50 percent of filed cases leading to settlement in recent years and almost all the rest resolved by motions before trial.[4] Indeed, studies have found that settlements often have more to do with the defendant's insurance limits than with the strength of plaintiffs' claims. *See Schleicher*, 618 F.3d at 686 (citing studies). The necessity, and therefore the prevalence, of insurance against securities fraud cases puts defendants in a position where settlement is their only reasonable option.

Plaintiffs' choices of defendants likewise often have little to do with the merits. While the Court inferred a private right of action from SEC Rule 10b-5 based on the perceived need for securities fraud suits to provide a remedy for investors who were victims of fraud, securities class actions have been filed generally following almost any kind of negative announcement by a company that corresponds to a decline in the stock price. Statistics on the filing of class action securities fraud lawsuits from the Stanford Law School Securities Class Action Clearinghouse ("Stanford Clearinghouse") demonstrate that class action suits often target particular industry sectors, in many cases ensnaring a large portion of the publicly traded companies in a given industry.[5] For example, in 2010, new securities fraud class actions were

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4. *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2013 Mid-Year Assessment* 15-17 (2013) ("Stanford Clearinghouse") (demonstrating resolution statistics by case lifecycle, showing that in 2006, the most recent year for which all cases are completed, 57% of filed cases settled), http://securities.stanford.edu/clearinghouse_research/2013_YIR/Cornerstone-Research-Securities-Class-Action-Filings-2013-MYA.pdf.

5. *See* Stanford Clearinghouse at 8.

filed against 5.4 percent of S&P 500 companies, but the figures were 15.4 percent for health care companies, 10.3 percent for financial companies, and 7.7 percent for energy companies. *Id.*[6] These lawsuits do not only target the largest companies; securities suits increasingly target companies with smaller market capitalizations, including companies that are not traded on the major exchanges. *See id.* at 14.

These suits impose a tremendous cost on American business. For example, per the Stanford Clearinghouse, securities fraud class actions led to $2.9 billion in settlements in 2012, with the average settlement at $54.7 million.[7] As they drag on, these cases generate tremendous litigation expenses as well, with a median time to settlement of 3.3 years and approximately 19 percent of cases taking more than 5 years. *Id.* at 6 (examining cases settled from 2007-2011). Defense costs in these cases have been estimated to range from 25 to 35 percent of the settlement value. *See* John C. Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1546 (2006). Costs are borne not only by those companies sued but by public companies in general, as the prevalence of insurance spreads costs through companies that access capital

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6. Because securities fraud cases can take multiple years to resolve, the filing of a significant number of cases against an industry in one year can mire that industry in litigation for years to come.

7. Stanford Clearinghouse & Cornerstone Research, *Securities Class Action Settlements: 2012 Review and Analysis* 3 (2013), http://securities.stanford.edu/Settlements/REVIEW_1995-2012/Settlements_Through_12_2012.pdf.

markets, hampering the competitiveness of American public companies against their rivals. Ultimately, investors themselves pay the costs of securities fraud litigation through lower returns on their investments.

These costs come without corresponding benefits. The *Basic* approach to securities fraud lawsuits was originally designed to give investors protection from fraud beyond that provided at common law, *see Basic*, 485 U.S. at 244 n.22, and to deter fraud. Yet, class actions built on the fraud-on-the-market presumption have brought neither protection for investors nor meaningful deterrence benefits. *See generally* William M. Bratton & Michael Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72-73 (2011). While the securities laws were not intended "to provide investors with broad insurance against market losses," *Dura*, 544 U.S. at 345 (citing *Basic*, 485 U.S. at 252 (White, J., dissenting)), they have in fact become an entitlement to a partial recovery of losses through settlement of class actions after stock declines.

The *Basic* approach has failed to provide benefits to investors in part because of the circular nature of private securities fraud class actions. In the typical case, the putative class of investor plaintiffs purchased the defendant's stock during a period in which, they allege, the price was inflated due to the defendant company's misrepresentations. Thus, the class of purchasing shareholders seeks recovery from all current shareholders, whose equity interests in the defendant company are negatively affected by the company's cost of defending the litigation, as well as any resulting increase

in the company's insurance premiums. The shareholders who (innocently) benefited from the alleged fraud by selling their shares during the period of inflated price are out of the scene, so any costs incurred by the company will impact the shareholders who are not only innocent but also could not have benefited from any fraud.

Any recovery the class obtains from the company is just a transfer of wealth from one set of innocent shareholders to another, with significant litigation costs incurred in between. While individual executives are often named as defendants, they in fact pay virtually nothing when so included.[8] They are sued for their insurance coverage, the costs of which are then spread across public companies in general:

8. *See* Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 n.43 (1996) ("[I]n the average settlement, 68.2% comes from the insurer and 31.4% from the issuer, with only 0.4% coming from individual defendants.") (citing Frederick C. Dunbar et al., Nat'l Economic Research Assocs., *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* v (1995)).

Securities Fraud Class Actions – A Circular System[9]

The system seems even odder when one considers that most investors rely on portfolios of securities. To the extent undiscovered fraud inflates a stock price, the average investor is just as likely to be a buyer of shares, and thus an unwitting victim of such fraud, as they are to be a seller, and thus an unwitting beneficiary. *See* Bratton, *Political Economy*, *supra*, at 94-95. Because investors often own stock in diversified portfolios, they should gain about as much from undiscovered fraud as they should lose from it. Thanks to this dynamic, only a narrow set of

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9. Source: U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform* 16 (2008), *available at* www.instituteforlegalreform.com/get_ilr_doc.php?docId=1213.

fortunate investors in fact receives any corrective justice at all from the system of securities class actions. *See id.* at 94-99.

The costs of securities class action litigation do not even benefit capital markets by significantly deterring fraud. Academic literature has recognized that the social costs of private securities class actions have overwhelmed the modest amount of fraud deterrence they offer. *See id.* at 111-12. Recognizing this reality, in times of elevated concern about financial fraud, Congress and the Executive Branch have consistently looked to the Department of Justice and the Securities and Exchange Commission, not private litigation, to increase deterrence.[10] In addition, unlike in many other contexts, such as consumer fraud, large institutional investors provide a separate deterrence for securities fraud by frequently bringing non-class claims under the securities laws.

B. The Court should revisit *Basic* and reconsider the role that efficient-market theory may properly play in class certification.

As four members of the Court suggested in *Amgen*, the Court should revisit *Basic* to reconsider the role of the efficient-market theory in class certification. The decision has produced confusion in the lower courts, and recent scholarship has been highly critical of the economic

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10. Thus, after this Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), refused to recognize the cause of action for aiding and abetting securities fraud that many lower courts had implied, Congress expressly authorized such a cause of action by statute, but only for the SEC. *See* 15 U.S.C. § 78t(e).

assumptions underlying *Basic* when it was decided 25 years ago. Reconsideration of *Basic* will allow the Court to address the extent to which now-rejected economic assumptions have led to the development of unnecessarily costly litigation. Finally, there are no reasonably settled reliance interests or *stare decisis* concerns that militate against reconsideration of *Basic*, particularly as *Basic*'s presumption is a judge-made, common law doctrine.

1. Courts have struggled to apply the *Basic* framework in a consistent and coherent manner.

Just as Justice White predicted, *Basic*'s acceptance of the fraud-on-the-market theory has given rise to "[c]onfusion and contradiction in court rulings." *In re DVI Sec. Litig.*, 639 F.3d 623, 632-33 (3d Cir. 2011) (quoting *Basic*, 485 U.S. at 252 (White, J., concurring in part and dissenting in part)); *see also* Donald C. Langevoort, Basic *at Twenty*, *supra*, at 153-54 (discussing extent to which law following *Basic* "is confused, and in flux").

While the *Basic* Court did not "intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price," 485 U.S. at 249, most courts following *Basic* assume that once a market is labeled "efficient," all prices in that market will reflect all publicly available information at all times. *See, e.g.*, *In re DVI Sec. Litig.*, 639 F.3d at 631 ("The Supreme Court appears to have endorsed the semi-strong version of the efficient capital market hypothesis.") (citing *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010); *In re Polymedica Sec. Litig.*, 432 F.3d 1, 10 n.16 (1st Cir. 2005)). Courts applying *Basic* have exhibited a binary approach

to market efficiency by either deeming a market to be "efficient" as a matter of law—so that all information is treated as incorporated into the prices of the securities traded in the market—or concluding that the market at issue is "inefficient." The binary approach forces courts into awkward line-drawing, both in determining whether a market qualifies as efficient and in establishing the consequences of that determination. *See, e.g.*, *In re DVI Sec. Litig.*, 639 F.3d at 635 (holding that while "we have held that a market is inefficient when a price does not decrease within four days following an alleged corrective disclosure," a market can be efficient where the price took two days to move); Langevoort, Basic *at Twenty*, *supra*, at 174-75.

2. Subsequent economic studies of how markets function have called into question *Basic*'s binary approach to market efficiency.

Basic rested on an understanding of market efficiency that modern economic understanding has called into question. *See Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring) (citing Langevoort, Basic *at Twenty*, *supra*, at 175-76), 1209 n.4 (Thomas, J., dissenting). *See generally* Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 Nw. U. L. Rev. 135 (2002).

Basic assumed investors were justified in relying on market prices because "the market [acts] as the unpaid agent of the investor, informing him that given all information available to it, the value of the stock is worth the market price." *Basic*, 485 U.S. at 244 (quoting *In re*

LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980)), 246 (stating that "[r]ecent empirical studies have tended to confirm" this premise). Not only has economic thought evolved such that we now understand that the relationship between stock prices and market information is far more complex than *Basic* assumed, *see, e.g.*, Bradford Cornell & James C. Rutton, *Market Efficiency, Crashes, and Securities Litigation*, 81 Tul. L. Rev. 443, 466 (2006), but we also now understand that real investors most definitely do not uniformly believe in market efficiency or integrity, *contra Basic*, 485 U.S. at 246-47 ("'[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity.'") (quoting *Schlanger v. Four-Phase Sys.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)). In fact, Congress has taken an approach in the securities fraud context that is inconsistent with the simple approach to market efficiency that underlay *Basic*. Out of a concern that markets may overreact following disclosure of fraud, Congress enacted as part of the PSLRA a cap on damages, *see* 15 U.S.C. § 78u-4(e), that limits damages where the relevant security "bounces back" from its drop. Such an approach is not consistent with *Basic*'s assumption that stock prices in an efficient market properly reflect all available information. *See* Stefan J. Padfield, *Who Should Do the Math? Materiality Issues in Disclosures that Require Investors to Calculate the Bottom Line*, 34 Pepp. L. Rev. 927, 969 n.260 (2007).

The Court should reconsider *Basic* to determine whether it remains appropriate to apply the fraud-on-the-market theory in light of developments since 1988 in the understanding of how markets function and the significant criticism scholars have directed at *Basic*'s simplistic approach to market efficiency.

3. Reconsideration of *Basic*'s presumption will not impair reasonable reliance expectations or implicate principles of *stare decisis*.

Reconsideration of *Basic* will not threaten reliance interests. In fact, the public already anticipates reconsideration of *Basic* following the suggestion of four members of the Court in *Amgen* that reconsideration may be appropriate. *See, e.g.*, Sean T. Carnathan, *Fraud-on-the-Market Theory Questioned*, Litigation News (June 12, 2003), http://apps.americanbar.org/litigation/litigationnews/top_stories/061213-fraud-on-the-market.html. Even prior to *Amgen*, developments in the Court's class action jurisprudence generated expectations that *Basic* could be subject to revision. *See, e.g.*, John C. Coffee, *"You Can't Just Get There From Here": A Primer on* Wal-Mart v. Dukes, 141 BNA Daily Labor Report I-1, at 3 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/002.authcheckdam.pdf. Potential litigants can have no settled expectation that *Basic*'s fraud-on-the-market framework will continue into the future unmodified.

Further, *stare decisis* does not weigh against revisiting *Basic*. *Basic*'s fraud-on-the-market approach arises not from statute or rule but rather from this Court's understanding of how markets worked in 1988. *See Basic*, 485 U.S. at 245 (describing presumptions, such as the fraud-on-the-market presumption, as "[a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy"). The Court described itself as not endorsing the validity of the fraud-on-the-market

theory but merely determining whether it was proper for courts to allow the use of the theory as a means of creating a rebuttable presumption that the reliance element was satisfied. *Id.* at 242.

It would be appropriate and prudent for the Court to revisit that determination. While the Court in *Basic* anticipated that the fraud-on-the-market theory could be rebutted—for example, by evidence that a plaintiff in fact believed that a given security's stock price was distorted, *see id.* at 249—the dissent's concern that *Basic* would eviscerate the reliance element in securities fraud claims, *see id.* at 257-58 (White, J., concurring in part and dissenting in part), has come to pass. The determination that class certification can be obtained on a mere showing of trading in an efficient market around public, alleged misstatements eliminates the opportunity for defendants to rebut the reliance element for individual defendants, creating an entitlement to rely on market prices through "an act of juristic grace." *See* Donald C. Langevoort, Basic *at Twenty*, *supra*, at 161. Revisiting the wisdom of that "act of grace" is within the Court's appropriate role to determine the "contours of a judicially implied cause of action with roots in the common law." *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

II. The Court Should Grant Review to Resolve the Circuit Split Regarding the Use of Price Impact Evidence at Class Certification to Rebut the *Basic* Presumption of Reliance

The Court should also take up the second question presented in the Petition to address the significant disagreement among the circuits over whether defendants

may introduce evidence of lack of price impact at class certification to rebut the *Basic* presumption of reliance. This circuit split is pronounced and involves an issue of great importance to the conduct of securities fraud litigation.

Lack-of-price-impact evidence can be relevant on the merits of a securities fraud claim to rebut the elements of materiality, statement publicity, or loss causation. *See* Pet. App. 13a-14a, 17a-18a. If permitted at the class certification stage, the same evidence could defeat a motion for class certification because the plaintiffs would be required to prove the element of reliance on an individualized basis, rather than through evidence common to the class. *See* Fed. R. Civ. P. 23(b)(3) (requiring that common questions of fact or law predominate for class treatment).

The Fifth Circuit below, like the Seventh Circuit in *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010), held price impact evidence inadmissible at class certification, and instead treated such evidence as "based upon common evidence" in the analytical process employed in *Amgen*, such that "later proof of price impact will not result in the possibility of individual claims continuing." Pet. App. 19a. The court interpreted such evidence as an effort to show that the stock price "did not actually transfer the effects of the alleged fraud to a stock purchaser," which the court believed was foreclosed by *Amgen*. *Id.* at 15a. The Second and Third Circuits, in contrast, have allowed evidence of price impact at class certification to defeat the fraud-on-the-market presumption and thereby foreclose class treatment. *See In re DVI Sec. Litig.*, 639 F.3d 623 (3d Cir. 2011); *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008).

In applying *Amgen*, the Fifth Circuit asked two questions regarding the introduction of price impact evidence: (1) whether price impact evidence is common to the class, and (2) whether there is any risk that a later failure of proof on price impact could result in individual questions predominating. Pet. App. 16a-17a. Finding that price impact evidence was common to the class and that the defendants' successful demonstration of no price impact would undermine the loss causation element, the Fifth Circuit found price impact to be, like materiality in *Amgen*, inappropriate for consideration at class certification. *Id.* at 17a-18a.

The same logic applied by the Fifth Circuit to conclude that price impact belonged at the merits stage would likewise apply to any element—such as the publicity element of the fraud-on-the-market theory—for which a failure of proof would undermine loss causation. Yet this Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), rejected the view that an issue can be removed from consideration on a motion for class certification just because it is subject to common evidence and is a component of or bears upon the plaintiffs' claim on the merits. *Id.* at 2552 n.6 (pointing to market efficiency in securities fraud cases as a paradigmatic example). The Fifth Circuit also ignored the potential that plaintiffs may establish loss causation notwithstanding uncertainty about price impact; plaintiffs would have to do so, for example, in any case involving a security traded in a market not shown to be "efficient" in the *Basic* sense, *see, e.g.*, *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1053 (9th Cir. 2011) (noting plaintiffs in securities fraud cases involving private companies generally seek to prove loss causation without analysis of price impact), *cert.*

denied, 132 S. Ct. 2713 (2012), or in any case where the alleged misrepresentation was not public, *see, e.g.*, *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 871 (3d Cir. 2000) (plaintiff sufficiently alleged 10b-5 claim against publicly traded company even though plaintiff "d[id] not base its claim on public misrepresentations or omissions that affected the price of the stock").

District courts have routinely and successfully resolved factual disputes about price impact at the class certification stage. For example, since *In re Salomon Analyst Metromedia Litigation*, district courts in the Second Circuit have examined expert testimony, event studies, and market reports in determining whether plaintiffs have shown that an alleged misrepresentation impacted a security's price. *See, e.g.*, *Berks Cnty. Emp. Ret. Fund v. First Am. Corp.*, 734 F. Supp. 2d 533, 541 (S.D.N.Y. 2010) (denying class certification); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 310-15 (S.D.N.Y. 2010) (granting certification); *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 143 (S.D.N.Y. 2008) (denying certification); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 138-39 (S.D.N.Y. 2008) (granting certification).

This approach has the benefit of eliminating unnecessary litigation by preventing class certification in precisely those cases where plaintiffs will be unable to prove reliance through common evidence at trial. Nothing is served by deferring consideration of price impact to the merits stage of the litigation, since evidence of price impact rarely requires extensive discovery.

In contrast, by precluding defendants from introducing evidence of lack of price impact to rebut the presumption of reliance at the class certification stage, the Fifth Circuit's decision will have the perverse result of producing routine class certifications (and thus virtually inevitable large-figure settlements) in many cases where plaintiffs' claims would otherwise fail on the merits. The Fifth Circuit's approach leaves defendants in the odd position of being able to introduce evidence to rebut fraud-on-the-market reliance at class certification only so long as that evidence does not also resolve plaintiffs' claims on the merits. Such a framework could force district courts to permit rebuttal evidence at class certification only where the court concludes that the plaintiffs' claims will survive introduction of the evidence.

Such was not *Amgen*'s intent. The Court should grant certiorari to address the circuit split and clarify that *Amgen*'s holding regarding the rebuttal of the fraud-on-the-market presumption was limited to rebuttal evidence on the issue of materiality and does not foreclose consideration at the class certification stage of all evidence that may threaten the merits of plaintiffs' claims.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,

Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Court Should Overrule or Modify the *Basic v. Levinson* Presumption of Reliance 5

A. The presumption undermines the requirement that plaintiffs prove actual reliance as an essential element of the implied private right of action for securities fraud 6

B. The presumption is based on an erroneous and effectively irrebuttable premise that investors rely on the integrity of market prices 11

C. At a minimum, the Court should modify the *Basic* presumption in light of developments in the economic understanding of markets 15

Table of Contents

Page

II. The Easy Certification of Class Claims under *Basic* Has Generated Excessive Costs for Businesses and Hampered Capital Markets. 21

III. Eliminating or Modifying the *Basic* Presumption Will Not Undermine Fraud Deterrence or Investor Compensation in Cases of Actual Fraud. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

Cases

Affiliated Ute Citizens of Utah v. United States,
406 U.S. 128 (1972) 6

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 3, 8, 15, 20

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131 S. Ct. 1740 (2011) 21

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 22

Bovee v. Coopers & Lybrand,
216 F.R.D. 596 (S.D. Ohio 2003) 19

Brennan v. Midwestern United Life Ins. Co.,
450 F.2d 999 (7th Cir. 1971) 14

Broussard v. Meineke Disc. Muffler Shops, Inc.,
155 F.3d 331 (4th Cir. 1998) 25

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989) 18, 19

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First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 8

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Page

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544 U.S. 336 (2005) 7

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Civ. No. 91-4012, 1994 WL 248172
(D.N.J. May 18, 1994) 14

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 20

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 6

Harris v. Am. Inv. Co.,
523 F.2d 220 (8th Cir. 1975) 7

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 7, 30

In re DVI Sec. Litig.,
639 F.3d 623 (3d Cir. 2011) 17, 19

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Civ. No. 00-621, 2002 WL 32818345
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MDL No. 1658, 2013 WL 396117
(D.N.J. Jan. 30, 2013) 19

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283 F.R.D. 623 (D. Colo. 2005) 14

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236 F.R.D. 431 (D. Minn. 2006) 19

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618 F. Supp. 735 (S.D.N.Y. 1985) 26

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202 F.R.D. 467 (N.D. Tex. 2011) 18

Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.,
No. 02-C-5893, 2005 WL 3801463
(N.D. Ill. Apr. 18, 2005) 13, 14

Lazar v. Superior Court,
909 P.2d 981 (Cal. 1996).....8

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989).....13

Rosenzweig v. Azurix Corp.,
332 F.3d 854 (5th Cir. 2003) 30

Ruggiero v. Am. Bioculture, Inc.,
56 F.R.D. 93 (S.D.N.Y. 1972).....26

Page

Schlanger v. Four-Phase Sys., Inc.,
555 F. Supp. 535 (S.D.N.Y. 1982) 11

Schleicher v. Wendt,
618 F.3d 679 (7th Cir. 2010).....17, 20, 22

Sears, Roebuck & Co. v. Meadows,
877 S.W.2d 281 (Tex. 1994) 8

Shores v. Sklar,
647 F.2d 462 (5th Cir. 1981).....10

State Oil Co. v. Khan,
522 U.S. 3 (1997).....13

Stoneridge Inv. Partners, LLC v.
Scientific-Atlanta, Inc.
552 U.S. 148 (2008)..... 3, 8, 22

Superintendent of Ins. v. Bankers Life & Cas. Co.,
404 U.S. 6 (1971).....7

Statutes and Other Authorities

15 U.S.C. § 77k.....30

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Page

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Sup. Ct. R. 37 1

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1942 Annual Report of the SEC 7

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers (the "NAM"), the Pharmaceutical Research and Manufacturers of America ("PhRMA"), and Business Roundtable ("BRT"). All have significant interest in the interpretation and enforcement of the federal securities laws and in the rules governing class actions in private securities litigation.

The Chamber is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the U.S. The Chamber's members transact business in countries around the world. An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and the courts. The Chamber actively participates as *amicus curiae* in various class-action appeals, including recently in this Court.

The NAM is the preeminent association of U.S. manufacturers and the largest industrial trade association in the country. Its members include more than 12,000 manufacturing companies, and it represents the interests

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1. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

of small and large manufacturers in every industrial sector and all 50 States. The NAM regularly participates as *amicus curiae* in cases raising issues that affect the ability of U.S. manufacturers to stay competitive, promote economic growth, and create jobs.

PhRMA is a voluntary, nonprofit association that represents America's leading research-based pharmaceutical and biotechnology companies, which are the primary source of new drugs and biologics. PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines. PhRMA closely monitors pertinent legal issues and has frequently participated in cases before this Court.

BRT is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders annually and give more than $9 billion per year in combined charitable contributions. BRT's member companies have a significant interest in public policy regarding securities fraud and class action litigation.

The Chamber, the NAM, PhRMA, and BRT have a keen interest in this case because of the significant burden imposed on their members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of all

sizes. Experience with the application of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), shows that the presumption of reliance it approved has imposed substantial costs on public companies and their shareholders without producing corresponding benefits to investors. Recognizing the economic drag frivolous securities fraud litigation has engendered, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, "to curb abusive securities-fraud lawsuits." *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013). However, Congress in the PSLRA did not address the relationship between Rule 23 of the Federal Rules of Civil Procedure and the judicially created presumption of reliance endorsed in *Basic*. *See id.* at 1212 n.9 (Thomas, J., dissenting). The present case offers the Court an opportunity to address the problems arising from *Basic*'s formulation of the presumption of reliance and the excessive, burdensome class action litigation it has fostered.

SUMMARY OF ARGUMENT

1. The Court should overrule or modify the *Basic v. Levinson* presumption of reliance. The presumption, both as justified by a four-Justice majority in *Basic* and as applied in the lower courts, is in conflict with the requirement that proof of actual reliance is an "essential element" of a private securities fraud claim under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, *see Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008).

The decision in *Basic* was founded on the assumption that investors who buy and sell securities in a mature

market do so in the belief that the market price of the security accurately incorporates all material public information about the issuer. That assumption, however, is false for many investors in the real world who trade precisely because they do not believe the market price accurately reflects the true value of the security. While the majority in *Basic* expected that this general premise could be challenged by defendants in particular cases, defendants, in fact, are denied that opportunity in most class actions, because plaintiffs' counsel can avoid the issue at the class certification stage through the careful selection of class representatives and the assumption becomes effectively unchallengeable once the class is certified.

Basic's presumption of reliance is also grounded in an outdated and overly simplistic understanding of market efficiency. Economists today understand that the functioning of markets and the manner in which they assimilate information into prices are more complex and more nuanced than the *Basic* majority recognized. Economic scholarship since 1988 shows that market efficiency is not a binary proposition, but exists along a continuum. Nevertheless, lower courts following *Basic* continue to apply a black-and-white test that reflexively treats virtually any market for an exchange-traded security as perfectly price efficient at all times. As a result, the presumption of reliance is far too easily invoked, and securities fraud actions have become divorced from market realities. At a minimum, the Court should modify and update *Basic*'s judge-made presumption to bring it into line with modern economic scholarship.

2. Under *Basic v. Levinson*, securities fraud plaintiffs get a near free pass to class certification, and the easy

certification of plaintiff classes has predictably led to excessive securities fraud litigation and the *in terrorem* settlement of insubstantial claims. The excess of class action litigation puts a significant economic drain on U.S. public companies and their investors, both through the direct costs of litigation and settlements and indirectly through higher insurance costs. These deadweight costs impose a burden on capital markets and increase the costs of capital and insurance for businesses of all sizes and for the U.S. economy generally. For all these negative effects, the *Basic* presumption has not delivered material benefits to investors who have been harmed by fraud; instead, it has simply resulted in the shift of money from one set of innocent investors to another and into the pockets of plaintiffs' lawyers.

3. Reversing or modifying *Basic*'s presumption of reliance would not unravel the law of securities fraud litigation or leave fraud undeterred and victims uncompensated. Governmental enforcers and motivated private plaintiffs will remain, under various theories of recovery, to deter actual cases of fraud and to compensate those investors who genuinely suffer real harm.

ARGUMENT

I. The Court Should Overrule or Modify the *Basic v. Levinson* Presumption of Reliance.

Contrary to the intent of this Court, the presumption approved in *Basic v. Levinson* improperly negates the essential element of personal reliance in securities fraud claims. The rationale for the presumption is a generalization about investor conduct that contradicts

reality and becomes effectively irrebuttable in class action litigation. The presumption is also based on an oversimplified understanding of market economics that contemporary scholarship disputes. For these reasons, *Basic*'s presumption of reliance should be eliminated or, at a minimum, substantially modified.

A. The presumption undermines the requirement that plaintiffs prove actual reliance as an essential element of the implied private right of action for securities fraud.

In reconsidering the *Basic v. Levinson* presumption, the proper starting point is to recognize that there is a fundamental contradiction between any evidentiary presumption of reliance and the essential requirement that every plaintiff must prove actual reliance to support a claim of fraud under the securities laws.

Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), was "enacted for the purpose of avoiding frauds." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972). Consistent with that purpose, Securities and Exchange Commission ("SEC") Rule 10b-5 implements section 10(b) by prohibiting market participants from using "any device, scheme, or artifice to defraud," making any untrue statement or omission of material fact, or engaging in any other "act, practice, or course of business" that operates "as a fraud or deceit upon any person" in connection with the purchase or sale of a security. 17 CFR § 240.10b-5. As is readily apparent from its terms, Rule 10b-5 was promulgated to protect investors against "fraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-13 n.32 (1976) (citing SEC, Securities

Exchange Act Release No. 3230 (May 21, 1942); 1942 Annual Report of the SEC at 10).[2]

Accordingly, when this Court endorsed an implied private right of action for violations of section 10(b) and Rule 10b-5 in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), the Court drew upon the common law action for civil fraud in defining the elements of the implied federal cause of action for securities fraud. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005); *Harris v. Am. Inv. Co.*, 523 F.2d 220, 224 (8th Cir. 1975); 4 Louis Loss, *et al.*, *Securities Regulation* § 11.C.4(d) (2013); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983) (adhering to the common law elements of fraud for claims under section 10(b) and Rule 10b-5 while approving variation from the common law standard of proof).

The "hornbook elements" of common law fraud are (1) that the defendant made a false representation of material fact, (2) that the defendant made the false statement with "scienter" (that is, knowing that the statement was false and intending to induce the plaintiff to rely on the statement), (3) that the plaintiff did in fact justifiably rely on the defendant's false statement, and (4) that the plaintiff suffered damages as a result of reliance on the false statement. 2 Louis Loss, *et al.*, *Securities Regulation* § 9.A.2 (2013); *accord Dobbs' Law of*

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2. In proposing Rule 10b-5 to clarify that the securities laws prohibit fraudulent practices in the purchase, not just the sale, of securities, the SEC made the famous comment, "Well, we are against fraud, aren't we?" Milton V. Freeman, *Foreword, Happy Birthday 10b-5: 50 Years of Antifraud Regulation Colloquium*, 61 Fordham L. Rev. S1, S1-S2 (1993).

Torts § 664 (2d ed. 2013); *see, e.g.*, *Lazar v. Superior Court*, 909 P.2d 981, 984-85 (Cal. 1996); *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994). The elements of the implied private cause of action for securities fraud reflect this common law provenance.[3]

Proof of actual reliance by the plaintiff "is an essential element of the § 10(b) private cause of action" because it "ensures that . . . the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge Inv. Partners*, 552 U.S. at 159 (quoting *Basic v. Levinson*, 485 U.S. at 243). In *Stoneridge*, the Court rejected a section 10(b) implied cause of action against customers and suppliers who allegedly enabled an issuer to make fraudulent financial statements on the ground that the plaintiff "did not in fact rely upon [the customers' and suppliers'] own deceptive conduct." 552 U.S. at 160. Similarly, the Court refused to extend section 10(b) liability to third-party aiders and abettors because such an action would permit plaintiffs to recover damages "without any showing that [they] relied upon the aider and abettor's statements or actions," and "[a]llowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by [the Court's] earlier cases." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994), *superseded in part by* 15 U.S.C. § 78t(e).

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3. This Court has defined the elements of a private securities fraud claim as: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance by the plaintiff on the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Amgen*, 133 S. Ct. at 1192.

Even in approving the rebuttable presumption of reliance in *Basic*, the Court reaffirmed the necessity of a plaintiff's proof of actual reliance: "We agree that reliance is an element of a Rule 10b-5 cause of action" that "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." 485 U.S. at 243 (Blackmun, J., for a four-Justice majority). The majority in *Basic*, however, accepted the notion that a plaintiff could establish actual reliance "indirectly" where the security in question was traded in "an open and developed market," "based on the hypothesis" that "[t]he market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the price paid." *Id.* at 241, 244-45 (quoting lower court opinions) (internal quotation marks omitted).

The Court made it clear that this "hypothesis" of an indirect, market-based causal link between the alleged misrepresentation and the plaintiff's injury necessarily assumes that "[a]n investor who buys or sells stock at the price set by the market does so *in reliance on the integrity of that price*," meaning that "purchasers generally rely on the price of the stock *as a reflection of its value*." *Id.* at 244, 247 (emphases added) (internal quotation marks omitted). It is only if and where this underlying premise is true that the plaintiff's reliance on any public material misrepresentation affecting the market price of the security "may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247. *See id.* at 255 (White, J., dissenting in relevant part) ("At the bottom of the Court's conclusion that the fraud-on-the-market theory sustains a presumption of reliance is the assumption that individuals rely 'on the integrity of the market price' when buying or selling stock . . . .").

Moreover, to preserve the element of actual reliance, the Court further held that defendants must have the opportunity to rebut the presumption in particular cases with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." 485 U.S. at 248. As the Court stated, the presumption must give way if the defendant can show, among other things, (1) that the alleged misrepresentation did not in fact impact the trading price of the security, (2) that any impact the alleged misrepresentation may have had on the market price had dissipated by the time the plaintiff traded in the security; (3) that the security was not traded in an "efficient market" where it is fair to assume that all material public information was accurately reflected in the security's trading price; or (4) that an individual plaintiff did not, in fact, trade in reliance on the belief that the trading price accurately reflected the value of the security. *See id.* at 248-49.

If the Court's assumption that investors trade in reliance on the "integrity" of the market price does not hold; if the Court's belief in the perfect, friction-free price efficiency of any "open and developed" market for a security is unjustified; or if the defendant is not given a fair opportunity to rebut the presumption, such that it becomes effectively irrebuttable, then the essential element of actual reliance is negated. In that event, the implied cause of action for securities fraud is converted into "a scheme of investors' insurance" that is wholly beyond the aims of section 10(b) and Rule 10b-5. 485 U.S. at 252 (White, J., dissenting) (quoting *Shores v. Sklar*, 647 F.2d 462, 469 n.5 (5th Cir. 1981) (en banc)); *see id.* at 251 (White, J., dissenting) ("I agree with the Court that

if Rule 10b-5's reliance requirement is to be left with any content at all, the fraud-on-the-market presumption must be capable of being rebutted by a showing that a plaintiff did not 'rely' on the market price.").

As the following discussion shows, the key reliance-preserving premises on which the presumption necessarily rests are unsound, and this Court should no longer approve the presumption—at least not in its current form.

B. The presumption is based on an erroneous and effectively irrebuttable premise that investors rely on the integrity of market prices.

It is apparent that the majority in *Basic* made a blanket assumption that all rational investors who enter into securities transactions do so in the belief that the market price of a widely traded security accurately reflects the security's value, including all known material information about the issuer's business. *See* 485 U.S. at 246-47 ("It has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity.'") (quoting *Schlanger v. Four-Phase Sys., Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).

Justice White, writing for himself and Justice O'Connor in dissent, strenuously criticized this assumption on the ground that "'many investors purchase or sell stock because they believe the price *inaccurately* reflects the corporation's worth,'" and, indeed, "[i]f investors really believed that stock prices reflected a stock's 'value,' many sellers would never sell, and many buyers never buy." *Id.* at 255, 256 (White, J., dissenting) (quoting Barbara Black, *Fraud on the Market: A Criticism of Dispensing*

with Reliance Requirements in Certain Open Market Transactions, 62 N.C. L. Rev. 435, 455 (1984) (emphasis added by Justice White)). Justice White thought the majority's idea of a "just price" (*see* 485 U.S. at 246 (quoting legislative history)) was reminiscent of "the scholastics of medieval times." *Id.* at 255.

The *Basic* majority's assumption about investor conduct was wrong in 1988, and it is wrong today. Justice White was surely correct that many (if not most) investors buy or sell a security precisely because they believe the market price is *wrong*—buying when they assess the market has undervalued the stock and selling when the stock is overvalued in their estimation. So-called "value investing," for example, is a recognized investment strategy that involves systematically identifying underappreciated stocks to exploit their potential for long-term gain. This strategy is reportedly followed (with more than a little success) by Warren Buffett.[4]

By resting on the false fiction that rational investors always believe in the "integrity" of stock prices in an open and mature market, the majority's rationale for approving the presumption in *Basic* was, at its core, "incoherent and unsatisfying."[5] This fundamental flaw in *Basic*'s reasoning

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4. *See, e.g.*, Gus Lubin, *Warren Buffett Can't Believe More People Haven't Copied His Investing Strategy*, Bus. Insider, Sept. 14, 2012, *available at* http://www.businessinsider.com/warren-buffett-on-value-investing-2012-9.

5. Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton, pp.15-16 (Georgetown Pub. Law & Legal Theory Research Paper No. 13-058, 2013), *available at* http://scholarship.law.georgetown.edu/facpub/1226.

is ample grounds for this Court to overrule the case in relevant part and disapprove the presumption of reliance. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) (overruling prior antitrust case because earlier decision was based on faulty economic reasoning); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480, 484 (1989) (overruling prior case rejecting arbitration for certain securities law claims because it was based on outmoded "judicial hostility to arbitration").

Furthermore, when combined with the class action procedures of Rule 23 of the Federal Rules of Civil Procedure, *Basic*'s faulty assumption has become effectively irrebuttable, contrary to the intent of the majority in *Basic*. Given that most public companies with exchange-traded stock have numerous investors who trade in the stock during any particular period of time, plaintiffs' lawyers who file securities fraud class actions have little trouble finding lead plaintiffs who will attest that they bought or sold the stock in sincere reliance on the integrity of the trading price as an accurate measure of the stock's value. *See* James D. Cox and Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1603-04 (2006).

Once the plaintiff class is certified under Rule 23 and the lead plaintiffs stand in as class representatives for purposes of litigating the merits of the claim, the defendant has no further effective opportunity prior to a judgment on liability to challenge the blanket assumption that the absent members of the class traded in reliance on the integrity of the stock price. *See, e.g., Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-C-5893, 2005 WL 3801463, at *3-4 (N.D. Ill. Apr. 18, 2005) (rejecting

post-certification discovery into individual reliance as irrelevant to issues of class-wide liability); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 283 F.R.D. 623, 626 (D. Colo. 2005); *In re Lucent Techs. Inc. Sec. Litig.*, Civ. No. 00-621, 2002 WL 32818345, at *2 (D.N.J. May 9, 2002).[6] Thus, in the typical class action context, the presumption of reliance is conclusive, for all practical purposes, once the trial court determines that the security was traded in an "efficient market." Not surprisingly, as Professor Joseph Grundfest of Stanford Law School has shown, cases where *Basic*'s presumption of reliance is successfully rebutted notwithstanding a finding of market efficiency are "as rare as hens' teeth."[7]

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6. Courts have held that defendants may take discovery from absent class members post-class certification in certain circumstances, provided such discovery is necessary for trial of the class claims as a whole, rather than individual claims, and is not burdensome. *See, e.g., Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005-06 (7th Cir. 1971). While limited discovery into the individual circumstances of absent class members' purchases has been allowed where the plaintiff class is quite small, *see, e.g., Easton & Co. v. Mut. Benefit Life Ins. Co.*, Civ. No. 91-4012, 1994 WL 248172 (D.N.J. May 18, 1994) (magistrate judge order permitting such discovery under limited conditions where plaintiff class included only 160 bond purchasers), most courts have not permitted it in cases, such as the typical securities fraud class action, involving large plaintiff classes. *See, e.g., Lawrence E. Jaffe Pension Plan*, 2005 WL 3801463, at *3 (distinguishing *Easton & Co.* as inapposite where plaintiff class included hundreds of thousands of investors); *In re Lucent Techs. Inc.*, 2002 WL 32818345, at *2 (similarly distinguishing *Easton & Co.*).

7. Joseph A. Grundfest, *Damages and Reliance under Section 10(b) of the Exchange Act*, p.47 (Rock Ctr. for Corp. Governance Working Paper No. 150, 2013), 69 Bus. Law. (forthcoming Feb. 2014) (finding only five such instances as of August 2013), *available at* http://ssrn.com/abstract=2317537.

Because the assumption that plaintiffs rely on the integrity of market prices has proven to be essentially beyond challenge in the typical class action context, the presumption of reliance, as applied in the lower courts, has become the "scheme of . . . insurance" for some investors (at the expense of other innocent shareholders) that the Court in *Basic* disavowed. For this reason, too, the presumption should be abandoned.

C. At a minimum, the Court should modify the *Basic* presumption in light of developments in the economic understanding of markets.

The majority in *Basic* cited "[r]ecent empirical studies" on "efficient-capital-market theory" in support of the premise that "an impersonal, well-developed market" is highly efficient at quickly and accurately assimilating all publicly available information into the trading price of a security. *See* 485 U.S. at 246-47 & n.24. That premise does not hold up in light of more recent economic analysis of the price efficiency of capital markets. *See Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring) (citing Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 160, 175-76 (2009) ("Langevoort, Basic *at Twenty*")); *id.* at 1209 n.4 (Thomas, J., dissenting). *See generally* Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 Nw. U. L. Rev. 135 (2002).

Economic scholarship since 1988 shows that the attributes of efficient markets are more complicated and more nuanced than the Court in *Basic* understood them to be. It is now more widely accepted that there is no perfect correlation between stock price and market

information, even in an "open and developed market." *See, e.g.*, Bradford Cornell & James C. Rutton, *Market Efficiency, Crashes, and Securities Litigation*, 81 Tul. L. Rev. 443, 466 (2006) ("Cornell & Rutton"); Langevoort, Basic *at Twenty*, *supra*, at 175-176. Congress evidently accepted this modern view of markets when it enacted, as part of the PSLRA, a limit on securities fraud damages in cases where the stock price "bounces back" from an initial drop following a corrective disclosure. *See* 15 U.S.C. § 78u-4(e). Commentators have pointed out that the PSLRA's limit on damages reflects a theory of capital markets inconsistent with *Basic*'s assumption that stock prices reflect all available information. *See* Stefan J. Padfield, *Who Should Do the Math? Materiality Issues in Disclosures that Require Investors to Calculate the Bottom Line*, 34 Pepp. L. Rev. 927, 969 n.260 (2007).

There is also less uniformity today among economists about how and when markets incorporate information into prices. The 2013 Nobel memorial prize in economics highlights the academic variation, since the prize was awarded to two economists (Eugene F. Fama of the University of Chicago and Robert J. Shiller of Yale University) with opposing views on efficient market theory. *See Methods for All Moments*, The Economist, Oct. 19, 2013, *available at* http://www.economist.com/news/finance-and-economics/21588059-nobel-prize-economics-reveals-how-little-we-know-about-behaviour; Binyamin Appelbaum, *Economists Clash on Theory, but Will Still Share the Nobel*, N.Y. Times, Oct. 14, 2013, at A1 ("[I]n jointly honoring the work of Mr. Fama and Mr. Shiller, the committee also highlighted how far the economics profession remains from agreeing on the answer to a basic and consequential question: How do markets work?").

Some courts and commentators associate the *Basic* presumption of reliance with the so-called "semi-strong" efficient market theory, which posits that stock prices reflect all historical information about the issuer's business and will quickly assimilate and reflect any new information that becomes publicly available to the market. *See In re DVI Sec. Litig.*, 639 F.3d 623, 631 (3d Cir. 2011); *Schleicher v. Wendt*, 618 F.3d 679, 684-85 (7th Cir. 2010) (Easterbrook, J.); Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 852 n.7 (1992).[8] But the "intellectual dominance" of the semi-strong hypothesis has declined markedly since *Basic*, and economists now recognize significant variation in how, and how quickly, markets process information under different circumstances. *See* Burton G. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. Econ. Perspectives 59, 60 (2003).

Economists today acknowledge that if markets were perfectly price efficient, there would be no incentive for investors to engage in the kind of information discovery that drives market efficiency. *See id.* at 80. It is more common now to treat efficiency as existing along a continuum, *see* Cornell & Rutton, 81 Tul. L. Rev. at 448, such that efficiency can vary between short- and long-term perspectives, depending on the type of information at issue, *see* Malkiel, *supra*, at 61—be it basic versus technical information, *see* Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J.

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8. The "weak" efficient-market theory posits that market prices will reflect only historical information, not the latest news, while the "strong" version of the theory would hold that market prices efficiently reflect all relevant information, both public and private. *See In re DVI Sec. Litig.*, 639 F.3d at 631 n.11; *Schleicher*, 618 F.3d at 685.

Corp. L. 635, 653-54 (2003), or positive versus negative information, *see* Robert J. Shiller, *From Efficient Markets to Behavioral Finance*, 17 J. Econ. Perspectives 83, 97-98 (2003) (noting that practical difficulties in shorting particular stocks at particular times can affect a market's ability to incorporate information).

Adhering to *Basic*'s example, however, lower courts continue to follow a simplistic binary approach to market efficiency, in which a market is either deemed price efficient as a matter of law or wholly "inefficient." *See* Langevoort, Basic *at Twenty*, *supra*, at 167, 174-75. Most courts look to the five factors identified in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), in deciding whether a market is "open and developed": (1) the average weekly trading volume of the security during the relevant period; (2) the number of security analysts following and reporting on the security; (3) the extent to which market makers traded the security; (4) the issuer's eligibility to file an SEC registration Form S-3 (generally limited to established public companies); and (5) evidence (such as by event studies) showing a cause-and-effect relationship between release of significant news about the issuer's business and changes in the security's price. *See id.* at 1286-87. *See also Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2011) (considering, in addition to the *Cammer* factors, the issuer's market capitalization and the size of the public float for the security).

All but one of these factors hang market efficiency entirely on the size of the issuer and the size and trading volume of the market for the security, and in practice, the *Cammer* analysis leads to the near automatic application of the *Basic* presumption, and thus the certification

of a plaintiff class (unless analysis of price impact is permitted), in virtually any securities fraud case where the security at issue traded in large volumes on an established exchange—true for the stock of most large companies. *See, e.g.*, *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, MDL No. 1658, 2013 WL 396117, at *11 (D.N.J. Jan. 30, 2013) (declining to consider challenge to market efficiency because defendant's stock trades on the New York Stock Exchange); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 489 n.3 (S.D.N.Y. 2011) (same); *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 606-07 (S.D. Ohio 2003) (same). Accordingly, commentators have criticized the *Cammer* factors as a crude and inadequate approach to analyzing the price efficiency of securities markets. *See, e.g.*, William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L. J. 843, 864-65 (2005); David Tabak, Nat'l Econ. Res. Assocs. ("NERA"), *Do Courts Count* Cammer *Factors*?, p.1 (Aug. 2012) (finding that in 98 percent of cases, courts' purported "balancing" of *Cammer* factors produced the same results as simply counting the factors), *available at* http://www.nera.com/nera-files/PUB_Cammer_Factors_0812.pdf.[9]

9. Even the fifth *Cammer* factor (considering empirical evidence of correlation between news events and price changes for the security at issue) often leads to arbitrary line drawing. The court of appeals in *DVI Sec. Litig.*, for example, upheld a finding that a market was "efficient" for *Basic* purposes where event studies showed that the stock price moved within two days of the release of significant news about the company, but reaffirmed a prior holding that a market is "inefficient" if the price does not move within four days. 639 F.3d at 635. *See also In re Retek Inc. Sec. Litig.*, 236 F.R.D. 431, 436-37 (D. Minn. 2006) (certifying class notwithstanding lack of evidence on fifth *Cammer* factor because court believed "empirical evidence is not necessary to demonstrate market efficiency").

The legacy of *Basic*'s unquestioning acceptance of fraud-on-the-market theory based on the state of economic scholarship in 1988 is that plaintiffs in the great majority of securities fraud cases secure class certification as a matter of course. Even before this Court's decisions in *Amgen* and *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), when lower courts at times permitted defendants to contest materiality or loss causation at the class certification stage, 75 percent of decided certification motions in securities litigation resulted in certification of a class under Rule 23. *See* Renzo Comolli, *et al.*, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review*, p.20 (2013) (examining results of class certification motions in securities cases from 2000 to 2012), *available at* http://www.nera.com/nera-files/PUB_Year_End_Trends_2012_1113.pdf; *see also Schleicher*, 618 F.3d at 682 (describing class certification as "routine" in securities fraud cases when suitable class representatives come forward).

The present case gives this Court the opportunity to restore the element of actual reliance in private securities fraud litigation by overturning *Basic*'s unquestioning and outmoded approach to market efficiency. At a minimum, even if the Court were to retain the presumption of reliance in some circumstances, the Court should recognize the variation and complexities in economic scholarship since 1988 and require a more demanding test for application of the presumption to bring it into line with market realities. In doing so, the Court should make it clear to lower courts that a binary approach to market efficiency is inappropriate. Instead, lower courts should determine efficiency based on evidence about the

full context of the alleged misrepresentations at issue and the particulars of the market for the relevant security. Rather than simply ask whether the market for a security is "open and developed," courts should, if the presumption is retained, be required to determine that the market actually incorporated the relevant misrepresentations into price—the reason for looking to efficiency in the first place—before concluding that the presumption is applicable.

II. The Easy Certification of Class Claims under *Basic* Has Generated Excessive Costs for Businesses and Hampered Capital Markets.

The near certainty of class certification under the *Basic* presumption of reliance encourages insubstantial securities fraud claims that bear little relation to any real culpability and serve only to extract large settlements from insured businesses by the threat of class-wide damages. The excessive wave of securities fraud class action litigation fostered by *Basic* imposes enormous deadweight losses on U.S. businesses, innocent shareholders, and the economy generally, through higher costs of capital and insurance. At the same time, the easy certification of class claims for securities fraud does not effectively deter those who engage in fraudulent conduct or provide meaningful compensation for investors actually harmed by fraud.

This Court has frequently acknowledged the threat of abuse and unfair settlement pressures that often attend the class treatment of fraud claims. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (recognizing that consumer fraud class actions create

the risk of *in terrorem* settlement); *Stoneridge Inv. Partners*, 552 U.S. at 164 ("[E]xtensive discovery and the potential for uncertainty and disruption in a [securities fraud] lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."). Private securities fraud litigation is particularly susceptible to abuse. The Court has noted that class action litigation under section 10(b) and Rule 10b-5 poses "a danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

Settlement is the only reasonable option for many securities fraud defendants. Virtually no securities fraud cases are tried to verdict, as nearly all that survive motions to dismiss are settled.[10] Indeed, studies have found that settlements often have more to do with the defendant's insurance limits than with the strength of plaintiffs' claims. *See Schleicher*, 618 F.3d at 686 (citing studies). Because all businesses with publicly traded securities must carry insurance against securities fraud claims, and because the insurers play a central role in the defense of such claims, defendants are put in a position where settlement is virtually inevitable following class certification.

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10. *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2013 Mid-Year Assessment*, pp.15-17 (2013) (case resolution statistics showing that for cases filed in 2006, the most recent year for which all cases are completed, 43% of filed cases were dismissed and 57% settled), *available at* http://securities.stanford.edu/clearinghouse_research/2013_YIR/Cornerstone-Research-Securities-Class-Action-Filings-2013-MYA.pdf.

Plaintiffs' targeting of defendants likewise often has little to do with the merits. While the implied private right of action under section 10(b) and Rule 10b-5 is intended to provide a remedy for investors who suffer genuine injury from securities fraud, securities class actions are routinely filed in the wake of almost any negative announcement by a company that corresponds to a stock price decline. Statistics on class action securities fraud litigation from the Stanford Law School Securities Class Action Clearinghouse ("Stanford Clearinghouse") demonstrate that suits often target particular industry sectors, in many cases ensnaring a large portion of the publicly traded companies in a given industry.[11] For example, in 2010, new securities fraud class actions were filed against 5.4 percent of S&P 500 companies, but the figures were 15.4 percent for healthcare companies, 10.3 percent for financial companies, and 7.7 percent for energy companies. *Id.*[12] These lawsuits do not only target the largest companies; suits increasingly target companies with smaller market capitalizations, including companies that are not traded on the major exchanges. *See id.* at 14.

These suits impose a tremendous cost on American business. For example, according to the Stanford

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11. *See* Stanford Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2013 Mid-Year Assessment*, p.8 (2013), *available at* http://securities.stanford.edu/clearinghouse_research/2013_YIR/Cornerstone-Research-Securities-Class-Action-Filings-2013-MYA.pdf.

12. Because securities fraud cases can take multiple years to resolve, the filing of a significant number of cases against an industry in one year can mire that industry in litigation for years to come.

Clearinghouse, securities fraud class actions led to $2.9 billion in settlements in 2012, with an average settlement of $54.7 million per case.[13] As they drag on, these cases generate significant litigation expenses as well, with a median time to settlement of 3.3 years and approximately 19 percent of cases taking more than 5 years. *Id.* at 6 (examining cases settled from 2007-2011). Defense costs in these cases have been estimated to range from 25 to 35 percent of the settlement value. *See* John C. Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1546 (2006). Costs are borne not only by those companies sued but by public companies in general, as the higher costs of insurance spread the risks across companies that access capital markets, and these higher costs hamper the competitiveness of American public companies versus their rivals overseas. Ultimately, investors themselves pay the costs of securities fraud litigation through a lower return on their investments.

These costs come without corresponding benefits. The *Basic* approach to securities fraud lawsuits was originally designed to give investors protection from fraud beyond that provided at common law, *see Basic*, 485 U.S. at 244 n.22, and to deter fraud. Yet, class actions built on the fraud-on-the-market theory and the *Basic* presumption of reliance have not delivered either protection for investors or meaningful deterrence benefits. *See generally* William M. Bratton & Michael Wachter, *The Political Economy of*

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13. Stanford Clearinghouse & Cornerstone Research, *Securities Class Action Settlements: 2012 Review and Analysis*, p.3 (2013), *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2012/Settlements_Through_12_2012.pdf.

Fraud on the Market, 160 U. Pa. L. Rev. 69, 72-73 (2011) ("Bratton & Wachter"). Instead, these class actions have become a virtual entitlement to a payoff following almost any sudden decline in stock prices.

The *Basic* presumption of reliance has failed to benefit investors in part because of the circular nature of private securities fraud class actions. In the typical case, the putative class of investor plaintiffs purchased the defendant's stock during a period in which, the plaintiffs allege, the price was inflated due to the defendant company's misrepresentations. Thus, the class of purchasing shareholders seeks recovery from all current shareholders, whose equity interests in the defendant company are negatively affected by the company's cost of defending the litigation as well as by any resulting increase in the company's insurance premiums. The shareholders who (innocently) benefited from the alleged fraud by selling their shares during the period of inflated price are out of the scene, so any costs incurred by the company will impact the shareholders who are not only innocent but also could not have benefited from any fraud.[14] While individual executives are often named as

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14. Class treatment of securities fraud claims can also raise serious due process issues because of differences among investors in the putative class. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) ("due process requires that named plaintiffs possess undivided loyalties to absent class members"); *see also* Timothy S. Bishop, *et al.*, 20th Annual Fed. Sec. Inst., *Defeating Class Certification in Securities Fraud Actions*, p.13 (2002), *available at* http://www.appellate.net/articles/tsb.pdf. Because recovery from a defendant corporation reduces the value of stock in the corporation, class members who still hold shares are in a different position from class members

defendants, they are sued almost exclusively for their insurance coverage,[15] the costs of which are spread across public companies in general.

As a result, any recovery the class obtains from the company is a transfer of wealth from one set of innocent shareholders to another, with significant litigation costs incurred in between and, of course, healthy payouts to the lawyers:

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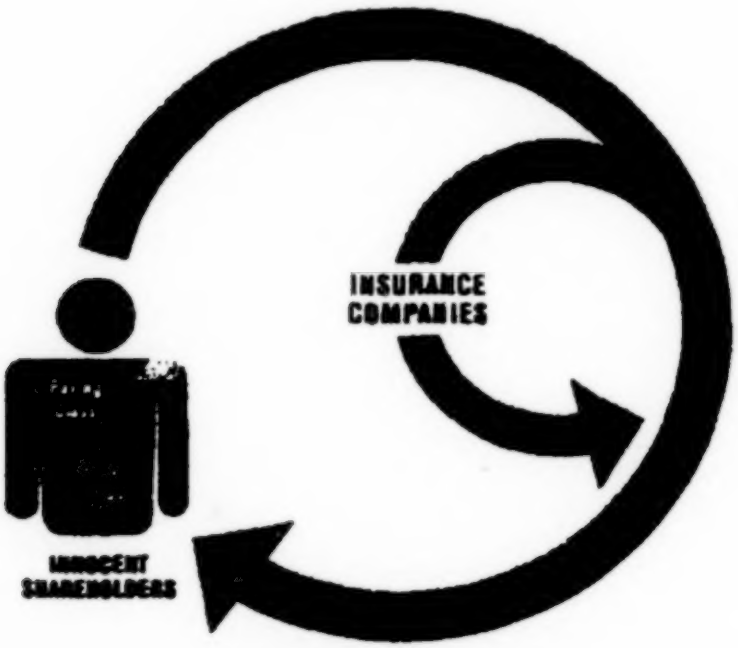
who sold shares and may have different interests in the outcome of the litigation. *See, e.g., Ruggiero v. Am. Bioculture, Inc.*, 56 F.R.D. 93, 95 (S.D.N.Y. 1972) (concluding in derivative case that interests of current and former shareholders were in conflict). Similarly, where the nature of the misrepresentations or share price effects change during the class period, those who bought and sold at different times may be in conflict with respect to what facts they are trying to establish. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving class settlement but noting difficulties posed by volatility in share price throughout the class period).

15. *See* Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 n.43 (1996) ("[I]n the average settlement, 68.2% comes from the insurer and 31.4% from the issuer, with only 0.4% coming from individual defendants.") (citing Frederick C. Dunbar, *et al.*, NERA, *Recent Trends III: What Explains Settlements in Shareholder Class Actions?*, p.v (1995)).

Securities Fraud Class Actions – A Circular System[16]



The system makes even less sense when it is understood that most investors rely on portfolios of securities. To the extent undiscovered fraud inflates a stock price, the average investor is just as likely to be a buyer of shares, and thus an unwitting victim of such fraud, as he is to be a seller and thus an unwitting beneficiary. *See* Bratton & Wachter, *supra*, at 94-95. Because investors often own stock in diversified portfolios, they gain about as much as they lose from undiscovered fraud. *See* Anjan V. Thakor, *The Economic Reality of Securities Class Action Litigation*, p.1 (U.S. Chamber Institute for Legal Reform research paper, 2005), *available at* http://www.nytimes.com/packages/pdf/business/27suit.pdf. Thanks to this

16. Source: U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform*, p.16 (2008), *available at* www.instituteforlegalreform.com/get_ilr_doc.php?docId=1213.

dynamic, only a narrow set of fortunate investors receives any corrective justice at all from the system of securities class actions. *See* Bratton & Wachter, *supra*, at 94-99.

III. Eliminating or Modifying the *Basic* Presumption Will Not Undermine Fraud Deterrence or Investor Compensation in Cases of Actual Fraud.

Even if "[r]equiring proof of individualized reliance from each member of [a] proposed plaintiff class effectively would" prevent some plaintiffs "from proceeding with a class action, since individual issues then would" predominate over "common ones," *Basic*, 485 U.S. at 242, securities fraud will still be deterred and investors who are harmed by fraud will still obtain compensation if *Basic*'s presumption of reliance is eliminated or substantially modified. The presumption and the class action industry it has spawned are not the essential keystone of fraud deterrence and compensation. Various potent mechanisms to accomplish these ends will remain unaffected.

First, the element of reliance required for private securities fraud claims does not apply to the SEC and the Department of Justice, and these federal enforcers will continue to police securities fraud with the mission of investor protection. The SEC, in particular, will retain its full arsenal of statutory causes of action and its prime responsibility for deterring and redressing securities fraud through enforcement actions that seek monetary penalties, including restitution for investors harmed by material misrepresentations. Government enforcement offers effective compensation for investors, as both the SEC and Justice Department can and do pursue restitution for investors harmed by fraud. *See* SEC, *FY 2014 Congressional Budget Justification*, p.33

(2013), *available at* http://www.sec.gov/about/reports/secfy14congbudgjust.pdf; U.S. Dep't of Justice, *What Is Restitution?*, http://www.justice.gov/usao/briefing_room/vw/returning_money.html (last visited Dec. 22, 2013).

Second, individual investors who can show reliance on misstatements will retain their ability to bring 10b-5 claims. Investors often have large enough claims that they have an economic incentive to sue, particularly given the option to consolidate such claims. Even when class actions are available, large investors, including pension funds and mutual funds, have frequently brought their own claims in opt-out groups and have obtained significant recoveries that have the same or greater deterrence potential as class actions. *See, e.g.*, Amir Rozen, *et al.*, Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements*, p.4 (2013) (highlighting major opt-out cases such as the AOL-Time Warner securities litigation, where over 100 individual plaintiffs obtained more than $764 million in settlement, and Qwest Communications securities litigation, in which settlements for individual investor claims exceeded the settlement for the class), *available at* http://www.cornerstone.com/Publications/Press-Releases/Securities-Report-Provides-Class-Action-Opt-Out-Statistics. Large institutional investors like pension funds are more prone to sue than ever, *see id.* at 2 n.6, and, because of the significant role large institutional investors play in capital markets, their suits carry great weight with issuers. If the *Basic* presumption goes away, such heavyweight plaintiffs are likely to play an even greater role in addressing alleged fraud.[17]

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17. *See* Karen Freifeld, *Q&A: Stanley Bernstein on game changers in class action litigation*, Reuters Legal (Dec. 9, 2013) (quoting Stanley Bernstein, a leading plaintiffs' counsel who "represents state, city and county pension funds in securities

Similarly, overruling or modifying *Basic* will not prevent the securities plaintiffs' bar from pursuing class actions under section 11 or section 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2). Unlike private claims for fraud in connection with open market transactions under section 10(b) and Rule 10b-5, claims may be brought under section 11 or 12 for false or misleading misrepresentations made in registration statements or prospectuses in connection with the offering of securities.[18] Plaintiffs bringing claims under section 11 or 12 do not ordinarily need to prove scienter or reliance, so *Basic*'s presumption is unnecessary for these claims. *See Herman & MacLean*, 459 U.S. at 382. These claims do not suffer from the circular payment problem that infects 10b-5 secondary trading claims, as investors will have purchased the securities at issue in the section 11 or 12 claims in connection with an offering, and so any recovery the plaintiffs obtain will be a refund from the issuer defendant of money received for the plaintiffs' shares and will thereby reduce the defendant's proceeds from the offering to what they would have been absent the alleged false statement.[19]

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cases," as confidently predicting, "Should *Halliburton* throw out the 'fraud-on-the-market' presumption, . . . the largest investors will have the means to sue for their losses and will likely recover even larger amounts than under the present system."), *available at* http://t.co/0nVDzelBiC.

18. Several courts of appeals have permitted section 11 claims by secondary purchasers who are able to "trace" the sales history of their shares from prior owners to prove the securities were purchased in the offering at issue. *See, e.g.*, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 872 (5th Cir. 2003).

19. In contrast, the typical 10b-5 plaintiff will have purchased shares from another investor in the secondary market. Because that investor cannot be found, the plaintiff's money is gone, and

In sum, this Court should reaffirm the importance of the element of actual reliance in private securities fraud cases by eliminating or substantially modifying the *Basic* presumption. Doing so will not cause securities fraud to go undeterred or leave investors who are harmed by fraud without effective means to recover their losses.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reverse the judgment of the court of appeals.

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recovery will have to come indirectly from other innocent investors (or insurers or, in theory but not in practice, executives). In section 11 or 12 cases, the issuer defendant is returning to the plaintiff investor the money received by the issuer for the shares purchased by the investor.

January 6, 2014

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE COMMITTEE ON CAPITAL MARKETS REGULATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE COSTS OF SECURITIES CLASS ACTIONS TO THE U.S. ECONOMY AND CAPITAL MARKETS ARE UNJUSTIFIABLE 5

A. Securities Class Actions Impose Significant Costs on U.S. Corporations and their Shareholders 5

B. Securities Class Actions Undermine the Vibrancy and Competitiveness of U.S. Capital Markets 8

II. THE PURPORTED BENEFITS OF SECURITIES CLASS ACTIONS—COMPENSATION AND DETERRENCE—ARE UNSUBSTANTIATED IN THEORY OR FACT 11

A. Securities Class Actions Do Not Efficiently Compensate Defrauded Investors 11

TABLE OF CONTENTS (cont'd)

Page

B. Securities Class Actions Do Not Contribute Significantly to the Deterrence of Corporate Wrongdoing 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 4

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

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711 F. Supp. 1264 (D.N.J. 1989) 8

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 5

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Page

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Fed. R. Civ. P. 23(b)(3) 7

Sup. Ct. R. 37 1

INTEREST OF *AMICUS CURIAE*[1]

Founded in 2006, the Committee on Capital Markets Regulation (the "Committee") is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. The Committee's reports, releases, and comment letters provide lawmakers and regulators with concrete policy recommendations based on rigorous empirical research. Its membership includes thirty-two leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and directed by Prof. Hal S. Scott (Nomura Professor, Harvard Law School). C. Wallace DeWitt serves as the Committee's Executive Director of Research. The Committee is an independent and non-partisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

The Committee has a strong interest in reforming the U.S. securities class action enforcement system, which imposes significant

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[1] All parties have consented to this filing in letters on file with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

costs on U.S. corporations and shareholders and severely undermines the competitiveness of U.S. capital markets. [2] This brief sets forth the Committee's policy views regarding the economic and competitive effects on U.S. capital markets of the "fraud-on-the-market" presumption of reliance adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

SUMMARY OF ARGUMENT

The Court adopted the fraud-on-the-market presumption, in part, because it believed the presumption was necessary to advance the goals of the Securities Exchange Act of 1934 ("1934 Act"), which "was designed to protect investors against manipulation of stock prices." *Id.* at 230. The Court described private civil actions under Rule 10b-5 as "an essential tool for enforcement of the 1934 Act's requirements." *Id.* at 231. [3] It feared that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class

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[2] The Committee's *Interim Report*, released in 2006, sets forth, *inter alia*, a comprehensive reform program for the enforcement of U.S. securities laws, including proposed changes to the securities class action regime. *See* Comm. on Capital Mkts. Regulation, *Interim Report of the Committee on Capital Markets Regulation* (2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

[3] Rule 10b-5 refers to Rule 10b-5 of the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5, adopted under Section 10(b) of the 1934 Act.

effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Id.* at 242. The presumption of reliance solved this purported problem, and the Court reasoned that "by facilitating Rule 10b-5 litigation, [it] support[ed] the congressional policy embodied in the 1934 Act." *Id.* at 245. In other words, the four-member majority in *Basic* believed more litigation—including class litigation—was needed to "to protect investors against the manipulation of stock prices." *Id.* at 230.

However, in the 25 years since *Basic* was decided, empirical research has shown that, rather than protect investors, the U.S. securities fraud class action system imposes heavy costs on U.S. corporations and shareholders and places U.S. capital markets at a decided competitive disadvantage *vis-à-vis* other global financial centers, where securities enforcement is typically the exclusive province of the public civil and criminal authorities and individual (i.e., non-class) civil actions. Since its founding, accordingly, the Committee has advocated reform of the U.S. system.

As this Court and others have recognized,[4] securities class actions frequently feature

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[4] *See, e.g.*, Advisory Committee's 1998 Note on subd. (f) of Fed. R. Civ. P. 23, 28 U.S.C.A. Fed. R. Civ. P. 23 at 161

exorbitant settlements, extracted from defendants through the *in terrorem* effect of potential damages at trial. Win or lose, companies—and ultimately their shareholders—are also saddled with costly legal bills in defending against such suits. Yet, as this brief will demonstrate, empirical data suggest that the burdens imposed on companies and shareholders by securities class actions are unjustified by their purported benefits, namely investor compensation and deterrence of corporate wrongdoing. Indeed, the Department of Justice and the SEC have in recent years significantly increased staff resources devoted to securities enforcement efforts, further undermining the assumption—not embraced in legislation—that there was a need for a separate private class action enforcement mechanism under Section 10(b).

In his dissent from the Court's first endorsement of the "fraud-on-the-market" presumption of reliance in *Basic,* Justice White worried that the decision would "have many adverse, unintended effects as it is applied and interpreted in the years to come." 485 U.S. at 251 (White, J., dissenting). A quarter century of experience has confirmed Justice White's prescience, as overwhelming evidence has mounted that the costs of the United States' present securities class action mechanisms overwhelm any

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(2012). *See also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

plausible societal benefit. Congress has responded to this evidence by narrowing the bases for those actions through the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998, and this Court, too, has in a number of recent decisions[5] continued to trim the expansive scope of the judicially implied private right of action under Rule 10b-5. The Committee therefore urges the Court to reconsider its adoption of the fraud-on-the-market presumption of reliance in the class certification context and overrule the *Basic* four-Justice majority.

ARGUMENT

I. THE COSTS OF SECURITIES CLASS ACTIONS TO THE U.S. ECONOMY AND CAPITAL MARKETS ARE UNJUSTIFIABLE

A. Securities Class Actions Impose Significant Costs on U.S. Corporations and their Shareholders

Irrespective of their merit or whether they reach trial, securities class actions impose significant

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[5] *See, e.g., Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2298 (2011); *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010); *Stoneridge Inv. Partners, LLC, v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 153 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

costs. Although Congressional action and the recent decisions of this Court have to some degree reduced the number of securities class action claims, the collective impact of these changes in law has been limited. Since 2007, an average of 181 securities class action suits has been filed per year, almost exactly matching the historical average from 1996 (the first year following enactment of the PSLRA) through 2011. In 2012, 142 federal class actions alleging securities fraud were filed, while courts approved 93 settlements with an aggregate value of $3.3 billion. Renzo Comolli et al., NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* 6, 23-31 (2013). From 2000 through 2012, the aggregate value of securities class action settlements amounted to approximately $68.1 billion. *Id.* at 31. The historical peak of such settlements is over $19 billion in 2006. Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review And Analysis* 1 (2011). It is important to note, too, that the filing of securities class actions is cyclical and generally follows the market. In bull markets, such as at present, there is a natural tendency for fraud claims to decline, only to surge once again when the market turns and damage claims become more enticing as they are facially easier to allege.

It is difficult to overstate the pall of uncertainty cast across the U.S. economy by the threat of securities class actions. Since 1996, over 40% of corporations listed on major U.S. stock exchanges

have been targeted by a securities class action suit. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 615-16 (2010). Even where such actions never materialize, the mere threat is sufficient to impose significant costs. For example, insurance costs for a Fortune 500 company are six times higher in the United States than in Europe, *see* Comm. on Capital Mkts. Regulation, *Interim Report*, *supra*, at 78. Studies have shown that targets of securities class actions face deteriorating profitability and operational efficiency compared to peer firms—even three years after settlement—and run a higher risk of bankruptcy. Lynn Bai et al., *Lying and Getting Caught: An Empirical Study of the Effect of Securities Class Action Settlements on Targeted Firms*, 158 U. Pa. L. Rev. 1877, 1896-1904 (2010).

While the *Basic* fraud-on-the-market presumption is not solely responsible for the high levels of securities litigation in the United States, the presumption is an essential predicate to shareholder securities class actions. In order to prevail at the class certification stage, a plaintiff must convince the court "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In

establishing the predominance of such "common questions" in a private securities fraud claim under Rule 10b-5, the element of "reliance" tends to be a determinative inquiry. Thus, by significantly lowering the bar from proof of individual reliance—as in a traditional face-to-face fraud claim—to proof of purchase from a "well-developed market," *Basic* vastly expanded the ability of the plaintiffs' bar to file and obtain certification of securities class action suits. In subsequent cases, the efficient market underpinnings of *Basic*'s fraud-on-the-market presumption have been found by courts to be met simply on the basis of factors such as exchange listing or analyst coverage. *See, e.g., Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

B. Securities Class Actions Undermine the Vibrancy and Competitiveness of U.S. Capital Markets

Given that competitor economies have eschewed adopting the U.S. approach,[6] it is unsurprising that foreign private issuers often cite the U.S. class

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[6] Securities class actions do not exist under the legal systems of other competitor markets for IPO activity, such as the United Kingdom, Hong Kong, or Singapore. *See, e.g.*, Comm. on Capital Mkts. Regulation, *Interim Report*, *supra*, at 2-3.

action regime as a primary reason for avoiding participation in U.S. public capital markets.[7]

The severity of these competitive effects has been exhaustively documented by the Committee's research. *See* Comm. on Capital Mkts. Regulation, *Interim Report, supra,* at 71. For years, such suits have contributed to driving significant quantities of capital abroad or into private markets, as shown in a series of competitiveness measures compiled by the Committee. *See Competitiveness Measures*, Comm. on Capital Mkts. Regulation, *available at* http://capmktsreg.org/tag/competitiveness/. These measures, which track 13 metrics of equity raised in public markets, the relative size of the private (*i.e.*, Rule 144A) and public equity markets in the United States, U.S. cross-listings and delisting by foreign private issuers, trading on U.S. and foreign exchanges, and the regional origin of U.S. investment bank revenues, demonstrate a significant decline in the competitiveness of U.S. capital markets since 1996. *Id.* As of the third quarter of 2013, the U.S. share of global IPOs by foreign companies sits at 8.1%, the lowest level since 2008 and a substantial decline from the 11.4% recorded in 2012. *Continuing Competitive Weakness in U.S. Capital Markets*, Comm. On Capital Mkts. Regulation (Nov. 21, 2013), *available at* http://capmktsreg.org/2013/11/ continuing-

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[7] *See* Brief of *Amicus Curiae* NYSE Euronext In Support of Respondents at 28, *Morrison v. Nat'l Austl. Bank* 130 S. Ct. 2869 (2010) (No. 08-1191).

competitive-weakness-in-u-s-capital-markets-2. This measure remains far below the historical average of 26.8%. *Id.* The U.S. share of the top 20 global IPOs remains depressed, with only one of the top 20 global IPOs in 2013 occurring in the U.S. public markets. *Id.* Foreign companies that raise equity capital in the United States do so overwhelmingly via private (*i.e.*, Rule 144A) rather than public markets. During the third quarter of 2013, over 88% of initial offerings of foreign equity in the United States were conducted through Rule 144A offerings rather than public offerings. *Id.*

While numerous factors affect U.S. competitiveness, securities class actions are widely understood by market participants as a leading cause of the decline. Numerous independent reports have concurred with the Committee's view that securities class actions detract from the competitiveness of U.S. capital markets. A 2007 report, commissioned by then New York City Mayor Michael R. Bloomberg and Senator Charles E. Schumer and endorsed by then New York Governor Eliot Spitzer, cited securities class actions as a major contributor to the high "cost of doing business in the US financial services industry." Senator Charles E. Schumer and Mayor Michael R. Bloomberg, *Sustaining New York's and The US' Global Financial Services Leadership* 75 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf. A 2008 report of the U.S. Chamber of Commerce and a 2007 report of the Financial Services Forum each reached similar

conclusions. *See generally* Ctr. For Capital Mkts. Competitiveness, U.S. Chamber of Commerce, *Strengthening U.S. Capital Markets: A Challenge For All Americans* 13 (2008), *available at* http://www.uschamber.com/reports/strengthening-us-capital-markets-challenge-all-americans; Fin. Servs. Forum, *2007 Global Capital Markets Survey* 1, 6 (2007), *available at* http://crapo.senate.gov/documents/FINAL2007ForumIPOStudy.pdf..

II. THE PURPORTED BENEFITS OF SECURITIES CLASS ACTIONS—COMPENSATION AND DETERRENCE—ARE UNSUBSTANTIATED IN THEORY OR FACT

Compensation of defrauded investors and deterrence of malfeasance in corporate disclosure are the most commonly cited benefits of securities class actions. *See Basic*, 485 U.S. at 231 (describing private civil actions, including class actions, under Rule 10b-5 as "an essential tool for enforcement of the 1934 Act's requirements"). The theoretical and empirical case for each rationale is weak.

A. Securities Class Actions Do Not Efficiently Compensate Defrauded Investors

In securities class actions, long-term institutional investors effectively sue themselves. In light of the substantial legal fees associated with such actions—on the order of 25-35% for plaintiffs, with comparable defense costs, as well—

institutional shareholders consistently lose money on securities class actions, since settlement payments by their portfolio companies generally exceed actual recoveries paid to such shareholders. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 Colum. L. Rev. 1534, 1538 (2006); *see also* Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' and Officers' Liability Insurer*, 95 Geo. L.J. 1795, 1815 n. 95 (2007). Modern portfolio management techniques compound the circularity of class action recoveries, with recoveries "largely paid by diversified shareholders to diversified shareholders [representing] a pocket-shifting wealth transfer that compensates no one in any meaningful sense and [yet] incurs substantial wasteful transaction costs in the process." Comm. on Capital Mkts. Regulation, *Interim Report*, *supra*, at 79.

The situation is similarly perverse with respect to short-term shareholders. With annualized share turnover rate reaching approximately 86% at the end of 2011, *see Facts & Figures*, NYSE Technologies, *available* at http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=tables&key=317&category=3 (last visited Jan. 2, 2014), the decision as to which short-term shareholders may recover and which must pay is "decidedly random." *See* Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration For Stockholder Disputes*,

36 Harv. J.L. & Pub. Pol'y 1187, 1189 (2013). An investor with a diversified portfolio is likely to be on the winning and losing sides of numerous class actions, sometimes receiving a distribution and sometimes paying for another investor's recovery.

Since the passage of the PSLRA, over 3,900 securities class action filings have yielded only 20 trials. Unless dismissed by a court, almost all such actions are settled between the parties, with less than 0.5% of filings resulting in a verdict. Comolli et al., NERA Econ. Consulting, *supra*, at 39. Due in large part to the strong incentives of plaintiffs' attorneys to settle and reap fees without the risk of a trial, studies have shown that plaintiffs generally settle for a small fraction of their "estimated damages," from which sums plaintiffs' attorneys extract their customary fees. *See* Ryan & Simmons, Cornerstone Research, *supra*, at 7-8.

Moreover, net of legal fees, a significant portion of actual settlement amounts is never distributed to class members, whether because such members cannot be located, because they fail to submit claims to the court, or because the costs of distributing relatively trivial amounts would exceed the value of the underlying claim. *See* Kevin M. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, 35.3 Judge's J. 19, 19 (1996). Only 40-60% of potentially eligible shares submitted a claim for distribution in a sample set of settled securities class actions between 2001 and 2008. See Scott & Silverman, *supra*, at 1193. By contrast, the authority of the

SEC to force profit disgorgement in administrative and judicial proceedings and compensate investors by drawing on the "Fair Fund" established under the Sarbanes-Oxley Act of 2002, represents a far more efficient means of making defrauded investors whole. *See id.* at 1195.

B. Securities Class Actions Do Not Contribute Significantly to the Deterrence of Corporate Wrongdoing

The case for the deterrent value of securities class actions is similarly weak. Individuals commit fraud, but corporations—and ultimately their innocent shareholders—are left to pay the cost of the ensuing securities class actions. Indeed, hypothetical future class action settlements and judgments have only an indirect and glancing effect on incumbent management. "Managers seeking short-term profits from stock performance are unlikely to be deterred by the later possibility of class actions whose impact will fall on all stockholders." *Id.* at 1190; *see also* Jonathan M. Karpoff et al., *The Consequences to Managers for Financial Misrepresentation*, 88 J. Fin. Econ. 193 (2008). Over 90% of individuals responsible for corporate wrongdoing ultimately lose their jobs, with the majority being terminated. *Id.* at 194.

Such consequences represent a far stronger deterrent to management than any putative effects of securities class action suits, as any additional quantum of deterrence derived from class actions appears to be relatively trivial. Empirical evidence

suggests that the most significant source of deterrence of management malfeasance is the threat of *disclosure* of wrongdoing, with all the attendant reputational costs, rather than the specter of anticipated litigation. One study found that firms lose approximately 40% of their market value when news of serious corporate misconduct is reported, of which decline only 8.8% is related to anticipated litigation costs. *See* Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. Fin. & Quant. Analysis 581, 582 (2008); *see also* John Armour et al., *Regulatory Sanctions and Reputational Damage in Financial Markets* 10 (Dec. 28, 2011) (unpublished manuscript) (*available at* http://ssrn.com/abstract=1678028).

Moreover, the United States boasts one of the world's most robust public securities fraud enforcement regimes, with the Department of Justice and SEC responsible for criminal and civil enforcement actions, respectively. Since 2009, the SEC has devoted considerably greater resources to its Enforcement Division, and in 2011, the agency filed "735 enforcement actions, an 8.6 percent increase from 2010," obtaining almost $2 billion in penalties and disgorgements. U.S. Sec. & Exch. Comm'n, *FY 2011 Performance And Accountability Report* 2 (2011). In fiscal 2013, the SEC obtained a record $3.4 billion in monetary sanctions (disgorgement and penalties)—a 10% increase over 2012 and 22% higher than in 2011—and filed 686 enforcement actions. Press Release, U.S. Sec. &

Exch. Comm'n, *SEC Announces Enforcement Results for FY 2013* (Dec. 17, 2013), (*available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrDAHE3nbcs). State attorneys general and securities officials also play a significant enforcement role. The SEC's enforcement powers are further enhanced by its close cooperation with other federal and state officials, as well as self-regulatory organizations ("SROs"), referring 586 investigations to SROs or other state, federal, or foreign authorities in fiscal 2011. U.S. Sec. & Exch. Comm'n, *FY 2011 Performance*, *supra*, at 64.

In bringing enforcement actions, public authorities consider a broad array of factors, not merely which cases will bring the largest or speediest payouts to plaintiffs' counsel.[8] "The SEC, for example, carefully considers whether to pursue the corporation (and therefore the stockholders) or just the officials and directors in an individual capacity, recognizing that stockholders bear the brunt of recoveries against corporations." Scott & Silverman, *supra*, at 1199. Critically, where appropriate, the SEC targets individual

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[8] Although some abusive practices have been curtailed by the PSLRA, allegations of "pay-to-play," a *quid pro quo* scheme whereby plaintiffs' firms exchange political campaign contributions for appointment as lead counsel in actions brought by state pension funds, continue to surface. *See, e.g.*, Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, Wall St. Journal, Feb. 3, 2010.

wrongdoers rather than the corporate enterprise, so innocent shareholders do not suffer as they do when companies settle securities class action claims.

Thus, contrary to the four-member majority's assumptions in *Basic*, private class actions are not necessary to protect investors. Government enforcement and individual private actions are more effective at furthering the goals of the 1934 Act and, unlike private class actions, do not impose unnecessary heavy costs on U.S. corporations and innocent shareholders.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to reverse the judgment of the Circuit Court.

Respectfully submitted,

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January 6, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-317

OCT 11 2013

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus Curiae* 1

Introduction and Summary of Arguments 2

Arguments 4

A. The Fifth Circuit's rule effectively makes the *Basic* presumption irrebuttable. 4

B. This Court's *Amgen* decision does not compel the result reached by the Fifth Circuit. 9

C. The Fifth Circuit's rule is inconsistent with expressed Congressional policy regarding securities-fraud class actions. 11

D. The Fifth Circuit's rule is inconsistent with this Court's general class-action jurisprudence 14

Conclusion 15

TABLE OF AUTHORITIES

Cases Page

Amgen, Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 2, 9, 10, 11, 14

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 7, 8, 14

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) .....*passim*

Binder v. Gillespie,
184 F.3d 1059 (9th Cir. 1999) 4

Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.,
368 F.3d 86 (2d Cir. 2004)..... 12

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 13

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 4

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 2

Freeman v. Laventhol & Horwath,
915 F.2d 193 (6th Cir. 1990) 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006) 12

Ockerman v. May Zima & Co.,
27 F.3d 1151 (6th Cir. 1994) 4

Page

Oscar Private Equity Invs. v. Allegiance Telecom, Inc.,
487 F.3d 261 (5th Cir. 2007) 8

Rapanos v. U.S.,
547 U.S. 715 (2006) 13

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,
546 F.3d 196 (2d Cir. 2008) 4

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 12

Thompson v. RelationServe Media, Inc.,
610 F.3d 628 (11th Cir. 2010) 7

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 14

Statutes and Rules

Pub. L. 104-67, 109 Stat. 737
(December 22, 1995) 7

Fed. R. Civ. P. 23(b)(3) ..... *passim*

Other Authorities

144 CONG. REC. E1384-85
(July 22, 1998) 12

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

DRI members have extensive experience litigating securities class actions and have first-hand experience with how rulings from this Court are applied "on the ground" in those cases. DRI filed a brief *amicus curiae* the first time that this case was in this Court.

This case is particularly important to DRI's members because the Fifth Circuit's rule (which differs from the rule in the Third Circuit and the Second Circuit) skews the class-certification balance so far to the plaintiffs' side that defendants will have little or no effective opportunity to rebut the pre-

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* provided timely notice of the intent to file this brief. Consent letters have been filed with the Clerk concurrently with this brief.

sumption of reliance or to defeat class certification.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The first time that this case was in this Court, the issue was whether the Fifth Circuit properly required plaintiffs to prove "loss causation" at the class-certification stage. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011). During oral argument, Justice Scalia suggested that a victory by the plaintiffs on the issue of "loss causation" could be a Pyrrhic one because the Fifth Circuit could reach the same result (finding that a class should not be certified) on the ground that the alleged misrepresentations did not impact the price of Halliburton's stock. That notion makes perfect sense, because price impact is at the very heart of the presumption of reliance that this Court first approved in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). If the alleged misrepresentations did not impact the price of the stock, then there is no basis for the presumption of reliance to attach in the first instance. And in that case, the plaintiffs would fail to meet their burden under Rule 23 to prove in fact that class certification would be proper.

But on remand, the Fifth Circuit held that defendants are not entitled to raise a lack of price impact to rebut the presumption of reliance at the class-certification stage. Pet. App. 19a-20a. The Fifth Circuit reached this result through a misapplication of this Court's ruling in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

The Fifth Circuit's rule turns what was intended to be a *rebuttable* presumption of reliance into an effectively *irrebuttable* presumption. If a securities-fraud suit can survive a motion to dismiss, the Fifth Circuit's approach makes class certification almost a foregone conclusion. And once the class is certified, the sheer aggregation of claims exerts so much settlement pressure that most cases are settled without regard to the merits; they are settled because the defendants simply cannot risk the consequences of an adverse result, even if that adverse result is wrong on the merits. Said another way, otherwise innocent defendants might be forced to settle a case solely because a foreordained procedural result crushes them under the weight of possible liability.

Because of this perverse settlement incentive, the Fifth Circuit's rule raises the specter of strike suits that Congress has tried repeatedly to exorcise, first through the Private Securities Litigation Reform Act of 1995 ("PSLRA") and then through the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").

Moreover, the Fifth Circuit's *laissez-faire* approach to class certification appears to be unique to securities-fraud suits. Although this Court's class-action jurisprudence emphasizes rigorous analysis of Rule 23's requirements and concern for settlement pressure created by unduly permissive class certification, those concerns do not seem to inform decisions in the securities-fraud arena.

To ensure consistency in class-action jurisprudence and to give securities-fraud defendants a realistic opportunity to test the propriety of class

certification, this Court should grant Halliburton's petition and make clear that a defendant can seek to rebut the presumption of reliance at any time—including at the class-certification stage—with evidence that the alleged misrepresentations did not affect the stock price.

ARGUMENTS

A. The Fifth Circuit's rule effectively makes the *Basic* presumption irrebuttable.

Reliance is an essential element of every securities-fraud case. *E.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). But actual reliance is so subjective and individualized that proving it for each member of a putative class can cause individual issues to predominate, precluding class certification. *Basic*, 485 U.S. at 243. Therefore, most securities-fraud plaintiffs seek to invoke a rebuttable presumption of reliance that this Court first approved in *Basic*. *Id.* at 250.[2]

The presumption is based on the hypothesis

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[2] This rebuttable presumption of reliance is sometimes referred to as the "fraud-on-the-market presumption." *E.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 199-200 (2d Cir. 2008); *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1158 (6th Cir. 1994); Pet. App. 7a. But this phrase is a misnomer, because it suggests that the presumption at issue relates to the impact of the alleged misrepresentations on the market. A better short-hand reference is "presumption of reliance" because it more accurately describes what has to be presumed in order to make the requisite causal connection.

that, in an efficient market, the price of a stock reflects all material, publicly available information about the stock. *Id.* at 241-42. Thus, according to the hypothesis, if the stock is traded in an efficient market, it can be presumed that market participants indirectly relied on all material, publicly available information when making decisions to buy or sell. *Id.* This presumption of reliance can then be substituted for evidence of individual reliance, and common issues will predominate over individual issues. *Id.*; *see also* FED. R. CIV. P. 23(b)(3). This rebuttable presumption is therefore a judge-made accommodation—an evidentiary place-holder—that permits securities-fraud plaintiffs to meet the factual burdens necessary to satisfy the standards of Rule 23.

But this accommodation was never intended to be an automatic ticket to class-certification. It is, after all, a *rebuttable* presumption. And as part of its evidentiary review of the class-certification order in *Basic*, this Court recognized that the presumption could be rebutted by "*any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff or his decision to trade at a fair market price." 485 U.S. at 248 (emphasis added). The Court went on to provide examples of the types of evidence that could sever the link:

- evidence that the alleged misrepresentation did not affect the market price;
- evidence that the truth entered the market and dissipated the effect of the misrepresentation; and

- evidence that the plaintiffs acted without relying on the integrity of the market.

Id. at 248-49.

It is significant that the first example of rebuttal evidence is the lack of impact on the stock price and the second example potentially relates to price impact. Price impact is at the very heart of the presumption. If the alleged misrepresentations did not influence or distort the stock price, then there is no basis to presume that the misrepresentations affected decisions to buy or sell. And if there is no basis to make that assumption, then each individual plaintiff will have to offer proof of actual reliance (*i.e.* evidence that each class member knew of and acted based on the alleged misrepresentation). In that case, individual issues of reliance would predominate, and class certification would be improper. *See id.* at 243. Thus, without price impact, there is no justification to permit plaintiffs to obtain class certification.

By refusing to consider lack of price impact at the class-certification stage, the Fifth Circuit has adopted a rule that essentially eliminates the predominance requirement for securities-fraud cases involving nationally traded securities. The Fifth Circuit held that only trade timing, publicity of the alleged misrepresentation, and market efficiency can be challenged at class-certification. Pet. App. 13a. If the case survives a motion to dismiss under the

PSLRA[3], there will most likely be no issues related to trade timing or the publicity of the alleged misrepresentations. And if the stock is traded on a national exchange, then market efficiency will not present much of an issue either. *See, e.g.*, *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 693-94 (11th Cir. 2010) ("Securities traded on NASDAQ are often presumed to be traded on an efficient market."); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (noting that "securities traded in national secondary markets such as the New York Stock Exchange ... are well suited for application of the fraud on the market theory"). Accordingly, the practical effect of the Fifth Circuit's refusal to consider price impact at class-certification is that a securities-fraud suit that survives a motion to dismiss will be certified as a class action as a matter of course, and any required rigorous analysis is transformed into a perfunctory, ministerial act.

Further, it is well-established that a securities-fraud suit certified as a class action will almost certainly be settled before any consideration of the merits. This *in terrorem* effect of class certification has been repeatedly recognized by courts, including this Court. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has observed, the aggregation of claims creates a nearly irresistible pressure to settle:

> [W]hen damages allegedly owed to tens

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[3] Pub. L. 104-67, 109 Stat. 737 (December 22, 1995) (codified in scattered sections of Title 15 and Title 18 of the United States Code).

> of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail ... .

Id. (internal citations omitted). And because of this *in terrorem* effect, delaying rebuttal of the *Basic* presumption to summary judgment or trial means that there will be no rebuttal.

It is also important to understand that this *in terrorem* effect is not limited to large, deep-pocketed corporate defendants. For example, in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the defendants were two individuals who were officers of a bankrupt corporation. 487 F.3d 261, 263 (5th Cir. 2007). And these defendants were individually facing millions of dollars in potential liability. *Id.* at 266-67.

Taken together, these realities mean that, under the Fifth Circuit's rule, any securities-fraud suit involving nationally traded securities that can survive a motion to dismiss will be certified as a class, and then be settled, and the merits will never be reached. Therefore, by delaying defendants' best chance to rebut the *Basic* presumption until summary judgment or trial, the Fifth Circuit has in effect converted what was supposed to be a rebuttable presumption into an irrebuttable presumption.

To suggest that market efficiency *can* be challenged at class-certification, but that price impact—the cornerstone of the theory itself—*cannot* be simply makes no sense from a legal or logical standpoint. This Court should make clear that because price impact is central to the justification for the *Basic* presumption, defendants should be able to use it to sever the link between the alleged misrepresentation and the stock price at the class-certification stage. Plaintiffs should not be permitted to benefit from the *in terrorem* effect of class certification without having to respond to defendants' evidence that goes to the very heart of the presumption on which the plaintiffs rely to meet the requirements of Rule 23(b).

B. This Court's *Amgen* decision does not compel the result reached by the Fifth Circuit.

The Fifth Circuit rejected Halliburton's arguments about rebuttal because the court interpreted this Court's decision in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), to bar rebuttal based on lack of price impact. Pet. App. 19a-20a. But *Amgen* does not compel the Fifth Circuit's result.

As an initial matter, the question in *Amgen* was whether a plaintiff must prove materiality at the class-certification stage to invoke *Basic*'s presumption of reliance. *Amgen*, 133 S. Ct. at 1191. As the Fifth Circuit recognized, price impact is not the same as materiality, so the holding in *Amgen* is not directly on point. Pet. App. 13a-14a. But the Fifth

Circuit concluded that the reasoning in *Amgen* prevents defendants from seeking to disprove price impact at the class-certification stage. *Id.* 19a-20a.

For at least three reasons, *Amgen* should not be stretched to prevent defendants from attacking the central premise of the *Basic* presumption at class certification. *First*, this Court in *Amgen* emphasized that requiring a plaintiff to prove materiality at the class-certification stage would be requiring it to "prove that it will win the fray." 133 S. Ct. at 1191. But in seeking to rebut the presumption with evidence that the alleged misrepresentations did not affect the stock price, defendants are not seeking to prove or disprove the ultimate merits of the case. They are seeking to show that the plaintiffs are not entitled to invoke the presumption of reliance to support their request for class certification. And if reliance cannot be proven on a class-wide basis, then a class action is not the best way to adjudicate the claims. *See id.* ("But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

Second, the existence of price impact is central to the application of the presumption of reliance in a way that materiality is not. The entire presumption turns on price impact. If the stock price does not reflect the alleged misrepresentation, then "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price, and hence no grounding for any contention that investors indirectly relied on those

misrepresentations through their reliance on the integrity of the market price." *Id.* at 1199. Therefore, unlike materiality, the issue of price impact is essential to whether Rule 23(b)'s requirements can be met. *See id.* at 1195 n.4.

Third, unlike a failure of materiality, a failure of price impact does not necessarily eliminate the possibility of actual reliance. *Id.* at 1199. As this Court observed, if the alleged misrepresentations are not material, then none of the plaintiffs could have relied on them. But if the stock price does not reflect the impact of the alleged misrepresentations, it does not mean that no one relied on them in making a decision to buy or sell. Instead, it means that each plaintiff will have to prove that he or she actually relied on the alleged misrepresentations. And that proof will mean that individual issues will predominate over common ones.

Therefore, *Amgen* does not compel the conclusion that defendants cannot rebut the presumption of reliance at the class-certification stage with evidence of lack of price impact.

C. The Fifth Circuit's rule is inconsistent with expressed Congressional policy regarding securities-fraud class actions.

The Fifth Circuit's application of the judge-made presumption of reliance is also inconsistent with the policies expressly adopted by Congress in its securities-fraud statutes. Congress has repeatedly expressed concern about securities "strike suits"—meritless nuisance filings that result in "extortionate settlements," chill disclosures from issuers, and

deter qualified individuals from serving on boards of directors. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

To deter such suits, Congress first enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The purpose of the PSLRA was to raise pleading standards as a check on strike suits. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (PSLRA was adopted "[a]s a check against abusive litigation by private parties"); *Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 98 (2d Cir. 2004) ("The PSLRA was intended to curtail 'strike suits' ... .").

When the PSLRA caused plaintiffs to bring suits in state court rather than attempt to clear the PSLRA's hurdles, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA was intended to stop the shift from federal to state court to ensure that the standards of the PSLRA were not frustrated. *See Dabit*, 547 U.S. at 82; Remarks of Representative Boehner, 144 CONG. REC. E1384-85 (July 22, 1998) ("This bill [SLUSA] would prevent strike suit lawyers from abusing convenient state law ... .").

The Fifth Circuit's rule flies in the face of Congress's expressed concerns about strike suits and intent to stop them. Rather than require rigorous compliance with the prerequisites of Rule 23, the Fifth Circuit's rule makes the Rule 23 bar virtually nonexistent. Now, as discussed above, surviving a motion to dismiss not only means access to discovery, it means the case will likely be certified as a class action and settled because the effect of

aggregated claims will bring to bear settlement pressures that even the most innocent defendants cannot withstand.

Respondents may suggest that Congress has failed to act to curtail the *Basic* presumption and that this Court should defer to that lack of action. But because *Basic* says that this judge-made presumption is rebuttable and because other courts have held that price impact can be addressed at the class-certification stage, it is dangerous to read too much in to Congress's inaction. *See, e.g., Rapanos v. U.S.*, 547 U.S. 715, 750 (2006); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). It is just as likely that Congress has not acted to curtail the *Basic* presumption because, until the Fifth Circuit made the presumption effectively irrebuttable, Congress believed that it would not lead to extortionate settlements. *See Rapanos*, 547 U.S. at 750 (noting that inaction could be explained by Congressional belief that the courts would address any potential issues); *Central Bank*, 511 U.S. at 187 ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction ... .") (internal quotations and citations omitted). But if the Fifth Circuit's rule stands, then plaintiffs will frequently be able to extract such settlements simply by surviving a motion to dismiss.

D. The Fifth Circuit's rule is inconsistent with this Court's general class-action jurisprudence.

The Fifth Circuit's rule also appears to make securities-fraud cases unique among class-actions. This Court has repeatedly reiterated that class-certification requirements must be strictly construed and rigorously analyzed. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring a "rigorous analysis" of the requirements of Rule 23). Moreover, the claim aggregation inherent in class actions creates an *in terrorem* effect on defendant's that courts should not ignore. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). Finally, a rigorous inquiry into the prerequisites of Rule 23 is required even though that inquiry may also overlap with the merits of the claim. *Dukes*, 131 S. Ct. at 2551-52.

In contrast, the Fifth Circuit's rule here actually prevents a rigorous inquiry into the requirements of Rule 23. By prohibiting defendants from challenging price impact, the Fifth Circuit has prohibited a complete inquiry into whether the heart of the presumption of reliance has been satisfied. In fact, the Fifth Circuit's rule permits class certification in the face of evidence that there cannot be class-wide reliance because the alleged misrepresentations did not impact the stock price.

Finally, the Fifth Circuit's overbroad reading of *Amgen* results in a failure to consider price impact because the inquiry also overlaps with the merits of the claim. As discussed above, price impact and materiality affect reliance in different ways. Without

price impact, there can be no presumption of reliance, but individualized reliance may still be possible. The fact that the inquiry into price impact (which is central to the presumption of reliance) may also overlap with the merits should not be the basis of allowing plaintiffs to obtain class certification without meeting the requirements of Rule 23.

CONCLUSION

This Court should grant the petition for a writ of certiorari because the Fifth Circuit's rule turns what was supposed to be a rebuttable presumption into an irrebuttable presumption that virtually guarantees class certification. The promise of the ability to raise price impact at summary-judgment or trial is illusory because the aggregation of claims that results from class certification puts nearly irresistible pressure on defendants to settle.

The Fifth Circuit's rule effectively replaces stringent class-certification requirements with an artificially low bar that applies only to securities-fraud suits. It is a virtual certainty that a securities case based on nationally traded securities will be certified as a class. This effect is contrary to both Congressional policy related to securities-fraud suits and recent decisions of this Court requiring rigorous application of the class-certification standards.

For these reasons, DRI—The Voice of the Defense Bar urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amicus Curiae* 1

Introduction and Summary of Arguments 2

Arguments 3

A. The *Basic* presumption of reliance is supposed to be rebuttable, not conclusive. 3

(1) The presumption of reliance is a judge-made accommodation for securities-fraud suits. 3

(2) Price impact is at the heart of the presumption of reliance. 5

(3) The presumption must be rebuttable to avoid converting the securities laws into a broad insurance scheme for investors. 7

B. By delaying rebuttal, the Fifth Circuit's rule makes the presumption effectively irrebuttable. 8

(1) The Fifth Circuit's approach reduces Rule 23 to a speed bump. 10

(2) The settlement pressure created by class certification ensures that price impact will almost never be addressed. 13

Page

C. The Fifth Circuit's rule is inconsistent with expressed Congressional policy regarding securities-fraud class actions. 15

D. *Amgen* does not require a different result. 17

(1) Price impact is not the same as materiality. 17

(2) Courts should not defer class-certification issues just because they overlap with the ultimate merits. 19

Conclusion 22

TABLE OF AUTHORITIES

Cases **Page**

Amgen, Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 17, 18, 19, 20

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 3, 4

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 13, 14

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) .....*passim*

Binder v. Gillespie,
184 F.3d 1059 (9th Cir. 1999) 4, 12

Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.,
368 F.3d 86 (2d Cir. 2004)..... 15

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989)..... 11, 12

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 16

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 10, 20

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 8, 11

Freeman v. Laventhol & Horwath,
915 F.2d 193 (6th Cir. 1990) 12

Gariety v. Grant Thornton, LLP,
368 F.3d 356 (4th Cir. 2004) 12

Page

Hayes v. Gross,
982 F.2d 104 (3d Cir. 1992) 12

In re Xcelera.com Sec. Litig.,
430 F.3d 503 (1st Cir. 2005) 12

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006) 15, 16

Ockerman v. May Zima & Co.,
27 F.3d 1151 (6th Cir. 1994) 4

Oscar Private Equity Invs. v. Allegiance Telecom, Inc.,
487 F.3d 261 (5th Cir. 2007) 14

Rapanos v. U.S.,
547 U.S. 715 (2006) 16

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,
546 F.3d 196 (2d Cir. 2008) 4, 12

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 15

Thompson v. RelationServe Media, Inc.,
610 F.3d 628 (11th Cir. 2010) 12

Unger v. Amedisys Inc.,
401 F.3d 316 (5th Cir. 2005) 12

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 10, 20

Page

Statute

Pub. L. 104-67, 109 Stat. 737 (December 22, 1995) (codified in scattered sections of Title 15 and Title 18 of the United States Code) 11

Rule

FED. R. CIV. P. 23(b) 3, 4, 9, 18

Legislative Material

144 CONG. REC. E1384-85 (July 22, 1998)..... 16

Additional Authorities

John C. Coffee, *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 141 BNA Daily Labor Report I-1 (2011).....10

Linda S. Mullenix, *Commentary: Class Action Cacophony at the Supreme Court,* NAT'L L.J., April 15, 2013 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the civil-litigation defense. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

DRI members have extensive experience litigating securities class actions and have first-hand experience with how rulings from this Court are applied "on the ground" in those cases. DRI filed a brief *amicus curiae* at the petition for certiorari stage and the first time that this case was in this Court.

This case is particularly important to DRI's members because class certification has become the most important decision point in securities-fraud litigation. Moreover, the Fifth Circuit's rule (which differs from the rule in the Third Circuit and the

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both parties have filed letters with the Clerk giving blanket consent to the filing of *amicus* briefs.

Second Circuit) skews the class-certification balance so far to the plaintiffs' side that defendants will have little or no effective opportunity to rebut the presumption of reliance or to defeat class certification. And once a class is certified, securities-fraud suits almost invariably settle, instead of proceeding to decision on the merits. This imbalance threatens to convert federal securities laws into insurance for investors. The Court should reverse the Fifth Circuit to restore the proper balance.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The presumption of reliance that this Court first approved in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is a judicial modification of the law that would otherwise control the class-certification question for securities-fraud suits. Without that accommodation, class certification would often be impossible. An important part of that accommodation is that the defendant can rebut the presumption of reliance. The Court specifically stated that proof that the alleged misrepresentation did not affect the stock price would sever the link between the alleged misrepresentation and the stock price, and thereby rebut the presumption.

The Fifth Circuit, while acknowledging that the presumption can be rebutted, held that defendants must wait until summary judgment or trial to show that the alleged misrepresentation did not affect the stock price. This approach is inconsistent with the nature of the presumption itself because it permits plaintiffs to obtain the benefits of class certification

without having to address the cornerstone of the presumption that makes class certification possible. It makes little sense to tell defendants that they must wait until after a class is certified and they are faced with the peril of the aggregated claims before they can put on evidence to defeat class certification. Moreover, because of the extreme pressure created by the aggregation of claims, it is unlikely that many (if any) defendants will take that risk. Instead, the overwhelming majority of cases will settle before the merits are reached.

This Court should, therefore, reverse the Fifth Circuit, and, at a minimum, hold that defendants can raise a lack of price impact at the class-certification stage to rebut the presumption of reliance.

ARGUMENTS

A. The *Basic* presumption of reliance is supposed to be rebuttable, not conclusive.

(1) The presumption of reliance is a judge-made accommodation for securities-fraud suits.

Putative class actions cannot be certified under Federal Rule of Civil Procedure 23(b)(3) if individual issues predominate over issues common to the class. FED. R. CIV. P. 23(b); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). In other words, certification is appropriate under Rule 23(b) only where the claims of the class members are "sufficiently cohesive to warrant adjudication by

representation." *Amchem Prods.*, 521 U.S. at 623. Where there are key issues that cannot be resolved on a class-wide basis, certification is not permissible. *Id.* at 624-25 (finding certification of a class of persons exposed to asbestos would be improper because there were too many individualized issues).

In securities-fraud cases under Rule 10b-5 (which must satisfy Rule 23(b)), the fact that reliance is an essential element of the claim would generally make class certification impossible. Proof of reliance would require proof that each class member was aware of the allegedly fraudulent statements and that the class member decided to buy or sell the stock based on the statement. *E.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988). Because individual issues of reliance on the allegedly fraudulent statements would predominate over other issues, class certification would not be proper. *Id.*

To avoid this problem, securities-fraud plaintiffs typically seek to invoke the rebuttable presumption of reliance[2] that this Court first recognized in *Basic*. The presumption substitutes for proof of individual reliance, allowing reliance to be tried on a class-wide

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[2] This rebuttable presumption of reliance is sometimes referred to as the "fraud-on-the-market presumption." *E.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 199-200 (2d Cir. 2008); *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1158 (6th Cir. 1994); Pet. App. 7a. But this phrase is a misnomer, because it suggests that the presumption at issue relates to the impact of the alleged misrepresentations on the market. A better short-hand reference is "presumption of reliance" because it more accurately describes what has to be presumed in order to make the requisite causal connection.

basis and preventing individual issues of reliance from predominating. *Id.* at 242-43.

In approving the presumption of reliance, this Court acknowledged that it was an accommodation for securities-fraud cases. The Court noted that the presumption was a solution to "balancing the substantive requirement of proof of reliance in securities cases against the procedural prerequisite" of Rule 23. *Id.* at 242. Another part of the Court's justification was that Rule 10b-5's reliance requirement needed to reflect the realities of the modern securities market. *Id.* 243-44. Finally, the Court noted that presumptions accommodate issues of fairness, probability, and judicial economy. *Id.* at 245. In short, the presumption of reliance is a judge-made accommodation that enables securities-fraud cases to proceed as class actions.[3]

(2) Price impact is at the heart of the presumption of reliance.

The Fifth Circuit improperly concluded that price impact is not an "element of the fraud-on-the-market theory." Pet. App. 13a. But a proper understanding of the presumption of reliance reveals that price impact (or lack thereof) is the very heart of the presumption and the underlying hypothesis about capital markets.

The presumption of reliance recognized in *Basic*

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[3] The dissent in *Basic* pointed out that the effect of the majority's approach was to change the understanding of reliance for securities-fraud suits. *Id.* at 253-54 (White, J., dissenting).

is founded on the "efficient capital markets" hypothesis. That hypothesis posits that, in an efficient market, the stock price reflects all publicly available information. *Id* at 241-42. Under the efficient capital markets hypothesis, therefore, market participants can be said to *indirectly* rely on publicly available information (even if they are unaware of it) because they make decisions to buy or sell based on the market price. *Id.* at 244.[4]

The heart of the hypothesis is that the stock price is impacted by (*i.e.*, reflects) the alleged misrepresentations. *Id.* Under the hypothesis, the market price is the method by which the market communicates with the investor. *Id.* at 244. Accordingly, it is price impact that allows a presumption that market participants are indirectly relying on publicly available information.

Therefore, if the stock price is not, in fact, affected by the alleged misrepresentation, then the hypothesis underlying the presumption of reliance must fail. And if the hypothesis fails, then there is no basis for a presumption that market participants relied on the statements when making decisions to buy or to sell. *Id.* at 248 (noting that any showing that severs the link between the alleged misrepresentation and the stock price rebuts the presumption of reliance).

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[4] The validity of this hypothesis has come under attack from many quarters. DRI shares the concerns about the continued validity of the hypothesis that have been expressed by Petitioner. (Brief for Petitioners at 14-22.)

(3) The presumption must be rebuttable to avoid converting the securities laws into a broad insurance scheme for investors.

The Court recognized this limitation on the presumption in *Basic* itself; the majority opinion refers to the presumption as "rebuttable" at least ten times. *Id.* at 226, 229, 242, 245, 248, 249 n.28 & n.29, 250. In fact, the majority included the fact that the presumption is rebuttable in its summary list of holdings. *Id.* at 250. The fact that the presumption is rebuttable appears to have been essential to the Court's acceptance of it.

The Court held that the presumption could be rebutted by "*any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff or his decision to trade at a fair market price." *Id.* (emphasis added). Significantly, the Court expressly recognized that the presumption could be rebutted by:

- evidence that the alleged misrepresentation did not affect the market price;
- evidence that the truth entered the market and dissipated the effect of the misrepresentation; and
- evidence that the plaintiffs acted without relying on the integrity of the market.

Id. at 248-49.

The dissent also points out the importance of the opportunity to rebut the presumption. While disagreeing with the majority's decision to accept the presumption, the dissent did give the majority credit for rejecting a "nonrebuttable presumption." *Id.* at 252 (White, J., dissenting). The dissent notes that such a rule would "effectively convert Rule 10b-5 into 'a scheme of investors insurance.'" *Id.* (internal citations omitted); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (noting that the securities laws should not be an insurance scheme for investors).

In sum, the *Basic* presumption must be rebuttable. And price impact is central to the *Basic* presumption, such that absence of price impact undermines any justification for applying the presumption. The only issue, then, is when a defendant may use lack of price impact to rebut the presumption. For the reasons set out below, the Fifth Circuit's rule is inconsistent with both the rationale for the presumption and the "on-the-ground" realities of securities-fraud litigation. Therefore, this Court should reject the Fifth Circuit's approach.

B. By delaying rebuttal, the Fifth Circuit's rule makes the presumption effectively irrebuttable.

Although *Basic* is clear that the presumption must be rebuttable, it does not address *when* the presumption may be rebutted. It stands to reason that if the presumption is rebuttable (which it must be), it must be rebuttable at the time that it is employed by courts to satisfy the requirements of

Rule 23(b). As discussed above, without the presumption, class certification would often be impossible. And allowing plaintiffs to invoke the presumption to obtain class certification without allowing defendants a similar full opportunity to rebut the presumption to avoid class certification is unreasonable.

The Fifth Circuit held that defendants can attempt to rebut some elements of the presumption of reliance at the class-certification stage, such as market efficiency, the publicity of the alleged misrepresentations, and trade timing. Pet. App. 13a. But they cannot raise the lack of price impact. Pet. App. 19a.

As an initial matter, it is illogical to permit indicia of market efficiency to be contested at class-certification while barring evidence that goes to the heart of the presumption: price impact. As discussed above, without price impact, there is no basis for the presumption, regardless of whether the stock trades on an efficient market.

Moreover, requiring defendants to wait until summary-judgment or trial to address price impact effectively makes the presumption irrebuttable. This is true for two interrelated reasons. First, the only issues that the Fifth Circuit's rule permits to be addressed at class-certification are the easiest hurdles for plaintiffs. Second, once the class is certified, the probability of a resolution on the merits (either through summary judgment or trial) approaches zero because the overwhelming majority of cases settle before reaching the merits.

(1) The Fifth Circuit's approach reduces Rule 23 to a speed bump.

First, the Fifth Circuit's rule improperly turns Rule 23 into a speed bump rather than a hurdle. This Court has repeatedly reiterated that class-certification requirements must be strictly construed and rigorously analyzed. *E.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring a "rigorous analysis" of the requirements of Rule 23). Unfortunately, this basic tenet of class-action procedure seems to be occasionally lost in securities-fraud cases. At least two commentators have recently pointed out the apparent disconnect between the rigorous analysis embodied in *Dukes* and *Comcast* and the deference granted to the presumption of reliance. Linda S. Mullenix, *Commentary: Class Action Cacophony at the Supreme Court*, NAT'L L.J., April 15, 2013, at 28; John C. Coffee, *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 141 BNA Daily Labor Report I-1 (2011).[5]

The Fifth Circuit's rule artificially limits the inquiry at the class-certification stage to the issues that present the lowest burden, thereby preventing a rigorous analysis of whether class certification is proper. The Fifth Circuit permits only trade timing, publicity of the alleged misrepresentation, and market efficiency to be challenged by defendants at the

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[5] *Available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/002.authcheckdam.pdf.

class-certification stage. Pet. App. 13a. This half-a-loaf approach implicitly recognizes that rebuttal must be available at the class-certification stage, but incorrectly prevents an inquiry into the heart of the presumption.

The elements of the presumption of reliance that the Fifth Circuit permits defendants to challenge are those that plaintiffs will have the easiest time satisfying. Trade timing and publicity relate to whether the alleged misrepresentations were made publicly and whether the stock trades at issue took place after the alleged misrepresentation and before the truth was revealed. *Basic*, 485 U.S. at 248 n.27.

These issues relate closely to elements of the claim that must be specifically pleaded to survive a motion to dismiss under the Private Securities Litigation Reform Act of 1995. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (noting that the PLSRA requires plaintiffs to specifically plead all elements of a securities-fraud claim). Therefore, if a case survives a motion to dismiss under the PSLRA[6], there will most likely be no issues related to trade timing or the publicity of the alleged misrepresentations.

Moreover, if the stock is traded on a national exchange, then market efficiency will not present much of an issue either. Many courts determine market efficiency by looking at factors identified in *Cammer v. Bloom*, 711 F. Supp. 1264, 1285-87

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[6] Pub. L. 104-67, 109 Stat. 737 (December 22, 1995) (codified in scattered sections of Title 15 and Title 18 of the United States Code).

(D.N.J. 1989). These factors include average weekly trading volume, the number of analysts that follow the stock, the number of market makers, whether the company is entitled to file an S-3 registration statement, and the effect of the release of information on the price of the stock. *Id.*; *see also Hayes v. Gross*, 982 F.2d 104, 107 n.1 (3d Cir. 1992); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 508 (1st Cir. 2005); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004); *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999) (all citing *Cammer* factors with approval).

But for a stock traded on a national exchange, market efficiency is basically presumed. *See, e.g.*, *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 693-94 (11th Cir. 2010) ("Securities traded on NASDAQ are often presumed to be traded on an efficient market."); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (noting that "securities traded in national secondary markets such as the New York Stock Exchange ... are well suited for application of the fraud on the market theory").

Accordingly, the Fifth Circuit's rule prevents a full, rigorous analysis of the propriety of class certification. By prohibiting defendants from challenging price impact, the Fifth Circuit has prohibited an inquiry into the heart of the presumption. The practical effect of the Fifth Circuit's refusal to consider price impact at class-certification is that a securities-fraud suit that survives a motion to dismiss will be

certified as a class action as a matter of course, and any required rigorous analysis is transformed into a perfunctory, ministerial act.

(2) The settlement pressure created by class certification ensures that price impact will almost never be addressed.

Second, securities-fraud cases almost invariably settle if class certification is granted. The high settlement rate is not the result of probabilities of success on the merits of the claims, but on the effect of aggregating of thousands of individual claims. This massive claim aggregation creates an overwhelming pressure to settle, regardless of the merits of the case. The sheer volume of claims and total possible damages amount make any attempt to resolve the claims on the merits untenable from the defendant's perspective.

This *in terrorem* effect of class certification has been repeatedly recognized by courts, including this Court. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has observed, the aggregation of claims creates a nearly irresistible pressure to settle:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk

> of "in terrorem" settlements that class actions entail ... .

Id. (internal citations omitted). That effect is particularly severe in securities-fraud cases, which could involve millions of outstanding shares. And the aggregation of these claims makes it unlikely that any defendant will ever have the opportunity to rebut the presumption of reliance with price-impact evidence.

Moreover, the Court should be aware that these settlement pressures are not limited to large corporate entities. Some securities-fraud suits are brought against individual officers or directors who are on their own because, for example, the entity has filed for bankruptcy protection. For example, in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the defendants were two individuals who were officers of a bankrupt corporation. 487 F.3d 261, 263 (5th Cir. 2007). And these defendants were individually facing millions of dollars in potential liability. *Id.* at 266-67. Although most individual defendants may not face the same type of liability, they still feel pressure to settle. In settlement, individual defendants do not typically admit any liability and usually pay nothing out of pocket because of indemnity agreements with the entity. But an adverse trial result includes the very real possibility that indemnification rights could be cut off, leaving the individual defendants subject to personal damages awards.

Therefore, the ability to raise price-impact evidence at the summary-judgment stage or at trial is largely illusory. The settlement pressure created

by class certification effectively removes the defendant's ability to raise the lack of price impact. It also means that the Fifth Circuit's rule will allow plaintiffs to obtain the benefits of class certification (including the likelihood of settlement) without ever having to address the fact that the alleged misrepresentation did not actually impact the stock price. This Court should not condone such a result.

C. The Fifth Circuit's rule is inconsistent with expressed Congressional policy regarding securities-fraud class actions.

The Fifth Circuit's application of the judge-made presumption of reliance is also inconsistent with the policies expressly adopted by Congress in its securities-fraud statutes. Congress has repeatedly expressed concern about securities "strike suits"—meritless nuisance filings that result in "extortionate settlements," chill disclosures from issuers, and deter qualified individuals from serving on boards of directors. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

To deter such suits, Congress first enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The purpose of the PSLRA was to raise pleading standards as a check on strike suits. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (PSLRA was adopted "[a]s a check against abusive litigation by private parties"); *Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 98 (2d Cir. 2004) ("The PSLRA was intended to curtail 'strike suits' ... .").

When the PSLRA caused plaintiffs to bring suits

in state court rather than attempt to clear the PSLRA's hurdles, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA was intended to stop the shift from federal to state court to ensure that the standards of the PSLRA were not frustrated. *See Dabit*, 547 U.S. at 82; Remarks of Representative Boehner, 144 CONG. REC. E1384-85 (July 22, 1998) ("This bill [SLUSA] would prevent strike suit lawyers from abusing convenient state law ... .").

The Fifth Circuit's rule flies in the face of Congress's expressed concerns about strike suits and intent to stop them. Rather than require rigorous compliance with the prerequisites of Rule 23, the Fifth Circuit's rule makes the Rule 23 bar virtually nonexistent. Now, as discussed above, surviving a motion to dismiss not only means access to discovery, it means the case will likely be certified as a class action and settled because the effect of aggregated claims will bring to bear settlement pressures that even the most innocent defendants cannot withstand.[7]

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[7] Respondents may suggest that this Court should defer to the fact that Congress has not modified the *Basic* presumption. Reliance on Congressional inaction is particularly dangerous. *See, e.g., Rapanos v. U.S.*, 547 U.S. 715, 750 (2006) (noting that inaction could be explained by Congressional belief that the courts would address any potential issues); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction ... .") (internal quotations and citations omitted). But if the Fifth Circuit's rule stands, then plaintiffs will frequently be able to extract such settlements

D. *Amgen* does not require a different result.

The Fifth Circuit found (and the Respondent will likely argue) that rebuttal of price impact is not permissible in light of this Court's opinion in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). The Fifth Circuit acknowledged that *Amgen* does not address price-impact evidence. Pet. App. 16a. But the court found that the reasoning in *Amgen* regarding evidence of materiality precludes consideration of price-impact evidence. Pet. App. 19a. But there are key differences between materiality and price impact that the Fifth Circuit did not consider. Moreover, the Fifth Circuit's rule ignores a basic rule of class-action jurisprudence: rigorous analysis of class-certification issues cannot be deferred simply because those issues overlap with the ultimate merits of the dispute. Therefore, the Fifth Circuit erred in concluding that *Amgen* does not permit consideration of price impact at the class-certification stage.

(1) Price impact is not the same as materiality.

The Fifth Circuit reasoned that price impact need not be addressed at the class-certification stage for the same reasons that materiality need not be addressed. Pet. App. 16a-19a. But there are key dif-

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simply by surviving a motion to dismiss. Moreover, Congress cannot possibly have acquiesced to the Fifth Circuit's approach, because no court had held that price impact cannot be addressed at the class-certification stage at the time PSLRA and SLUSA were adopted.

ferences between price impact and materiality, and these differences reveal why this Court's approach to materiality in *Amgen* should not control the approach to price impact.

First, this Court in *Amgen* emphasized that requiring a plaintiff to prove materiality at the class-certification stage would be requiring it to "prove that it will win the fray." 133 S. Ct. at 1191. But in seeking to rebut the presumption of reliance with evidence that the alleged misrepresentations did not affect the stock price, defendants are not seeking to prove or disprove the ultimate merits of the case. They are seeking to show that the plaintiffs are not entitled to invoke the presumption of reliance to support their request for class certification. And (as discussed above) if reliance cannot be proven on a class-wide basis, then a class action is not the best way to adjudicate the claims. Thus, inquiry into price impact relates to the propriety of class certification, not the ultimate merits of the case. *See id.* ("But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

Second, unlike materiality, the issue of price impact is essential to whether Rule 23(b)'s requirements can be met. *See id.* at 1195 n.4. As discussed above, price impact is the heart of the entire presumption. If the stock price does not reflect the alleged misrepresentation, then "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price, and hence no grounding for any contention

that investors indirectly relied on those misrepresentations through their reliance on the integrity of the market price." *Id.* at 1199. Therefore, if the defendant can sever the link between the alleged misrepresentation and the price of the stock by showing a lack of price impact, there is no justification for certifying a class.

Third, unlike a failure of materiality, a failure of price impact does not necessarily eliminate the possibility of actual reliance. *Id.* at 1199. As this Court observed in *Amgen*, if the alleged misrepresentations are not material, then none of the plaintiffs could have relied on them. But if the stock price does not reflect the impact of the alleged misrepresentations, it does not mean that no one relied on them in making a decision to buy or sell. Instead, it means that each plaintiff will have to prove that he or she actually relied on the alleged misrepresentations. And that proof will mean that individual issues will predominate over common ones.

Because of these key differences between materiality and price impact, the Fifth Circuit incorrectly concluded that the rationale of *Amgen* should determine whether price impact can be considered at the class-certification stage.

(2) Courts should not defer class-certification issues just because they overlap with the ultimate merits.

The Fifth Circuit refusal to consider price impact also runs afoul of this Court's repeated instruction that rigorous analysis cannot be avoided simply because the inquiry overlaps with the merits. *E.g.*,

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (holding that proper analysis of Rule 23(b) will "frequently" overlap with the merits); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."). This Court's opinion in *Amgen* did not overrule that instruction. To the contrary, the Court recognized that inquiry into the merits is proper to the extent that it is relevant to determining whether the requirements of Rule 23 have been met. *Amgen*, 133 S. Ct. at 1195.

The Fifth Circuit held that proving lack of price impact would require proving lack of loss causation. Pet. App. 17a-18a. And because this relates directly to the ultimate merits, the Fifth Circuit concluded that consideration of price impact is not proper at the class-certification stage. *Id.* But this approach misconstrues *Amgen*.

It is true that this Court in *Amgen* rejected consideration of materiality in part because such consideration would be too deep an inquiry into the merits of the case. *Amgen*, 133 S. Ct at 1195-96. But the Court's concerns about materiality are simply not present in the inquiry into price impact. As discussed above, price impact is central to the presumption of reliance in a way that materiality is not. If the alleged misrepresentation affected the stock price, then there is an arguable basis for presuming reliance, even if the statement is later shown to be immaterial. In that instance, a class can be certified based on the presumption, and materiality can be addressed on a class-wide basis. Conversely, if the

alleged misrepresentation did not have any price impact, then there is no reason to presume any reliance and, consequently, no basis to certify a class.

The Fifth Circuit's analysis drifted into the irrelevant realm of the possible motivations for Halliburton to try to disprove price impact. Pet. App. 13a-14a. But this reasoning misses the point. Without price impact, there is no basis for the presumption in the first place and therefore no basis to find that Rule 23 is satisfied. The fact that lack of price impact may also relate to other issues should not prevent its consideration in the context of the requirements of Rule 23.

In sum, this Court has been clear that rigorous analysis of the requirements of Rule 23 cannot be avoided just because the issues happen to overlap with the merits. In *Amgen* the Court concluded that inquiry into materiality was not necessary to determine whether the requirements of Rule 23 were met. But price impact is different. Without price impact, the very heart of the hypothesis underlying the presumption of reliance fails. Without that underlying hypothesis, there is no basis to presume that market participants indirectly relied on the stock price. And without that presumption, individual issues of reliance must predominate over common issues and a class cannot be certified. Therefore, defendants should not have to wait until summary judgment or trial to disprove price impact and defeat class certification.

CONCLUSION

DRI—The Voice of the Defense Bar respectfully requests that the Court reverse the Fifth Circuit's judgment and, at a minimum, hold that defendants can raise the lack of price impact to rebut the presumption of reliance at the class-certification stage.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

HALLIBURTON CO. ET AL., PETITIONERS,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR FORMER MEMBERS OF CONGRESS, SENIOR SEC OFFICIALS, AND CONGRESSIONAL COUNSEL AS AMICI CURIAE SUPPORTING NEITHER PARTY

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TABLE OF CONTENTS

Page

Interest of amici curiae 1

Summary of argument 2

Argument 3

In the PSLRA, the 104th Congress did not express any view on the *Basic* presumption of classwide reliance 3

A. The PSLRA does not address the *Basic* presumption 5

1. The House of Representatives initially voted to codify a form of the *Basic* presumption 6

2. The Senate bill did not address the *Basic* presumption at all 11

3. A bicameral supermajority adopted the Conference Report, which did not refer to the *Basic* presumption, over President Clinton's veto 14

B. The PSLRA does not represent acquiescence in the *Basic* presumption 18

Conclusion 26

List of amici curiae 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*,
532 U.S. 275 (2001) 19

Amgen Inc. v. *Connecticut Retirement Plans & Trust Funds*,
133 S. Ct. 1184 (2013) 1, 2, 5, 21

Astrue v. *Ratliff*,
130 S. Ct. 2521 (2010) 21

Basic Inc. v. *Levinson*,
485 U.S. 224 (1988) ..... *passim*

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) 25

Bob Jones University v. *United States*,
461 U.S. 574 (1983) 20

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*,
511 U.S. 164 (1994) 18, 19, 22, 23

Dura Pharmaceuticals, Inc. v. *Broudo*,
544 U.S. 336 (2005) 21

Ernst & Ernst v. *Hochfelder*,
425 U.S. 185 (1976) 24

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 20

Helvering v. *Hallock*,
309 U.S. 106 (1940) 18

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*,
547 U.S. 71 (2006) 3, 4

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989) 20, 21

Cases—Continued:

Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 18

Rapanos v. *United States*, 547 U.S. 715 (2006) 19

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 18, 19, 20, 26

Stoneridge Investment Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 22, 25

Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) 3, 24

United States v. *Wells*, 519 U.S. 482 (1997) 18

Statutes, regulation, and rule:

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ..... *passim*

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 6

15 U.S.C. 78t(e) 22

15 U.S.C. 78u-4(b)(2)(A) 24

17 C.F.R. 240.10b-5 ..... 21, 25

S. Ct. R. 37.6 1

Miscellaneous:

141 Cong. Rec.:

E2437 (daily ed. Dec. 21, 1995) 16

H2760 (daily ed. Mar. 7, 1995) 10

H2863-H2864 (daily ed. Mar. 8, 1995) 11

Miscellaneous—Continued:

H10690 (daily ed. Oct. 24, 1995) 15
H14055 (daily ed. Dec. 6, 1995) 15
H15216 (daily ed. Dec. 20, 1995) 16
H15217 (daily ed. Dec. 20, 1995) 16
H15219 (daily ed. Dec. 20, 1995) 16
H15223 (daily ed. Dec. 20, 1995) 16
S1078 (daily ed. Jan. 18, 1995) 13
S17362 (daily ed. Nov. 17, 1995) 15
S17997 (daily ed. Dec. 5, 1995) 15
S19149 (daily ed. Dec. 22, 1995) 17
S19150 (daily ed. Dec. 22, 1995) 16, 17
S19153 (daily ed. Dec. 22, 1995) 17, 22
S19180 (daily ed. Dec. 22, 1995) 17
S9219-S9226 (daily ed. June 28, 1995) 14

Brief for the United States as Amicus Curiae Supporting Petitioners, *Dura Pharmaceuticals Inc.* v. *Broudo*, (No. 03-932) 21

Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecomms. and Finance of H. Comm. on Commerce, 104th Cong., 1st Sess. (1995) 7

H.R. 10, 104th Cong., 1st Sess. (1995) 24

H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (1995) 15

H.R. Doc. No. 150, 104th Cong., 1st Sess. (1995) 15, 16

H.R. Rep. No. 50, 104th Cong., 1st Sess. (1995) 9

S. 240, 104th Cong., 1st Sess. (1995) 11, 12, 13, 14

S. 667, 104th Cong., 1st Sess. (1995) 12

S. Rep. No. 98, 104th Cong., 1st Sess. (1995) 14

Securities Litigation Reform Proposals: Hearings on S. 240 Before the Subcomm. on Securities of S. Comm. on Banking, Housing, and Urban Affairs, 104th Cong., 1st Sess. (1995) 11, 12

Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to H.R. 10 Offered By Mr. Deutsch of Florida* (Comm. Print 1995) 9, 10

Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to Title II of H.R. 10* (Comm. Print 1995) 7, 8

BRIEF FOR FORMER MEMBERS OF CONGRESS, SENIOR SEC OFFICIALS, AND CONGRESSIONAL COUNSEL AS AMICI CURIAE SUPPORTING NEITHER PARTY

INTEREST OF AMICI CURIAE

Amici are former Members of Congress, senior officials at the Securities and Exchange Commission (SEC or Commission), and congressional counsel who were intimately involved in the drafting and passage of the Private Securities Litigation Reform Act of 1995 (PSLRA or Act), Pub. L. No. 104-67, 109 Stat. 737.[1] As reflected in its text and legislative history, the PSLRA does not address the element of reliance in private securities-fraud litigation, and this Court therefore should not consider Congress to have acquiesced in the fraud-on-the-market presumption of classwide reliance adopted by this Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988).

In *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), this Court briefly touched on the fact that the PSLRA does not address reliance in a private securities-fraud suit. Based on a small portion of the Act's extensive legislative history, the Court read into the Act a congressional "reject[ion]" of "calls to undo the fraud-on-the-market presumption." *Id.* at 1200. In making that observation, however, the Court did not have before it the

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

PSLRA's full legislative history, which had not been briefed by the *Amgen* parties or their amici. As a complete recounting of that history makes clear, Congress did not codify, modify, or repeal the *Basic* presumption in the PSLRA. Rather, in enacting the PSLRA over President Clinton's veto, a supermajority of the 104th Congress simply left the fate of that judicially-created presumption to a future Congress or this Court. Amici thus take no position here on the merits of this case and the continued viability of the *Basic* presumption. Amici's lone interest is in having the Court decide those issues free from the mistaken notion that Congress endorsed the fraud-on-the-market theory in the PSLRA.

SUMMARY OF ARGUMENT

A. The text of the PSLRA is silent with respect to the element of reliance in a private securities-fraud suit. The House of Representatives initially considered undoing *Basic's* presumption of classwide reliance. It then voted to permit plaintiffs to invoke a presumption of classwide reliance if they could show that the market as a whole considered the fraudulent statement and that reliance on the market price was reasonable. By contrast, the Senate never voted on any aspect of reliance at all; the Senate version of the bill said nothing about *Basic*'s presumption or its fraud-on-the-market theory. A supermajority of both Houses of Congress then passed the Conference Report—which, like the Senate bill, did not address the reliance issue—over President Clinton's veto. As that legislative history demonstrates, Congress did not answer any of the competing calls to overturn, modify, or codify the *Basic* presumption. Congress was simply silent in response to those various requests, and

this Court should not take Congress's silence as implicit acceptance or rejection of *Basic's* fraud-on-the-market theory.

B. This Court has repeatedly cautioned against relying on legislative inaction as evidence of acquiescence. That caution is especially warranted here. Because the Conference Report was silent on reliance in the face of many varying proposals, Congress as a whole never considered whether to overturn, modify, or codify the *Basic* presumption. In addition, the PSLRA was passed by a narrow supermajority in the Senate. It was not possible in that situation for Congress to speak to any and all issues related to private securities-fraud litigation. As one prominent example, Congress also did not address certain important aspects of the element of scienter. The 104th Congress left the resolution of those issues to a future Congress or this Court. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-322 (2007) (noting that Congress did not define the "strong inference" standard for scienter). If anything, it was particularly reasonable for Congress not to resolve the debate over the *Basic* presumption, as that doctrine originated with this Court rather than Congress.

ARGUMENT

IN THE PSLRA, THE 104TH CONGRESS DID NOT EXPRESS ANY VIEW ON THE *BASIC* PRESUMPTION OF CLASSWIDE RELIANCE

In the early 1990s, many Members of Congress from both parties became increasingly concerned about abusive practices in private securities-fraud litigation. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81-82 (2006). The PSLRA was Congress's response to those perceived

abuses. That Act, like many major bipartisan pieces of legislation, addresses certain issues without purporting to cover the entire waterfront. For instance, the Act imposes heightened pleading requirements for securities-fraud actions, specifies the process for appointing the lead plaintiff and counsel, provides a safe harbor for forward-looking statements, stays discovery pending motions to dismiss, limits recoverable damages and attorney's fees, and mandates the imposition of sanctions for frivolous litigation. See *Dabit*, 547 U.S. at 81-82. At the same time, however, the PSLRA is silent on a number of related issues that were raised by individual Senators or Representatives, the SEC, or other parties during the legislative process—including whether to endorse or reject the *Basic* presumption of classwide reliance.

Amici were intimately involved with the PSLRA's drafting and passage in their capacity as Members of Congress, senior SEC officials, and congressional counsel. Indeed, one of the amici, former Senator Alfonse D'Amato, chaired the Senate Banking Committee, introduced the Senate version of the bill that eventually became the PSLRA, and chaired the Conference Committee. Another of the amici, former Representative Christopher Cox, was the principal author of the House version of the bill. As central figures in the PSLRA's passage, amici are concerned that the Act not be misconstrued as an implicit endorsement of the *Basic* presumption. In fact, from January to December 1995, as both Houses of Congress debated what became the PSLRA, there were multiple competing bills and amendments that ran the gamut from undoing *Basic*, to modifying its presumption, to endorsing that presumption.

In the end, the 104th Congress as a whole did not vote on any of those options. Instead, the PSLRA's managers elected not to address the *Basic* presumption (and many other issues surrounding private securities-fraud litigation) because the Act had to be passed over President Clinton's veto by a bipartisan supermajority. Making any statement on *Basic*—whether endorsing or rejecting it—could have affected the bill's ability to garner the necessary supermajority in both chambers. Thus, the legislation that was reported by the Conference Committee and adopted by the Representatives and Senators of the 104th Congress is silent on the *Basic* presumption, leaving its fate to a future Congress or this Court. Accordingly, there is no basis for treating the PSLRA's silence as tantamount to congressional approval or disapproval. Finding such acquiescence would seriously misread the legislative history and disregard the legislative process.

A. The PSLRA Does Not Address The *Basic* Presumption

Although it speaks directly to certain elements of the implied private right of action for securities fraud, the PSLRA says nothing about the element of reliance. Recently in *Amgen*, this Court briefly discussed a small portion of the PSLRA's legislative history, which it characterized as a "reject[ion]" of "calls to undo the fraud-on-the-market presumption of class-wide reliance endorsed in *Basic*." 133 S. Ct. at 1200. But the full legislative history of the PSLRA was not placed before this Court by the parties or their amici in *Amgen*. As a complete recounting of that history confirms, it may be equally said that Congress rejected calls to codify *Basic*. But either interpretation

would overstate the extent to which the entire Congress actually addressed the element of reliance.

1. The House of Representatives initially voted to codify a form of the *Basic* presumption

The PSLRA's progress through the House of Representatives demonstrates the varying views of Members with respect to whether to overturn, modify, or codify the *Basic* presumption.

a. *The initial version of H.R. 10.* In January 1995, the Securities Litigation Reform Act, H.R. 10, was introduced in the House of Representatives. Title II of that bill proposed substantial changes to the rules governing private securities-fraud litigation. As relevant here, H.R. 10 would have inserted a new Section 10A into the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, providing that in any private securities-fraud action "based upon a material misstatement or omission concerning a security, the plaintiff must prove that he or she had actual knowledge of and actually relied on such statement in connection with the purchase or sale of a security." H.R. 10, 104th Cong. § 204 (as introduced on Jan. 4, 1995). By its terms, that initial version of Section 10A would have replaced *Basic's* presumption of classwide reliance with a requirement that plaintiffs prove they were in fact aware of a company's misstatement and purchased or sold their securities based on that specific misrepresentation.

b. *The amended version of H.R. 10.* In January and February 1995, H.R. 10's proposed actual-reliance requirement was debated in hearings before the Subcommittee on Telecommunications and Finance. Supporters of such a requirement testified

that *Basic* was premised on flawed economic theory; that plaintiffs in securities-fraud actions should be required to prove reliance in the same way as other fraud plaintiffs; and that requiring actual reliance would not put an end to securities class actions. See *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecomms. and Finance of H. Comm. on Commerce*, 104th Cong., 1st Sess. 236-237, 251-252, 320-321 (1995). By contrast, opponents testified that *Basic* was premised on sound economics; that securities-fraud plaintiffs should be treated differently because they seldom interacted directly with sellers; and that requiring proof of direct reliance would effectively eliminate securities class actions. *Id.* at 56, 203, 211-212, 242-243.

In mid-February 1995, the Telecommunications and Finance Subcommittee met in an open markup session and made several revisions to H.R. 10, including to Section 10A's reliance requirement. As amended, Section 10A would have codified a version of the fraud-on-the-market theory. See Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to Title II of H.R. 10*, at 18-19 (Comm. Print Feb. 14, 1995) (Feb. Comm. Print). In fraud-on-the-market cases, a plaintiff could prove reliance "by establishing that the market as a whole considered the fraudulent statement, that the price at which the security was purchased or sold reflected the market's estimation of that fraudulent information, and that the plaintiff relied on that market price." *Id.* at 19.[2] If a plaintiff could adduce "proof that the mar-

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[2] A plaintiff could prove that "the market as a whole considered the fraudulent statement" using evidence that the statement "was published in publicly available research reports by analysts of such

ket as a whole considered the fraudulent statement," then he would be "entitled to a rebuttable presumption that the price at which the security was purchased or sold reflected the market's estimation of that fraudulent statement and that the plaintiff relied on such market price." *Id.* at 20.

The amended version of H.R. 10 thus would have codified a form of the *Basic* presumption. A plaintiff could invoke the presumption, however, only if the security at issue was part of a national securities exchange and if it was "[]reasonable to rely on market price." Feb. Comm. Print 21-22. The factors in determining reasonableness were "[t]he weekly trading volume of any class of securities of the issuer"; "[t]he existence of public reports by securities analysts concerning any class of securities of the issuer"; "[t]he eligibility of the issuer * * * to incorporate by reference [certain registration statements]"; and "[a] history of immediate movement of the price of any class of securities of the issuer caused by the public dissemination of information regarding unexpected corporate events or financial releases." *Ibid.* In addition, the presumption was rebuttable by evidence that "the market as a whole considered other information that corrected the allegedly fraudulent statement" or "the plaintiff possessed such corrective information

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security"; "was the subject of news articles"; "was delivered orally at public meetings by officers of the issuer, or its agents"; "was specifically considered by ratings agencies in their published reports"; or "was otherwise made publicly available to the market in a manner that was likely to bring it to the attention of, and to be considered as credible by, other active participants in the market for such security." Feb. Comm. Print 19-20.

prior to the purchase or sale of the security." *Id.* at 20.

c. *The debate over H.R. 10 as amended.* Three days after the Subcommittee meeting, the full Committee on Commerce met in an open markup session to further consider the bill. One of the proposed amendments, offered by Representative Peter Deutsch (D-FL), would have given the SEC rulemaking authority to define "markets that are not sufficiently active and liquid to justify" reliance on the market price. See Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to H.R. 10 Offered By Mr. Deutsch of Florida*, at 1 (Comm. Print Feb. 16, 1995). In exercising that authority, the SEC would have been required to consider the four factors for reasonableness discussed above, as well as "whether the issuer and its securities are regularly reviewed by two or more analysts." *Ibid.* Representative Deutsch's proposal was defeated by a party-line vote of 24-21. See H.R. Rep. No. 50, 104th Cong., 1st Sess. 29 (1995).

A week later on February 24, the Committee on Commerce reported the bill to the House with a Committee Report and a recommendation that the bill pass. In a dissent to that recommendation in the Committee Report, a group of 12 Democratic Representatives, supported by the SEC, expressed their appreciation that the amended reliance provision no longer completely dispensed with the *Basic* presumption but instead preserved it in some form. See H.R. Rep. No. 50, 104th Cong., 1st Sess. 44, 65-66 (1995). Those Democratic Representatives nevertheless objected to the amended provision on various grounds, among them that a plaintiff could only invoke the fraud-on-the-market presumption if his security was

part of a national securities exchange. See *id.* at 44, 66. The Representatives suggested that the House delegate rulemaking authority to the SEC to decide "when the fraud on the market theory should be available." *Id.* at 66.

d. *The passage of H.R. 1058.* On February 27, Committee of Commerce Chairman Tom Bliley (R-VA)—on behalf of himself and Representatives Christopher Cox (R-CA), Jack Fields (R-TX), and Billy Tauzin (D-LA)—introduced H.R. 1058 in the House. That bill contained the amended reliance provision codifying a form of the *Basic* presumption.[3] See 141 Cong. Rec. H2760 (daily ed. Mar. 7, 1995) (statement of Chairman Bliley) (noting that the bill would preserve "the principle of 'fraud on the market' by removing the obligation in H.R. 10 to prove reliance in each instance of misrepresentation"). Chairman Bliley observed that H.R. 1058 was the product of "months of intensive negotiations" and that "major changes" had been made "during the committee drafting process," including to the reliance provision. *Ibid.* He also disagreed with minority objections that the reliance provision was insufficient: "Members who seek to apply fraud on the market to all securities and not just those with liquid markets do not understand the legal principle and economic theories that underl[ie] the legislation." *Ibid.*

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[3] H.R. 10 was divided into three separate bills: H.R. 956, H.R. 988, and H.R. 1058. H.R. 1058 contained the portion of H.R. 10 concerning securities litigation reform, and the version that Chairman Bliley introduced in the House was substantively identical to the one that the Committee of Commerce had referred to the House days earlier.

On March 8, 1995, the House of Representatives passed H.R. 1058 by a vote of 325 to 99. See 141 Cong. Rec. H2863-H2864 (daily ed. Mar. 8, 1995). Republican Members voted for the bill 226 to 0; Democratic Members voted for the bill 99 to 98; and the one Independent Member voted against it.

2. The Senate bill did not address the *Basic* presumption at all

a. *The introduction of S. 240 and S. 667.* In January 1995, while the House was considering H.R. 10, Senators Pete Domenici (R-NM) and Chris Dodd (D-CT) introduced S. 240, the Private Securities Litigation Reform Act. Unlike the original House bill, S. 240 did not explicitly address whether plaintiffs in securities fraud actions were required to prove actual reliance. But the bill implicitly suggested that they were not required to do so in provisions focused on loss causation and damages. The bill provided in relevant part that

> [i]n an implied private action arising under this title based on a material misstatement or omission concerning a security, and in which the plaintiff claims to have bought or sold the security *based on a reasonable belief that the market value of the security reflected all publicly available information*, the plaintiff shall have the burden of proving that the misstatement or omission caused any loss incurred by the plaintiff.

S. 240, 104th Cong., 1st Sess. § 104 (as introduced on Jan. 18, 1995) (emphasis added); see *ibid.* (same; damages provision). Thus, although not dealing directly with reliance, the loss-causation and damages provisions in S. 240 alluded to the fact that a plaintiff could claim to have bought or sold the security at is-

sue "based on a reasonable belief that the market value of the security reflected all publicly available information." *Ibid.*

In April 1995, after the House had passed H.R. 1058, Senators Richard Shelby (R-AL) and Richard Bryan (D-NV) introduced S. 667, the Private Securities Enforcement Improvements Act of 1995. Like Representative Deutsch's proposal in the House, S. 667 would have provided the SEC with rulemaking authority to "define the circumstances in which it is and is not appropriate for reliance to be presumed under the fraud on the market theory." S. 667, 104th Cong., 1st Sess. § 103 (1995). In exercising that authority, the SEC would have been required to consider the same factors as under Representative Deutsch's proposal, along with "any other factors determined by the Commission to be appropriate." *Ibid.*

In March and April 1995, the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs held hearings on securities litigation reform. Several witnesses testified in support of limiting or abolishing the fraud-on-the-market theory. See, *e.g.*, *Securities Litigation Reform Proposals: Hearings on S. 240 Before the Subcomm. on Securities of S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 12 (1995) (*S. 240 Hearings*) (opening statement of Marc E. Lackritz, President, Securities Industry Association) ("The fraud-on-the-market theory affords the best vehicle for alleging the sort of astronomical damages most likely to coerce a settlement."); *id.* at 45 (same; prepared statement) ("Another step which deserves consideration is limiting or abolishing the fraud-on-the-market theory."); *id.* at 288 (letter from Michael L. Darland, President and CEO of Digital Systems International, Inc.)

("I would urge that * * * the legislature overrule or significantly limit the court[-]created 'fraud on the market' theory.").

Other witnesses contended that the Senate should preserve or at least not disturb the fraud-on-the-market theory. See, *e.g.*, *S. 240 Hearings* 216 (prepared statement of Mark J. Griffin, Director, Division of Securities, Utah Department of Commerce) (arguing in support of the fraud-on-the-market theory); *id.* at 355 (analysis by National Association of Securities and Commercial Law Attorneys) ("H.R. 1058 purports partially to codify fraud-on-the-market, but it actually sets up a highly burdensome and complex standard that bears little or no resemblance to the principle as applied in the courts."); *ibid.* ("S. 240 also fails sufficiently to provide for the availability of the fraud-on-the-market theory."); *id.* at 365 (report by committees of the Association of the Bar of the City of New York) ("Any codification of the fraud on the market theory should follow the present case law."); see also *id.* at 136, 191, 220, 362-365.

b. *The passage of substitute S. 240.* About six weeks after the Securities Subcommittee hearings, Senate Banking Committee Chairman D'Amato proposed a substitute version of S. 240, and three days later the Committee held a markup session to consider that substitute version. Chairman D'Amato's substitute version made substantial changes to the provisions of S. 240 concerning loss causation and damages. In the new version of the bill, those provisions no longer assumed the validity or availability of the fraud-on-the market theory in securities-fraud cases.[4]

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[4] Compare 141 Cong. Rec. S1078 (daily ed. Jan. 18, 1995) (referring to a "private action * * * in which the plaintiff claims to have

As a result, the substitute version of S. 240 did not address in any way the fraud-on-the-market theory, thereby omitting from the draft legislation a point on which various Members of Congress and witnesses had disagreed. See S. Rep. No. 98, 104th Cong., 1st Sess. 26 (as reported by the S. Banking Comm. on June 19, 1995) (discussing the requirements for securities-fraud actions and not addressing reliance). By a vote of 11 to 4, a bipartisan majority of the Committee reported the substitute version of S. 240 to the Senate with a recommendation that the bill pass.

About a month later, in June 1995, the Senate passed an amended version of H.R. 1058 by a vote of 69 to 30. The amendment replaced the entirety of the House bill with the text of Chairman D'Amato's substitute version of S. 240, which contained no reference to *Basic's* fraud-on-the-market theory. See 141 Cong. Rec. S9219-S9226 (daily ed. June 28, 1995). Republican Members voted for the bill 49 to 4, and Democratic Members voted for the bill 20 to 26.

3. A bicameral supermajority adopted the Conference Report, which did not refer to the *Basic* presumption, over President Clinton's veto

a. *Adoption of the Senate version.* In October 1995, the House of Representatives voted to send H.R. 1058 to a Conference Committee to reconcile the different House and Senate versions of the proposed legislation. The House appointed six Republican

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bought or sold the security based on a reasonable belief that the market value of the security reflected all publicly available information"), with 141 Cong. Rec. S9222 (daily ed. June 28, 1995) (referring simply to "any private action arising under this title").

Members (Representatives Bliley, Cox, Fields, Hyde, McCollum, and White) and six Democratic Members (Representatives Bryant, Conyers, Dingell, Eshoo, Markey, and Tauzin). See 141 Cong. Rec. H10690 (daily ed. Oct. 24, 1995). The Senate appointed five Republican Members (Senators Bennett, D'Amato, Domenici, Gramm, and Grams) and four Democratic Members (Senators Bryan, Dodd, Kerry, and Sarbanes). See *id.* at S17362 (daily ed. Nov. 17, 1995).

In November, the Committee returned the completed Conference Report to the House and Senate for final approval. See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (1995). The Conference Report—like the Senate's version of H.R. 1058—was silent on the fraud-on-the-market theory. It did not address whether or under what circumstances plaintiffs could rely on the theory to establish reliance. See *ibid.* Moreover, nothing in the Conference Report assumed the validity of, or in any way depended upon the availability of, the *Basic* presumption.

In early December 1995, the House passed the Conference Report version of H.R. 1058 by a vote of 320 to 102, and the Senate did the same by a vote of 65 to 30. See 141 Cong. Rec. H14055 (daily ed. Dec. 6, 1995); 141 Cong. Rec. S17997 (daily ed. Dec. 5, 1995).

b. *President Clinton's veto.* On December 19, President Clinton vetoed H.R. 1058. In his veto message, he explained that he supported Congress' goals of "end[ing] frivolous lawsuits" and "ensur[ing] that investors receive the best possible information by reducing the litigation risk to companies that make forward-looking statements." H.R. Doc. No. 150, 104th Cong., 1st Sess. 1 (1995). President Clinton believed, however, that H.R. 1058 would "have the effect of closing the courthouse door on investors who have le-

gitimate claims." *Ibid.* In particular, he objected to certain aspects of the bill's pleading requirements and its safe-harbor and sanctions provisions. See *id.* at 1-2. The President's veto message did not address the element of reliance or the fraud-on-the-market theory. President Clinton pledged to sign a bill that addressed his concerns.

c. *Congress's override of the veto.* In the House, both Republican and Democratic Members responded that H.R. 1058 was a balanced and bipartisan measure to curb abusive practices in securities litigation. See, *e.g.*, 141 Cong. Rec. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Fields, R-TX) ("Congress crafted strong bipartisan legislation designed to curb securities litigation abuse."); *id.* at H15217 (statement of Rep. Eshoo, D-CA) ("On every point that is mentioned in the veto, in a bipartisan effort all of this year we have worked to satisfy the concerns of the [SEC], the administration, and the Senate in the key areas."); *id.* at H15219 (statement of Rep. Fazio, D-CA) ("I supported the conference agreement that passed the House because I believe it was a balanced bill"); 141 Cong. Rec. E2437 (daily ed. Dec. 21, 1995) (statement of Rep. Schumer, D-NY) (terming the legislation a "fair, well-balanced bill"); 141 Cong. Rec. H15217 (daily ed. Dec. 20, 1995) (statement of Rep. Tauzin, D-LA) ("[W]e have huge bipartisan support for this bill, and we ought to, in fact, override the veto.").

On December 20, the House overrode President Clinton's veto by a vote of 319 to 100. All 230 Republican Members, and 89 of the 188 Democratic Members, voted in favor of H.R. 1058. See 141 Cong. Rec. H15223 (daily ed. Dec. 20, 1995).

Likewise in the Senate, a bipartisan group of Senators argued in favor of the bill. See, *e.g.*, 141 Cong.

Rec. S19150 (daily ed. Dec. 22, 1995) (statement of Sen. Domenici, R-NM) (noting that the bill had "51 cosponsors in the Senate" and was "cosponsored by a bipartisan group of Senators spanning the ideological spectrum—Senator Helms and Senator Mikulski"); *id.* at S19149 (statement of Sen. Bradley, D-NJ) (noting his view that the bill struck "the best available balance between protecting investors from fraud perpetuated by unscrupulous issuers and shielding growing businesses * * * from frivolous and costly lawsuits"); *id.* at S19153 (statement of Sen. Dodd, D-CT) ("I regret deeply that we are in this situation, after 4 years, 12 congressional hearings, over 100 witnesses, 5,000 pages of testimony, and committee reports, and truly a bipartisan effort, going back to 1991.").

On December 22, the Senate overrode the President's veto by a vote of 68 to 30—two votes more than the necessary two-thirds supermajority. See 141 Cong. Rec. S19180 (daily ed. Dec. 22, 1995). Of the 68 Senators voting to override the veto, 48 were Republicans and 20 were Democrats. Among those Democrats who supported overriding the veto were Senators Baucus, Dodd, Feinstein, Harkin, Kennedy, Kerry, Mikulski, Moseley-Braun, Murray, and Reid. Of the 30 Senators voting to sustain the veto, four were Republicans: Senators Cohen, McCain, Shelby, and Specter.

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In the end, although the House voted to codify a form of the *Basic* presumption, the Senate did not address that presumption at all. Faced with requests from both supporters and detractors to take action with respect to the *Basic* presumption, the Senate did not address the element of reliance or the validity of the fraud-on-the-market theory. The Conference

Committee followed the Senate's course, and accordingly the Conference Report that was passed by a bicameral supermajority over the President's veto says nothing about the *Basic* presumption.

B. The PSLRA Does Not Represent Acquiescence In The *Basic* Presumption

Under settled principles of law, Congress's silence with respect to *Basic* in the PSLRA plainly represents inaction, not acquiescence. Indeed, as explained below, this context is an especially poor candidate for acquiescence for several reasons.

1. This Court has repeatedly cautioned against relying on legislative inaction as evidence that Congress has acquiesced in an existing legal rule or interpretation. See, *e.g.*, *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 169 (2001) (*SWANCC*) (stressing that the Court has exercised "extreme care" in recognizing congressional acquiescence); *United States* v. *Wells*, 519 U.S. 482, 496 (1997) ("[W]e have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (internal quotation marks and brackets omitted); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (*Central Bank*) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'") (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").

The reason for the Court's reluctance in finding acquiescence is that "several equally tenable inferences may be drawn from" legislative inaction. *Central Bank*, 511 U.S. at 187. Bills can be proposed and rejected—or bills can address some issues and not others—for any number of reasons. See *SWANCC*, 531 U.S. at 170 ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) ("We have no idea whether the Members' failure to act * * * was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses."). This Court has therefore made clear that, "[a]s a general matter," arguments about legislative acquiescence "deserve little weight in the interpretive process." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Central Bank*, 511 U.S. at 187) (brackets in original; second brackets omitted).

The Court has been even more emphatic that acquiescence arguments deserve no weight at all when Congress makes targeted amendments to a statutory scheme without purporting to comprehensively revise that entire scheme. See *Alexander*, 532 U.S. at 292. As explained below, the PSLRA did not attempt to reform every aspect of private securities-fraud litigation. It addressed certain issues on which there was broad, bipartisan consensus (like the need to heighten pleading standards and limit damages), while leaving the resolution of other issues (like scienter and reliance) for another day and another Congress or this Court. See *infra*, pp. 24-25. In that circumstance, where Congress has amended particular provisions in a statute, "[i]t is impossible to assert with any degree

of assurance that congressional failure to act represents affirmative congressional approval" of other unamended statutory provisions. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (internal quotation marks omitted).

To be sure, the Court has occasionally found acquiescence in the face of overwhelming evidence that Congress considered a specific issue and embraced the status quo. In *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), for instance, the Court upheld an Internal Revenue Service interpretation because that interpretation was "correct"; because Congress had held "hearings on th[e] precise issue," making it "hardly conceivable that Congress * * * was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed. *Id.* at 599-601; cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-156 (2000) (contrasting "simple inaction" with Congress's development of "a distinct regulatory scheme" in reliance on background legal understanding). But in the absence of "such overwhelming evidence of acquiescence," *SWANCC*, 531 U.S. at 169 n.5, the Court has not rested its interpretation of a federal statutory scheme on legislative inaction.

2. Applying those well-established principles here, Congress's silence with respect to *Basic* constitutes simple inaction, not tacit acquiescence. Moreover, several additional factors counsel strongly against any finding of acquiescence here.

a. In the PSLRA, Congress did not simply fail to act in response to "calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*"—although even that would not be sufficient evidence of legislative acquiescence in the typical

case. *Amgen*, 133 S. Ct. at 1201. Congress also failed to codify the use of the *Basic* presumption or to permit the SEC to decide when classwide reliance could be presumed. It is thus "impossible to assert with any degree of assurance" that the legislative silence signified an implicit desire to take any particular side of the debate over *Basic*. *Patterson*, 491 U.S. at 175 n.1. When the Senate decided not to overrule, modify, or codify *Basic* and the House later agreed by passing the Conference Report, the 104th Congress left it for a future Congress or this Court to reconsider *Basic*. It did not in any way indicate that particular Congress's acceptance of the fraud-on-the-market theory in the PSLRA.

A useful contrast is the manner in which Congress addressed loss causation in the PSLRA. As the United States explained to this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), "[b]etween 1974 * * * and 1995, when Congress passed the PSLRA, loss causation was generally recognized as a judicially inferred element of a Rule 10b-5 cause of action. The PSLRA codified the loss-causation requirement, making it a statutory element." Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Dura*, *supra* (No. 03-932). The loss-causation provision of the PSRLA demonstrates that when Congress wanted to codify preexisting case law, whether from this Court or the lower courts, it did so expressly in the Act. Cf. *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2527 (2010) ("The SSA's express authorization of such payments * * * shows that Congress knows how to make fees awards payable directly to attorneys where it desires to do so.").

Another useful contrast is the manner in which Congress addressed aiding-and-abetting liability in

the PSLRA. This Court had previously held in *Central Bank* that the implied private right of action under the securities laws did not extend to such liability. See 511 U.S. at 177-178. In the PSLRA, Congress responded to *Central Bank* by authorizing aiding-and abetting-liability only in actions brought by the SEC, not in private actions brought by investors. See 15 U.S.C. 78t(e). As a result, in *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), this Court held that Congress's decision to provide for one type of liability but not the other was entitled to respect. See *id.* at 162-163. Thus, *Stoneridge* was a case in which, because of what Congress actually said in the PSLRA, its failure to say more on the subject was meaningful. Here, by contrast, Congress simply failed to say anything at all about the *Basic* presumption.

b. It would be particularly unwarranted to interpret the PSLRA's silence as signifying Congress's support for *Basic*'s fraud-on-the-market theory, because that Act was barely passed over President Clinton's veto. Although there were plenty of votes to spare in both the House and the Senate if a majority had been needed, 68 Senators voted to override the President's veto—only two votes more than the necessary two-thirds supermajority. That group included a number of Democratic Senators (for instance, Senators Feinstein, Kennedy, and Kerry), and it did not include some Republican Senators (such as Senators McCain, Shelby, and Specter). As might be expected given its broad bipartisan base of supporters, the legislation was winnowed down in the course of reaching a compromise. See, *e.g.*, 141 Cong. Rec. S19153 (daily ed. Dec. 22, 1995) (statement of Sen. Dodd) (noting that the PSLRA was the result of "4 years, 12 con-

gressional hearings, over 100 witnesses, 5,000 pages of testimony, and committee reports, and truly a bipartisan effort, going back to 1991").

It is not reasonable to suppose that, needing a two-thirds supermajority in both chambers, the bill's sponsors and managers would ask Congress to address any and all issues related to private securities-fraud litigation. A broader bill would have risked losing support at the margins. To be sure, a bicameral supermajority might have agreed on repealing or modifying *Basic* if a provision to that effect had been included in the Conference Report. But the most that can be said from the history is that the 21 conferees from the House and Senate did not seek such agreement from all of their colleagues. Whether that is because the conferees themselves could not agree on changing *Basic*, or because they had other priorities, or because they believed that a future Congress or this Court would reconsider *Basic*, or for some other reason altogether is simply not answerable based on the legislative record. Nor is there any need to select among those "several equally tenable inferences," *Central Bank*, 511 U.S. at 187, because the Court has never suggested that the mere failure of a supermajority of Congress to overturn a judicial interpretation should be viewed as acquiescence in that interpretation.

c. Congress's inaction with respect to reliance is not unique in the PSLRA. The Act was not intended to cover the entire waterfront of securities litigation reform. Rather, the PSLRA plainly leaves certain issues for future legislative or judicial resolution. A prominent example of that is the Act's scienter provision. The original House version of the bill, H.R. 10, would have provided that a defendant could be held

liable for money damages for a misrepresentation or omission only if he "knew the statement was misleading at the time it was made, or intentionally omitted to state a fact knowing that such omission would render misleading the statements made at the time they were made." H.R. 10, 104th Cong., 1st Sess. § 204 (as introduced on Jan. 4, 1995). In other words, H.R. 10 would have required that a defendant's misrepresentation or omission be intentional and knowing.

By the time that the PSLRA was passed, however, that provision had been changed. As enacted, the provision states that

> in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with *a particular state of mind*, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with *the required state of mind.*

15 U.S.C. 78u-4(b)(2)(A) (emphasis added). Congress thus heightened the applicable pleading standard by requiring plaintiffs to allege misrepresentations or omissions with particularity.

At the same time, however, Congress declined to specify "the required state of mind" in private securities-fraud actions. Whether the element of scienter could be satisfied only by actual knowledge or by some lesser showing like recklessness had long been a debated question, see, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976), and Congress did not resolve it one way or the other in the PSLRA. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-322 (2007) (observing that Congress also

did not define what would constitute a "strong inference" that the defendant had acted with the required state of mind). Congress likewise did not resolve the similarly contested question of *Basic*'s fraud-on-the-market theory.

d. Finally, it bears noting that the fraud-on-the-market theory—and indeed the implied private cause of action for securities fraud as a whole—originated with this Court rather than Congress. See *Stoneridge Inv. Partners, LLC*, 552 U.S. at 164 ("The [Section] 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."). Whatever the Court's normal reluctance to infer acquiescence from legislative inaction, it should be especially loath to assume that Congress implicitly ratified a judicially-created evidentiary presumption. Of the various issues not addressed in the PSLRA, it would have been particularly reasonable for Congress to believe that, in light of *Basic*'s origins and continuing controversy, the judiciary was well positioned to reconsider *Basic*'s fraud-on-the-market presumption. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Rehnquist, J.) ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.").

To be clear, amici do not contend that because the PSLRA is silent on reliance, this Court should infer congressional support for overruling its decision in *Basic*. Amici simply contend that the Court should draw no inference either way. That is especially so here, where the bar for legislative acquiescence should be set particularly high because the legal rule at issue is of judicial creation. But wherever the bar is set, the legislative history of the PSLRA does not

demonstrate—let alone provide "overwhelming evidence," *SWANCC*, 531 U.S. at 169 n.5—that Congress acquiesced in *Basic*'s presumption of classwide reliance.

CONCLUSION

For the reasons set forth above, in enacting the PSLRA, Congress did not implicitly endorse or reject *Basic*'s fraud-on-the-market presumption of classwide reliance. The Court should therefore decide the merits of this case without reference to the PSLRA and assertions of legislative endorsement or acquiescence.

Respectfully submitted.

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Simon M. Lorne served under Chairman Arthur Levitt, Jr. as the General Counsel of the Securities and Exchange Commission from 1993 to 1996.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

OCT 11 2013
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No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of the fact that Section 18 of the Securities Exchange Act, the closest express analogue to the judicially created right of action under Section 10(b) of that Act, requires a showing of actual reliance for the recovery of damages, the same showing should be required for the recovery of damages under Section 10(b).

2. Whether this Court's holding in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), establishing a presumption of reliance in Section 10(b) actions, should be overruled because that presumption, intended to be rebuttable, has proven in practice over time to be effectively irrebuttable.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	9
I. PRIVATE PLAINTIFFS SEEKING DAMAGES UNDER SECTION 10(b) SHOULD BE REQUIRED TO PROVE ACTUAL RELIANCE.	9
II. *BASIC* SHOULD BE OVERRULED BECAUSE ITS PRESUMPTION OF RELIANCE IS EFFECTIVELY IRREBUTABLE.	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page(s)
Alexander v. Sandoval, 532 U.S. 275 (2001)	18
Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184 (2013)	19, 21
Basic Inc. v. Levinson, 485 U.S. 224 (1988)	*passim*
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	11
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Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011)	8, 19
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	9, 14
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	10-11

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In re Pfizer Inc. Sec. Litig., 282 F.R.D. 38 (S.D.N.Y. 2012) 22

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Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) ..... *passim*

Montejo v. Louisiana, 556 U.S. 778 (2009) 8, 22

Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) 9

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Page(s)

Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau, 508 U.S. 286 (1993) ..... *passim*

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Ross v. A.H. Robins Co., 607 F.2d 545 (2d Cir. 1979) 15

Saddle Rock Partners v. Hiatt, No. 96 Civ. 9474, 2000 WL 1182793 (S.D.N.Y. Aug. 21, 2000) 22

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§ 5, 15 U.S.C. § 77e 12

§ 11, 15 U.S.C. § 77k 11, 12, 13

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§ 15, 15 U.S.C. § 77o 11, 13

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*:

§ 9, 15 U.S.C. § 78i 13, 14

§ 10(b), 15 U.S.C. § 78j(b) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

§ 16, 15 U.S.C. § 78p 13

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IN THE

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BRIEF FOR FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are former Commissioners and officials of the United States Securities and Exchange

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed any money to fund the preparation or submission of this brief. Counsel of record for the parties received at least 10 days' notice of *amici*'s intent to file this brief, and all parties have consented to its filing.

Commission, as well as prominent law professors whose scholarship and teaching focuses on the federal securities laws. *Amici* have devoted substantial parts of their professional careers to drafting, implementing, or studying the federal securities laws, including how those laws should be interpreted to ensure the protection of investors and the promotion of efficiency, competition, and capital formation.

This brief reflects the consensus of the *amici* that this Court should grant certiorari in this case, reverse the Fifth Circuit's decision, and curtail or abandon the fraud-on-the-market presumption of reliance established in *Basic Inc. v. Levinson*, 485 U.S. 224, 241–49 (1988). Each individual *amicus*, however, may not endorse every argument made in this brief. *Amici* are listed below in alphabetical order:

The Honorable Paul S. Atkins served as a Commissioner of the SEC from 2002 to 2008.

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Andrew N. Vollmer served as Deputy General Counsel of the SEC from 2006 through early 2009.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the viability and scope of the most powerful engine of civil liability ever established in American law: the fraud-on-the-market presumption of reliance under Section 10(b) of the Securities Exchange Act of 1934. That presumption revolutionized private securities litigation, and made it the massive multibillion-dollar industry that it is today. More than 3,050 private class-action securities-fraud lawsuits were filed between 1997 and 2012, generating settlements amounting to more than $73.1 billion, including six of the ten largest settlements in class-

action history, and tens of billions in fees for plaintiffs' and defense counsel.[2]

Most of this activity, of course, has taken place under Section 10(b) and its fraud-on-the-market presumption.[3] Because the private Section 10(b) right contains no requirement of contractual privity between plaintiff and defendant, and no requirement that the defendant be a seller of securities, most Section 10(b) class litigation has involved class claims involving "secondary," or "aftermarket" trading.[4] The application of the presumption of reliance in secondary trading cases potentially subjects a corporate issuer and its executives to massive damages in favor of everyone who purchased a company's securities during extended periods of time. As the Court is well aware, this sort of litigation, and the presumption that enables it, remain controversial to this day.

At least as remarkable as the change and controversy that the presumption has wrought, is how it came about. Not by an act of Congress. The fraud-on-the-market presumption was, instead, the work of a bare majority of a bare quorum of this Court. A judicially created rule, tacked on to a judicially created right of action, the fraud-on-the-market presumption did not derive from the text, structure, or history of the

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[2] Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act* 1 & nn.1–5 (Rock Ctr. for Corp. Governance Working Paper No. 150, 2013), 69 BUS. LAW. (forthcoming Feb. 2014), *available at* http://ssrn.com/abstract=2317537.

[3] *Id.* at 2 & n.10.

[4] The "aftermarket" or "secondary market" refers to "[t]he market in which existing securities are traded among investors," DAVID L. SCOTT, WALL STREET WORDS 8, 330 (3rd ed. 2003), as opposed to a public offering of securities by an issuer.

federal securities laws. Instead, it embodied two raw judicial policy judgments—*first*, a belief that "[r]equiring proof of individualized reliance" should be dispensed with, so that Section 10(b) plaintiffs could be free to "proceed[] with a class action"; and, *second*, an acceptance of what were then "[r]ecent empirical studies" supporting the efficient capital markets hypothesis, the theory "that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Basic Inc. v. Levinson*, 485 U.S. 224, 242, 246 (1988).

The petition trains its fire on *Basic's* dependence on the latter premise, pointing out that the efficient capital markets hypothesis was in 1988 "'a mere babe'" of an economic theory. *Id.* at 250 (White, J., dissenting), *quoted in* Pet. 18. Whatever its merits as an economic theory, the hypothesis was not designed or intended to be used to prove reliance in securities fraud cases. And twenty-five years on, it has become clear that this expansive theory cannot, as a practical matter, be applied by judges to actual cases. The petition thus correctly contends that the judiciary should not be an arbiter of economic theory, that it is ill-equipped to assess market efficiency, and that these are good and sufficient reasons why *Basic* should be overruled. On a narrower level, the petition is also right that, if *Basic* is to be retained, there is a sharp and consequential circuit split over how it applies, a split that by itself requires the attention of this Court.

But there are other reasons why *Basic* should be constrained, if not overruled. The first that we present below, in contrast to rendering judgments on economic theory and market efficiency, *does* involve a task that a court of law is particularly well-suited to

perform—the application of settled principles of construction to interpret a federal statute. Applying those principles to the Securities Exchange Act makes clear that there is no basis for imposing a presumption of reliance to actions seeking damages under Section 10(b).

Because Section 10(b) does not provide for a private right of action, its text tells us only what conduct it prohibits. Accordingly, this Court has repeatedly explained that divining the additional elements of the judicially created private right requires a form of "historical reconstruction," *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 294 (1993), by which the Court must try "'to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act,'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (quoting *Musick, Peeler*, 508 U.S. at 294)). To do that, the Court consults "the express causes of actions in the securities Acts as the primary model for the § 10(b) action," *id.* at 178, and borrows from the provision that existed in 1934 that is "most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294.

As we show below, that "most analogous" provision is unquestionably Section 18(a) of the Securities Exchange Act of 1934. Section 18(a) contains the only express right of action in existence in 1934 that authorizes damages actions for misrepresentations or omissions that affect secondary, aftermarket trading. It is the only express right that provides a cause of action for damages in favor of open-market purchasers and sellers against those (such as issuers or their executives) who allegedly made false or misleading

statements, but did not transact with the plaintiffs—the quintessential Section 10(b) class claim today, and the precise fact pattern presented in this case.

Section 18(a) explicitly tells us what Congress intended such plaintiffs to prove in order to obtain damages: that they transacted "in reliance upon such [false or misleading] statement[s]," 15 U.S.C. § 78r(a)—actual, "eyeball" reliance. And if this clear text could leave any doubt about "how Congress would have balanced the policy considerations" involved here, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991), Section 18(a)'s history dispels that doubt. As originally drafted, Section 18(a) contained *no* reliance requirement, but Congress rejected that no-reliance version in the face of a torrent of criticism—criticism that Congress took to heart. Thus, as enacted, Section 18(a) prohibits recovery "unless the buyer bought the security with knowledge of the [false or misleading] statement and relied upon the statement." 78 CONG. REC. 7701 (1934) (statement of Rep. Sam Rayburn), *cited in Basic*, 485 U.S. at 258 (White, J., dissenting).

Accordingly, to "ensure the [Section 10(b)] action does not conflict with Congress' own express right[] of action" in Section 18, *Musick, Peeler*, 508 U.S. at 295, and because this Court must "give 'narrow dimensions ... to a right of action Congress did not authorize,'" *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 167 (2008)), this Court should similarly require plaintiffs in Section 10(b) actions to prove actual reliance to obtain damages. Such a ruling would not necessarily require that this Court overrule *Basic* outright, because, as the Court in *Basic* made clear, its "decision

... is not to be interpreted as addressing the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. In conforming the Section 10(b) damages right to the reliance limitation contained in Section 18(a), the Court could treat actual reliance as part of the showing needed to establish the element of damages under Section 10(b); the *Basic* presumption could stand as a valid interpretation of the Section 10(b) reliance element, and remain a sufficient form of reliance in private actions not seeking money damages as relief.

Alternatively, the Court should grant certiorari to overrule *Basic*'s fraud-on-the-market holding, because that holding, even apart from its defiance of statutory text and congressional intent, has become "entirely untethered from [its] original rationale." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The Court originally intended the presumption to be "just that"—a presumption, and hence rebuttable "by appropriate evidence." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011); *see Basic*, 485 U.S. at 248–49. The Court tried to make the presumption rebuttable because it sought to preserve the requirement of reliance, "an essential element of the § 10(b) private cause of action." *Stoneridge*, 552 U.S. at 159. But as we show below, rebuttals of the presumption in the past quarter-century are few and far between. The rule of *Basic* has become exactly what the dissent in that case feared—"[a] nonrebuttable presumption of reliance" that "effectively convert[s] Rule 10b–5 into a scheme of investor's insurance." *Basic*, 485 U.S. at 252 (White, J., dissenting; citation and internal quotation marks omitted). The decision to create such "an investor insurance scheme[] should" have—and should still—"come from Congress, and not from the courts." *Id.* at 256–57 (White, J. dissenting).

ARGUMENT

I. PRIVATE PLAINTIFFS SEEKING DAMAGES UNDER SECTION 10(b) SHOULD BE REQUIRED TO PROVE ACTUAL RELIANCE.

When this Court created the fraud-on-the-market presumption of reliance in *Basic*, it expressly made clear that its "decision ... is not to be interpreted as addressing the proper measure of damages in litigation of this kind." *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.28 (1988). And in none of its decisions since then has the Court addressed that issue. Exactly what a private Section 10(b) plaintiff must show to prove damages thus still remains an open question.

A. The text of Section 10(b), of course, cannot answer that question. "The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes," *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); this Court has "made no pretense that it was Congress' design to provide the remedy afforded," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Congress envisioned Section 10(b) "as a 'catchall' clause to enable the [Securities and Exchange] Commission"—not private plaintiffs—'to deal with new manipulative ... devices.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976) (citation omitted). The statute's text therefore addresses only "'the scope of [the] conduct prohibited'"—and not "the additional 'elements of the 10b–5 private liability scheme'" later fashioned by the courts. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 n.5 (2010) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994)).

As it never enacted a "private cause of action under § 10(b), Congress had no occasion to address how to ... compute ... liability arising from it." *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 295 (1993). Determining the elements that a private plaintiff must establish to recover damages under Section 10(b) thus requires a kind of "historical reconstruction." *Id.* at 294. The Court must "face[] the awkward task," *Lampf, Pleva*, 501 U.S. at 359, of answering a hypothetical question—of "attempt[ing] to infer 'how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act.'" *Cent. Bank*, 511 U.S. at 178 (quoting *Musick, Peeler*, 508 U.S. at 294).

And "[f]or that inquiry," the Court must "use the express causes of action in the securities Acts as the primary model for the § 10(b) action," *id.*—"in particular, ... those portions of the 1934 Act most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294. "The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of actions in the securities Acts." *Cent. Bank*, 511 U.S. at 178. Indeed, there can be "no clearer indication of how Congress would have balanced the policy considerations" involved "than the balance struck by Congress in ... similar and related protections" contained in "the statute of origin." *Lampf, Pleva*, 501 U.S. at 359.

Drawing from an analogous express provision serves to promote "a fundamental canon of statutory construction": that courts should construe a statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). As for the securities laws in particular, looking to comparable provisions "ensure[s] that the rules established to govern the 10b–5 action are symmetrical and consistent with the overall structure of the 1934 Act." *Musick, Peeler*, 508 U.S. at 294. The Court has found it "'anomalous to impute to Congress an intention to expand ... a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.'" *Cent. Bank*, 511 U.S. at 180 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975)). Indeed, "in establishing limits for the 10b–5 action," one of the Court's "goals" has been "to ensure the action does not conflict with Congress' own express rights of action." *Musick, Peeler*, 508 U.S. at 295.

B. Here, the provision "most analogous to the private 10b–5 right of action that is of judicial creation," *id.* at 294, is the express right of action contained in Section 18(a) of the Securities Exchange Act. As this Court has previously observed, Section 18(a) "impose[s] liability upon defendants who stand in a position most similar to 10b–5 defendants." *Id.* at 296. In fact, Section 18(a) is the *only* express private right of action in the 1933 and 1934 Acts that provides an aftermarket damages remedy analogous to that recognized under Section 10(b).

As this Court has observed, there are "eight express liability provisions contained in the 1933 and 1934 Acts," seven of which existed when those acts were originally enacted. *Id.* at 296. Three of those seven—Sections 11, 12, and 15—reside in the 1933 Act, 15 U.S.C. §§ 77k, 77*l*, 77o, and plainly do not compare well to the inferred Section 10(b) right. Section 11 is,

as this Court has observed, "limited in scope"; "[i]n contrast" to the "'catchall'" Section 10(b) right, which authorizes actions "by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security," Section 11 only addresses securities offerings: it permits actions only "by a purchaser of a registered security, ... based on misstatements or omissions in a registration statement, and can only be brought against certain parties" involved in making a securities offering. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (emphasis in original; quoting 15 U.S.C. § 78j(b)); *see* 15 U.S.C. § 77k(a). Section 11 does not establish liability for secondary, aftermarket trading against issuers.

Section 12 is likewise limited in scope. Section 12(a)(1) imposes liability only upon those who sell unregistered securities in violation of Section 5 of the Securities Act, and requires no misrepresentation or omission. *See* 15 U.S.C. § 77*l*(a)(1) ("Any person who ... offers or sells a security in violation of section 77e of this title ... shall be liable ...."). And Section 12(a)(2), which authorizes rescission or damages for sales made "by means of a prospectus or oral communication" that is materially false or misleading, contains "an express privity requirement,"[5] as it only imposes liability on those who "offer[] or sell[] a security." 15 U.S.C. § 77*l*(a)(2). It thus does not cover aftermarket trading. That sharply contrasts with Section 10(b), which commonly applies to aftermarket trading, has no privity requirement, and does not limit liability to offerors or sellers of securities. Finally, the last of the

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[5] *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000).

three express 1933 Act liability provisions, Section 15(a), is the most limited of all: it "impose[s] derivative liability only," *Musick, Peeler*, 508 U.S. at 296, on "person[s] who ... control[] any person liable" under Sections 11 or 12, 15 U.S.C. § 77o(a).

The remaining express rights are found in the Securities Exchange Act of 1934—Sections 9, 16, 18, and 20. 15 U.S.C. §§ 78i, 78p, 78r, 78t. Section 16 merely "regulates short-swing trading by owners, directors, and officers," *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78p), does not address misstatements and omissions, and thus greatly "differs in focus from § 10(b)," *Lampf, Pleva*, 501 U.S. at 360 n.5. And Section 20 of the 1934 Act, like Section 15 of the 1933 Act, only provides for "controlling person" derivative liability, 15 U.S.C. § 78t, and does not establish primary liability, as does the judicially augmented Section 10(b). *See Musick, Peeler*, 508 U.S. at 296.

In contrast, as this Court explained when it "historical[ly] reconstruct[ed]" a contribution rule for Section 10(b), Sections 9 and 18 of the 1934 Act are the provisions that "impose liability upon defendants who stand in a position most similar to 10b–5 defendants." *Musick, Peeler*, 508 U.S at 294, 296. Sections 9 and 18 "both 'target the precise dangers that are the focus of § 10(b),'" *id.* at 296 (quoting *Lampf, Pleva*, 501 U.S. at 360), as "the intent motivating all three sections is the same—'to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions,'" *id.* (quoting *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986)). But as between Section 9 and Section 18, the latter is clearly the closer analogue to Section 10(b). For Section 9 is narrowly and specifically targeted at "manipulative practices such as wash sales, matched

orders, and the like," *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78i), whereas Section 10(b) far more broadly reaches misrepresentations and omissions of material facts.

Section 18(a), in contrast, closely approximates the reach of Section 10(b). It provides that "[a]ny person" who "shall make or cause to be made" "any" materially "false or misleading" "statement in any application, report, or document filed" with the SEC "shall be liable to any person ... who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance," if the person making the statement cannot show that she acted in "good faith and had no knowledge that [her] statement was false or misleading." 15 U.S.C. § 78r(a); *see Ernst & Ernst*, 425 U.S. at 211 n.31. Section 18(a) thus expressly provides for liability of issuers to aftermarket traders who rely on false statements made by the issuer that affect the price of the issuer's securities.

The parallel to the implied right under Section 10(b) and Rule 10b–5 is plain. Section 18(a) is the "[o]nly ... express private right of action in existence as of the time of Section 10(b)'s enactment [that] addresses misrepresentations or omissions that affect aftermarket prices."[6]

C. Because Section 18(a) is the express right of action "most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294, the Court must use that express right "as the primary model for the § 10(b) action," *Cent. Bank*, 511 U.S. at 178. So "in establishing limits for the 10b–5 action," *Musick, Peeler*, 508 U.S. at 295, the Court

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[6] Grundfest, *Damages and Reliance*, at 29.

must look to the limits established by Congress in Section 18.

And the most critical limitation that Congress placed on the Section 18 right is a strict requirement of actual reliance. Section 18(a) expressly allows recovery only by persons who buy or sell "in reliance upon" the allegedly false or misleading statement that affects the market price. 15 U.S.C. § 78r(a). Given this unambiguous text, courts have consistently held that "Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the SEC"[7]—in other words, "'eyeball' reliance," that the plaintiff "actually read and relied on the filed document."[8] As a result, "constructive reliance is not sufficient" under Section 18,[9] and the fraud-on-the-market "presumption of reliance ... is not available for Section 18 claims."[10]

It follows, then, that Section 18's requirement of actual reliance must also be a prerequisite for the recovery of damages under Section 10(b). That would "ensure the [Section 10(b)] action does not conflict with Congress' own express right[] of action" for damages in Section 18. *Musick, Peeler*, 508 U.S. at 295. Indeed, to hold otherwise would improperly "'expand ... a judicially implied cause of action beyond the bounds

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[7] *See, e.g., Ross v. A.H. Robins Co.*, 607 F.2d 545, 552 (2d Cir. 1979).

[8] *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 479 (S.D.N.Y. 2005) (citation omitted).

[9] *Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

[10] *Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 433 (S.D.N.Y. 2010); *see also, e.g.*, 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.18[2] (6th ed. 2013).

[Congress] delineated for [the] comparable express cause[] of action'" in Section 18. *Cent. Bank*, 511 U.S. at 180 (citation omitted). Plaintiffs seeking damages for misstatements or omissions should not be allowed to evade Section 18's congressionally mandated actual reliance requirement by suing under the judge-made right under Section 10(b).

D. That the text of Section 18 provides the clearest "indication of how Congress would have balanced the policy considerations" involved, *Lampf, Pleva*, 501 U.S. at 359, is strikingly confirmed by the legislative history of the 1934 Act. The legislative history leaves no doubt that, had the Seventy-Third Congress addressed the question, it would not have created a private Section 10(b) right unless that right required proof of actual reliance, and would never have condoned a presumption of reliance, rebuttable or not.

The "initial draft" of the "predecessor" of Section 18 contained *no* reliance requirement, and Congress *rejected* that draft for that very reason. *Basic Inc. v. Levinson*, 485 U.S. 224, 257 (1988) (White, J., dissenting). That proto-Section 18 would have "allowed recovery by any plaintiff 'who shall have purchased or sold a security the price of which may have been affected by such [misleading] statement.'" *Id.* (White, J., dissenting; quoting S. 2693, 73d Cong., 2d Sess., § 17(a) (1934)). It "would have permitted suits by plaintiffs based solely on the fact that the price of the securities they bought or sold was *affected* by a misrepresentation"—"a theory closely akin" to the fraud-on-the-market presumption of reliance. *Id.* (White, J., dissenting; emphasis in original).

But "in congressional hearings on the proposed Securities Exchange Act," witnesses "roundly criticized" the provision's failure to require reliance. *Id.* at

257 (White, J., dissenting). "The really objectionable feature of this provision," testified one stock-exchange president, "is that the civil penalties may be recovered by persons who have not relied upon the inaccurate or misleading statement"; "[t]he penalty provision leaves a wide open door for ... blackmail," testified another.[11] Congress agreed, and inserted a strict requirement of reliance. As Sam Rayburn, then Chairman of the House Committee on Interstate and Foreign Commerce, explained:

> The first provision of the bill as originally written was very much challenged on the ground that reliance should be required. This objection has been met. In other words, if a man bought a security following a prospectus that carried a false or misleading statement, he could not recover from the man who sold to him ... unless the buyer bought the security with knowledge of the statement and relied upon the statement. It seemed to us that this is as little as we could do.

78 CONG. REC. 7701 (1934), *quoted in part in Basic*, 485 U.S. at 258 (White, J., dissenting).

"Congress thus anticipated meaningful proof of 'reliance' before civil recovery can be had under the Securities Exchange Act." *Basic*, 485 U.S. at 258 (White, J., dissenting). Presuming reliance, even rebuttably, "negates congressional intent expressed during adoption of the 1934 Act," and disregards the

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[11] Stock Exchange Regulation, Hearing on H.R. 7852 and 8720, before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 226, 262 (1934) (statements of Richard Whitney and Eugene Thompson); *see also Basic*, 485 U.S. at 258 n.8 (White, J., dissenting; citing this and other testimony).

clear text of Section 18 that Congress approved. *Id.* (White, J., dissenting).

E. Finally, other principles of statutory interpretation support requiring a showing of reliance for damages claims under Section 10(b). The Court has always emphasized that "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991). Indeed, now that the Court has definitively "sworn off the habit of the venturing beyond Congress's intent" to invent unexpressed rights of action, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), it has become ever "mindful that we must give 'narrow dimensions ... to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law,'" *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge*, 552 U.S. at 167). Given the "'concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes,'" any doubt about the scope of the Section 10(b) right must be resolved "against its expansion," and any "decision to extend the cause of action" must be left "for Congress." *Stoneridge*, 552 U.S. at 165 (citation omitted).

Nor does *stare decisis* stand in the way of requiring a plaintiff to show reliance to obtain damages under Section 10(b). The Court in *Basic* expressly left open the question of what must be shown to obtain aftermarket damages under Section 10(b): it stated that its "decision ... is not to be interpreted as addressing the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. The Court has

never addressed that question. The Court could answer it in this case by holding that actual reliance is part of the element of, and is a precondition for recovering, damages under Section 10(b). At the same time, the *Basic* presumption could stand as a valid interpretation of the Section 10(b) reliance element, and remain a sufficient form of reliance in private actions not seeking damages as relief.

II. *BASIC* SHOULD BE OVERRULED BECAUSE ITS PRESUMPTION OF RELIANCE IS EFFECTIVELY IRREBUTTABLE.

An alternative basis for overruling *Basic*'s fraud-on-the-market holding is that the holding is at war with itself, and, far from acting as a proxy for reliance, it effectively eliminates reliance as an element of a Section 10(b) action.

An essential premise behind *Basic*'s fraud-on-the-market presumption was that "[t]he presumption ... is 'just that'"—a presumption—"'and [can be rebutted by appropriate evidence.'" *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011)); *see Basic*, 485 U.S. at 248–49. The Court intended the presumption to be rebuttable because reliance has always been a critical element of a private Section 10(b) action. "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action," the Court has explained, because "[i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge*, 552 U.S. at 159 (quoting *Basic*, 485 U.S. at 243).

But a quarter-century of experience with *Basic* has demonstrated that the fraud-on-the-market presumption is effectively *not* rebuttable, and that it essentially eradicates the element of reliance. Time has borne out Justice White's concern that, "while, in theory, the Court allows for rebuttal of its 'presumption of reliance' ... in practice ... such rebuttal is virtually impossible in all but the most extraordinary case." *Basic,* 485 U.S. at 256 n.7 (White, J., dissenting). For as numerous commentators have observed, the reality today is that the presumption is in fact rarely rebutted.[12]

To be sure, defendants have sometimes successfully prevented the presumption from attaching in the first place by showing that a market for a security is inefficient,[13] or by establishing a "truth on the market"

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[12] *See, e.g.*, Grundfest, *Damages and Reliance*, at 46–49; Roger A. Cooper, Matthew M. Bunda & Anthony M. Shults, *Rebutting the Presumption of Reliance in Securities Class Actions*, N.Y.L.J., June 10, 2013, *available at* http://bit.ly/19Cfonj ("defendants have had little luck in rebutting the presumption"); Patrick Hall, *The Plight of the Private Securities Litigation Reform Act in the Post-Enron Era: The Ninth Circuit's Interpretation of Materiality In* Employer-Teamster v. America West, 2004 B.Y.U. L. REV. 863, 870–71 & n.46 (2004) ("defendants have faced a nearly impossible task"); Jeffrey L. Oldham, *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U.L. REV. 995, 1013 (2003); Andrew R. Simmonds, Kenneth A. Sagat & Joshua Ronen, *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 KY. L.J. 123, 136 (1993) (rebuttal "virtually impossible"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2077 (1995) (rebuttal is a "null, or close to null, set[]").

[13] *See, e.g., Gamco Investors, Inc.* v. *Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013) ("a showing that the market in question

defense, which "is a method of refuting an alleged misrepresentation's materiality" by showing that accurate information in the market negated its effect.[14] But these aren't rebuttals; they are cases in which the presumption never applied. For the most part, "true rebuttals [have] require[d] an individualized inquiry into the buying and selling decisions of particular class members." *Vivendi*, 927 F. Supp. 2d at 100 (internal quotation omitted). And the cases in which such an individualized inquiry has rebutted the presumption after it has attached "are ... as rare as hen's teeth."[15]

That the theoretically rebuttable presumption of reliance is practically irrebuttable flows from a fundamental inconsistency in *Basic*'s reasoning. The four-justice majority in *Basic* admittedly created the (purportedly rebuttable) presumption in order to promote class-action treatment of securities claims.[16] But the nature of class action litigation has in practice guaranteed that the presumption cannot be meaningfully rebutted, because if the presumption is overcome, that conclusion only bars a particular representative

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was not efficient does not really 'rebut' the presumption, but rather shows that it does not apply in the first place").

[14] *Conn. Ret. Plans and Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) (emphasis omitted), *aff'd*, 133 S. Ct. 1184 (2013).

[15] Grundfest, *Damages and Reliance*, at 47 (identifying only five such cases).

[16] *See Basic*, 485 U.S. at 242 ("Requiring proof of individualized reliance from each member of the proposed class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.").

plaintiff from proceeding without proof of reliance.[17] It thus does not foreclose class treatment, and does not prevent plaintiff's counsel from substituting a new representative plaintiff—as there will always be another.

The result is a liability system that effectively dispenses with any substantial requirement of reliance. *Basic*'s presumption has thus become a rule "entirely untethered from [its] original rationale" and is accordingly ripe for overruling. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). As Justice White feared, "[a] nonrebuttable presumption of reliance" has "effectively convert[ed] Rule 10b–5 into 'a scheme of investor's insurance'"—a result for which "[t]here is no support in the Securities Exchange Act, the Rule, or our cases ...." *Basic*, 485 U.S. at 252 (White, J. dissenting; citations omitted). The decision to make "any extension of these laws, to approach something closer to an investor insurance scheme, should [have] come from Congress, and not from the courts." *Id.* at 256–57 (White, J. dissenting). The Court should take the opportunity of this case to return that decision to the branch of government to which it belongs.

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[17] *See, e.g.*, *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 45–46 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 281 (S.D.N.Y. 2003); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003); *Saddle Rock Partners, Ltd. v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793, at *5 (S.D.N.Y. Aug. 21, 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in light of the fact that Section 18(a) of the Securities Exchange Act of 1934, the closest express analogue to the judicially created private right of action under Section 10(b) of that Act, requires a showing of actual reliance for the recovery of damages, the same showing should be required for the recovery of damages under Section 10(b).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. PRIVATE PLAINTIFFS SEEKING DAMAGES UNDER SECTION 10(b) SHOULD BE REQUIRED TO PROVE ACTUAL RELIANCE	13
A. To define elements of the judicially created right under Section 10(b), the Court looks to the most analogous express right.	13
B. Section 18(a) of the 1934 Act is the express right most analogous to the judicially created Section 10(b) right.	15
C. Section 18(a) expressly requires proof of actual reliance.	19
D. The legislative history of the 1934 Act confirms that Congress would have rejected a presumption of reliance.	20
E. *Basic*'s presumption is *de facto* irrebuttable, and has effectively dispensed with the element of reliance under Section 10(b).	22

TABLE OF CONTENTS—Continued

	Page
II. *STARE DECISIS* AND CONGRESSIONAL INACTION DO NOT PRECLUDE REQUIRING PROOF OF ACTUAL RELIANCE IN SECTION 10(b) ACTIONS	26
A. *Stare Decisis*	26
B. Congressional Inaction	29
CONCLUSION	35

TABLE OF AUTHORITIES

Cases **Page(s)**

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 29

Alexander v. Sandoval,
532 U.S. 275 (2001) 5, 12, 28, 30

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 22, 23, 29, 31

Baretge v. Barnett,
553 F.2d 290 (2d Cir. 1977) 8

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Blackie v. Barrack,
524 F.2d 891 (9th Cir. 1975) 24, 25, 26

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 8, 15, 23, 29

Bruesewitz v. Wyeth LLC,
131 S. Ct. 1068 (2011) 29

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989) 7

Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S,
132 S. Ct. 1670 (2012) 31

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) ..... *passim*

Citizens United v. FEC,
558 U.S. 310 (2010) 27, 28

TABLE OF AUTHORITIES—Continued

Page(s)

Cohen v. Stevanovich,
722 F. Supp. 2d 416 (S.D.N.Y. 2010) 20

Conn. Ret. Plans & Trust Funds v. Amgen Inc.,
660 F.3d 1170 (9th Cir. 2011), *aff'd*,
133 S. Ct. 1184 (2013) 25

Conroy v. Ansikoff,
507 U.S. 511 (1993) 33

Deutschman v. Beneficial Corp.,
841 F.2d 502 (3d Cir. 1988) 8

Dura Pharm. Inc. v. Broudo,
544 U.S. 336 (2005) 23, 27

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 7, 23

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 18

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 15

GAMCO Investors, Inc. v. Vivendi, S.A.,
927 F. Supp. 2d 88 (S.D.N.Y. 2013) 25, 26

Hagen v. Utah,
510 U.S. 399 (1994) 30

Heit v. Weitzen,
402 F.2d 909 (2d Cir. 1968) 10, 19

Helvering v. Hallock,
309 U.S. 106 (1940) 27, 30, 32

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 16

TABLE OF AUTHORITIES—Continued

Page(s)

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 433 (S.D.N.Y. 2005) 10, 19

In re LTV Sec. Litig.,
88 F.R.D. 134 (N.D. Tex. 1980) 23, 26

In re Pfizer Inc. Sec. Litig.,
282 F.R.D. 38 (S.D.N.Y. 2012) 25

In re Safeguard Scientifics,
216 F.R.D. 577 (E.D. Pa. 2003) 25

In re WorldCom, Inc. Sec. Litig.,
219 F.R.D. 267 (S.D.N.Y. 2003) 25

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 30

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 4, 13, 23

J.I. Case Co. v. Borak,
377 U.S. 426 (1964) 5

Johnson v. Transp. Agency, Santa Clara Cty.,
480 U.S. 616 (1987) 30, 32

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 17

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) ..... *passim*

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 27, 28

TABLE OF AUTHORITIES—Continued

Page(s)

Lockhart v. United States,
546 U.S. 142 (2005) 31

Matrixx Initiatives, Inc. v. Siracusano,
131 S. Ct. 1309 (2011) 23

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 33

Morrison v. Nat'l Austl. Bank Ltd.,
561 U.S. 247 (2010) 13

Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau,
508 U.S. 286 (1993) ..... *passim*

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 29

Patterson v. McLean Credit Union,
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IN THE

Supreme Court of the United States

No. 13-317

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners and officials of the United States Securities and Exchange Commission, as well as prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed money to fund its preparation or submission. All parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

amici that this Court should reverse the decision below and hold that plaintiffs seeking damages pursuant to the judicially created private right of action under Section 10(b) of the Securities Exchange Act of 1934 must demonstrate actual reliance, as is required by Section 18(a) of the Act, the most analogous express private right that existed under the securities laws in 1934. Each individual *amicus*, however, may not endorse every argument made in this brief.[2] *Amici* are listed below in alphabetical order:

The Honorable Paul S. Atkins served as a Commissioner of the SEC from 2002 to 2008.

Professor Stephen M. Bainbridge is the William D. Warren Distinguished Professor of Law at the University of California, Los Angeles School of Law.

Brian G. Cartwright served as General Counsel of the SEC from 2006 to 2009.

Elizabeth Cosenza is Associate Professor of Law and Ethics, Fordham University.

Richard A. Epstein is the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution.

Professor Allen Ferrell is the Greenfield Professor of Securities Law at Harvard Law School.

The Honorable Edward H. Fleischman served as a Commissioner of the SEC from 1986 to 1992.

The Honorable Joseph A. Grundfest is the William A. Franke Professor of Law and Business at Stanford

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[2] *Amici* do not here address the public policy concerns raised by any decision that limits or overturns *Basic*, and observe that these issues can be considered by Congress in the wake of any decision reached by this Court.

Law School and served as a Commissioner of the SEC from 1985 to 1990.

Professor M. Todd Henderson is a Professor of Law at the University of Chicago Law School.

Professor Richard W. Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

Professor Kenneth E. Scott is the Ralph M. Parsons Professor of Law and Business, Emeritus, at Stanford Law School.

The Honorable Steven Wallman served as a Commissioner of the SEC from 1994 to 1997.

STATEMENT

At issue in this case is the most powerful engine of civil liability ever established in American law: the fraud-on-the-market presumption of reliance under Section 10(b) of the Securities Exchange Act of 1934. That presumption serves as the foundation of a massive, multibillion-dollar litigation industry, and its impact, along with the controversy it has created, has been remarkable.

But just as remarkable was how the presumption came about. Not by an act of Congress. The fraud-on-the-market presumption was instead created by a bare majority of a bare quorum of this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). A judicially created presumption, tacked on to a judicially created right of action, the majority's holding lacked any foundation in the statute's text, and defied its legislative history. The decision rested instead upon two judicial policy preferences. First, treating Rule 23's certification prerequisites as a "problem," *id.* at 242, the four-Justice majority constructed *Basic*'s presumption to

advance its preference for securities class actions. Second, the majority endorsed a then-novel economic theory, the efficient capital markets hypothesis, and adopted it as the foundation for *Basic*'s new rule.

These judicial policy choices have produced a litigation leviathan of which the Congress that passed the 1933 and 1934 Acts, and even the Court in *Basic*, could not possibly have conceived. Even though every Justice ever to have addressed the question has agreed that reliance is essential to a Section 10(b) claim, *Basic*'s fraud-on-the-market presumption has effectively eliminated that element from Section 10(b) class-action litigation. The presumption was ostensibly intended to be rebuttable, but the experience of the past twenty-five years teaches that it is, as a practical matter, *ir*rebuttable, particularly in class actions.

Basic produced this outcome even though the text and structure of the Exchange Act, along with its legislative history, make clear that private plaintiffs in Section 10(b) actions should be required to demonstrate actual reliance. That policy judgment, made explicitly by Congress, should control here.

1. The private right of action under Section 10(b) is, of course, vestigial. "Although the existence of the private right is now settled," *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011), this Court has "made no pretense that it was Congress' design to provide the remedy afforded," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Federal judges created the Section 10(b) private right under an "*ancien regime*" of law "that held sway [over] 40 years ago," a regime under which they indulged "the habit of venturing beyond Congress's intent" to better

effectuate, in their own policy calculations, "'the congressional purpose' expressed by a statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). The Court has long since "sworn off [that] habit," and has "abandoned ... [the] method for discerning and defining causes of action" that gave rise to the inferred Section 10(b) right. *Ibid.* Today, "[p]olicy considerations cannot override [this Court's] interpretation of the text and structure of the [Securities Exchange] Act." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

The Court's 4-2 decision in *Basic* sprang from that earlier, policy-driven mode of statutory interpretation. *Basic* relied not on the text or structure of the federal securities laws, but instead embodied two judicial policy judgments. The first was that compliance with "Federal Rules of Civil Procedure 23(a)(2) and (b)(3)" posed a "'problem'" because "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Basic*, 485 U.S. at 242. The fraud-on-the-market presumption "provided 'a practical resolution to the problem'" created by Rule 23. *Ibid.*

The second judicial policy judgment in *Basic* was a belief in the utility and correctness, as a substitute for the traditional element of reliance in fraud actions, of what was then "a mere babe" of an economic theory, *id.* at 250 (White, J., dissenting)—the efficient capital markets hypothesis. "Recent empirical studies have tended to confirm ... that the market price of shares traded on well-developed markets reflects all publicly

available information, and, hence, any material misrepresentations." *Id.* at 246. In dissent, Justice White presciently warned that the Court, "with no staff economists, no experts schooled in the 'efficient-capital-market-hypothesis,' no ability to test the validity of empirical market studies, [was] not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory." *Id.* at 253 (White, J., dissenting).

2. As foresightful as he was, even Justice White could not have anticipated how contested the efficient markets hypothesis would become twenty-five years later. In October 2013, the Royal Swedish Academy of Sciences awarded the Nobel Memorial Prize in Economic Sciences to the "leading proponents of *opposing* views" of that theory—one, the theory's "author," the other, its "most influential critic."[3] A vigorous "debate over market efficiency" today "splits leading scholars," and it is not one that this Court, or any court, could competently referee: the controversy "is nuanced and complex, and it implicates fine points of econometrics and finance theory."[4]

Whatever its merits as an economic theory, however, the efficient markets hypothesis was never designed to prove causation or reliance in securities cases, or to be applied by judges and juries. Forcing

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[3] Binyamin Applebaum, *Economists Clash on Theory, but Will Still Share the Nobel*, N.Y. TIMES, Oct. 14, 2013 (emphasis added), *available at* http://nyti.ms/1fk0tDA; *see* Nobelprize.org, Press Release, The Prize in Economic Sciences 2013 (Oct. 14, 2013), http://bit.ly/19Qa7Ka.

[4] Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, at 60 (Rock Ctr. for Corp. Governance Working Paper No. 150, 2013), 69 BUS. LAW. (forthcoming Feb. 2014), *available at* http://bit.ly/1gUL9U.

courts to wrestle with the hypothesis's implications, moreover, has yielded exactly what Justice White foretold: the "[c]onfusion and contradiction in court rulings" that is "inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252 (White, J., dissenting).

For example, under *Basic*, plaintiffs must prove "that the stock traded in an efficient market." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). But just what does that mean? Lower courts have produced varying multi-factor tests—with five or eight factors, depending on the venue.[5] "The jumble is evident."[6] "Courts have varied in their application of these factors,"[7] resulting in a "massive hodgepodge of cases and outcomes" that has left "plaintiffs and defendants ... at a loss when it comes to establishing or rebutting the fraud on the market theory's presumption of reliance."[8] "The law is confused, and in flux."[9]

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[5] *See, e.g.*, *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (eight); *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989) (five).

[6] Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 167.

[7] Mukesh Bajaj, Sumon C. Mazumdar & Daniel A. McLaughlin, *Assessing Market Efficiency for Reliance on the Fraud-on-the-Market Doctrine After* Wal-Mart *and* Amgen, at 16 (Dec. 12, 2013), *available at* http://bit.ly/1kdBQfm.

[8] Paul A. Ferillo, Frederick C. Dunbar & David Tabak, *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN'S L. REV. 81, 102 (2004).

[9] Langevoort, 2009 WIS. L. REV. at 154.

Confusion and contradiction reign, most critically, over how *Basic*'s presumption can, if at all, be rebutted. The majority in *Basic* intended the presumption to be "rebuttable," 485 U.S. at 250; *see id.* at 248–49, but that promise has failed, and *Basic* has effectively dispensed with the requirement of reliance, *see* pp. 22–26, below. "A nonrebuttable presumption of reliance" has "effectively convert[ed] Rule 10b–5 into 'a scheme of investor's insurance'"—a result for which "[t]here is no support in the Securities Exchange Act, the Rule, or our cases ...." *Basic*, 485 U.S. at 252 (White, J., dissenting; citations omitted).

Basic's effective elimination of reliance under Section 10(b) has produced an explosion of liability. As defined by the courts, the Section 10(b) right imposes no requirement of contractual privity between plaintiff and defendant, and no requirement that the defendant have sold securities.[10] It thus embraces claims involving "secondary," or "aftermarket," trading—the trading of existing securities among investors in the open marketplace, as distinct from purchases from a corporate issuer in an initial offering.[11]

Given this feature of the judge-made Section 10(b) right, *Basic*'s reliance-eliminating, class-action-facilitating presumption "substantially expands, if not creates, what is often staggering dollar exposure for

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[10] *See, e.g.*, *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 506 (3d Cir. 1988); *Baretge v. Barnett*, 553 F.2d 290, 291 (2d Cir. 1977); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 745 (1975). *But see Basic*, 485 U.S. at 261 (White, J., dissenting; "'[i]mposition of damages liability under Rule 10b–5 makes little sense ... where a defendant is neither a purchaser nor a seller of securities'"; citation omitted).

[11] *See* DAVID L. SCOTT, WALL STREET WORDS 8, 330 (3d ed. 2003).

the issuer and its shareholders."[12] It subjects a corporate issuer and its executives to damages in favor of everyone who purchased a company's securities during extended periods of time. The dollar amounts are breathtaking: more than 3,050 private class-action securities-fraud lawsuits were filed between 1997 and 2012, generating settlements amounting to more than $73.1 billion, including six of the ten largest settlements in class-action history, and yielding tens of billions in fees for plaintiffs' and defense counsel. Litigation under Section 10(b), and *Basic*'s reliance-eliminating presumption, accounts for the lion's share of these amounts.[13]

And it all came about not from an act of Congress, but from a judicially invented rule, engrafted onto a judicially invented right of action.

SUMMARY OF ARGUMENT

This Court need not wade into the complex and highly technical debate over the efficient markets hypothesis to answer the question presented here. Instead, the Court can, and should, decide this case by applying well-established principles of statutory construction.

The Court has repeatedly explained that divining the elements of the judicially created private right requires "historical reconstruction." *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 294 (1993). The Court tries "'to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act.'" *Cent. Bank of Denver, N.A. v. First*

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[12] Langevoort, 2009 WIS. L. REV. at 155–56.

[13] Grundfest, *Damages and Reliance*, at 1–2 & nn.1–5, 10.

Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) (citation omitted). To do that, the Court consults "the express causes of action" in the securities laws, *id.* at 178, and borrows from the "most analogous" one, *Musick, Peeler*, 508 U.S. at 294.

Here, that "most analogous" provision is Section 18(a) of the Securities Exchange Act of 1934. Section 18(a) is the only express right of action in existence in 1934 that authorizes damages actions for misrepresentations or omissions that affect secondary, aftermarket trading. It is the only express right that provides a cause of action for damages in favor of open-market purchasers and sellers against those (such as issuers or their executives) who allegedly made false or misleading statements, but did not transact with the plaintiffs—the quintessential Section 10(b) class claim today.

Section 18(a) explicitly states that plaintiffs must demonstrate that they transacted "in reliance upon such [false or misleading] statement[s]." 15 U.S.C. § 78r(a). They must, in other words, demonstrate actual, "eyeball" reliance.[14] Section 18(a)'s legislative history, moreover, underscores the need for plaintiffs to demonstrate actual reliance for aftermarket fraud. As originally drafted, Section 18(a) contained *no* reliance requirement, but Congress rejected that no-reliance version in the face of a torrent of criticism. As enacted, Section 18(a) thus prohibits recovery "unless the buyer bought the security with knowledge of the [false or misleading] statement and relied upon the

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[14] *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 479 (S.D.N.Y. 2005); *see, e.g.*, *Ross v. A.H. Robins Co.*, 607 F.2d 545, 552 (2d Cir. 1979); *Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

statement." 78 CONG. REC. 7701 (1934) (statement of Rep. Sam Rayburn), *cited in Basic*, 485 U.S. at 258 (White, J., dissenting). The Court should construe the Section 10(b) right accordingly.

Neither *stare decisis* nor congressional inaction precludes this Court from adhering to Congress's expressed intent. *Stare decisis* does not bar an actual reliance requirement: the Court in *Basic* expressly reserved the question of "the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. If that open question is answered, it also must be answered by looking to Section 18(a). And Section 18(a) gives the answer: only "damages *caused by* ... *reliance*" on a false or misleading statement may be recovered. 15 U.S.C. § 78r(a) (emphasis added). Accordingly, *Basic* does not preclude a holding that actual reliance must be required here.

But *Basic*'s holding should not be given *stare decisis* effect in any event. "'*[S]tare decisis* is not an inexorable command,'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citation omitted), and "'this Court has never felt constrained to follow precedent,'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted), with a decision so deeply flawed. The four-Justice opinion in *Basic* meets any number of classic criteria for overruling: among other things, it was badly reasoned, its underpinnings have been undermined by later cases, it was based upon perceptions about economic theory that are no longer beyond dispute, its shortcomings have been confirmed by experience, it has defied consistent application by lower courts, and, indeed, is unworkable. Any of these considerations make *Basic* eligible for abandonment; together, they all but require it.

Finally, the Court should not be deterred from following the Seventy-Third Congress's expressed intent by the suggestion that later Congresses, as reflected by their inaction, supposedly desired otherwise. This Court has repeatedly recognized that "congressional inaction ... 'deserve[s] little weight in the interpretive process,'" *Alexander v. Sandoval*, 532 US. 275, 292 (2001) (quoting *Cent. Bank*, 511 U.S. at 187), and that "'Congress' failure to overturn a statutory precedent'" ordinarily does not provide a "'reason for this Court to adhere to it,'" *Cent. Bank*, 511 U.S. at 186 (citation omitted). In particular, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute,'" because "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation." *Id.* at 187, 186 (citations omitted). That is exactly the case here. Instead of "reading the tea leaves of congressional inaction," *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality opinion), the Court should apply what Congress expressly enacted into law: a requirement of actual reliance.

ARGUMENT

I. PRIVATE PLAINTIFFS SEEKING DAMAGES UNDER SECTION 10(b) SHOULD BE REQUIRED TO PROVE ACTUAL RELIANCE.

A. To define elements of the judicially created right under Section 10(b), the Court looks to the most analogous express right.

"The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). The statute's text accordingly fails to address "the additional 'elements of the 10b–5 private liability scheme'" later fashioned by the courts. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 2881 n.5 (2010) (quoting *Cent. Bank*, 511 U.S. at 173). And because it never enacted a "private cause of action under § 10(b), Congress had no occasion to address how to ... compute ... liability arising from it." *Musick, Peeler*, 508 U.S. at 295.

Because the Section 10(b) right is thus one that "'Congress did not authorize when it first enacted the statute and did not expand when it revisited the law,'" this Court has become ever "mindful that we must give 'narrow dimensions'" to that right. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge*, 552 U.S. at 167). Given the "'concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes,'" the Court has made clear that any doubt about the scope of the Section 10(b) right must be resolved "against its

expansion," and that any "decision to extend the cause of action is for Congress, not for us." *Stoneridge*, 552 U.S. at 165 (citation omitted). In particular, "any extension of these laws, to approach something closer to an investor insurance scheme, should come from Congress, and not from the courts." *Basic*, 485 U.S. at 256–57 (White, J., dissenting).

To define the elements of the judicially created Section 10(b) right in a manner that best approximates Congress's intent, the Court engages in "historical reconstruction." *Musick, Peeler*, 508 U.S. at 294. The Court is "faced with the awkward task," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991), of answering a hypothetical question—of "attempt[ing] to infer 'how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act,'" *Cent. Bank*, 511 U.S. at 178 (quoting *Musick, Peeler*, 508 U.S. at 294).[15]

"For that inquiry," the Court "use[s] the express causes of action in the securities Acts as the primary model for the § 10(b) action," *ibid.*—"in particular, ... those portions of the 1934 Act most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294. "The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts." *Cent. Bank*, 511 U.S. at 178. Indeed, there can be "no clearer indication of how Congress would have balanced the policy

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[15] For a more complete treatment of the history of this interpretive technique and its application to Section 10(b), see Grundfest, *Damages and Reliance*, at 19–33.

considerations" involved "than the balance struck by the same Congress in limiting similar and related protections" in "the statute of origin." *Lampf, Pleva*, 501 U.S. at 359.

Drawing from an analogous express provision in this fashion promotes "a fundamental canon of statutory construction": that courts should construe a statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). As for the securities laws in particular, looking to comparable provisions "ensure[s] that the rules established to govern the 10b–5 action are symmetrical and consistent with the overall structure of the 1934 Act." *Musick, Peeler*, 508 U.S. at 294.

Most significantly here, the Court has found it "'anomalous to impute to Congress an intention to expand ... a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.'" *Cent. Bank*, 511 U.S. at 180 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975)). Indeed, "in establishing limits for the 10b–5 action," one of the Court's "goals" has been "to ensure the action does not conflict with Congress' own express rights of action." *Musick, Peeler*, 508 U.S. at 295.

B. Section 18(a) of the 1934 Act is the express right most analogous to the judicially created Section 10(b) right.

The provision "most analogous to the private 10b–5 right of action that is of judicial creation," *id.* at 294, is the express right contained in Section 18(a) of the

Exchange Act. As this Court has observed, Section 18(a) "impose[s] liability upon defendants who stand in a position most similar to 10b–5 defendants." *Id.* at 296. In fact, Section 18(a) is the *only* express private right of action in the 1933 and 1934 Acts that provides an aftermarket damages remedy analogous to the judicially invented right under Section 10(b).

There are "eight express liability provisions contained in the 1933 and 1934 Acts," seven of which existed when those acts were originally enacted. *Id.* at 296.[16] Three of those seven—Sections 11, 12, and 15—reside in the 1933 Act, 15 U.S.C. §§ 77k, 77*l*, 77*o*, and plainly do not resemble the inferred Section 10(b) right. Section 11 is "limited in scope." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). "In contrast" to the "'catchall'" Section 10(b) right, which authorizes actions "by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security," Section 11 only addresses registered securities offerings: it permits actions only "by a purchaser of a registered security ... based on misstatements or omissions in a registration statement, and can only be brought against certain parties" involved in making a securities offering. *Ibid.* (emphasis in original; quoting 15 U.S.C. § 78j(b)); *see* 15 U.S.C. § 77k(a).

Section 12 is likewise limited in scope. Section 12(a)(1) imposes liability only upon sellers of unregistered securities in violation of Section 5 of the Securities Act, and requires no misrepresentation or omission. *See* 15 U.S.C. § 77*l*(a)(1) ("Any person who

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[16] For a more extensive analysis of these provisions, see Grundfest, *Damages and Reliance*, at 22–32.

... offers or sells a security in violation of section 77e of this title ... shall be liable ...."). Section 12(a)(2), which authorizes rescission or damages for sales made "by means of a prospectus or oral communication" that is materially false or misleading, 15 U.S.C. § 77*l*(a)(2), contains "an express privity requirement,"[17] as it only imposes liability on those who "offer[] or sell[] a security," 15 U.S.C. § 77*l*(a)(2). It thus does not cover aftermarket trading. That sharply contrasts with Section 10(b), which applies to aftermarket trading, has no privity requirement, and does not limit liability to offerors or sellers of securities. Finally, Section 15(a) is the most limited right of all: it "impose[s] derivative liability only," *Musick, Peeler*, 508 U.S. at 296, on "person[s] who ... control[] any person liable" under Section 11 or Section 12, 15 U.S.C. § 77*o*(a).

The remaining express rights are found in the Securities Exchange Act of 1934—Sections 9, 16, 18, and 20. 15 U.S.C. §§ 78i, 78p, 78r, 78t. Section 16(b) "regulates short-swing trading by owners, directors, and officers," *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78p), does not address misstatements and omissions, and thus greatly "differs in focus from § 10(b)," *Lampf, Pleva*, 501 U.S. at 360 n.5. Section 20(a) of the 1934 Act, like Section 15(a) of the 1933 Act, only provides for "controlling person" derivative liability, 15 U.S.C. § 78t(a), and does not create primary liability, as does the judicially augmented Section 10(b). *See Musick, Peeler*, 508 U.S. at 296.

In contrast, as this Court explained when it "historical[ly] reconstruct[ed]" a contribution rule for Section 10(b), Sections 9(f) and 18(a) of the 1934 Act "impose liability upon defendants who stand in a

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[17] *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000).

position most similar to 10b–5 defendants." *Musick, Peeler*, 508 U.S at 294, 296. But as between Section 9(f) and Section 18(a), the latter is clearly the closer analogue to Section 10(b). Section 9(f) is narrowly and specifically targeted at "manipulative practices such as wash sales, matched orders, and the like," *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78i), whereas Section 10(b) far more broadly reaches misrepresentations and omissions of material facts. Put another way, misrepresentations and omissions of fact that are unaccompanied by manipulative acts and practices—the heart and soul of modern class-action litigation under Section 10(b)—are actionable under Section 18(a), but not Section 9(f).

Accordingly, it is Section 18(a) that most closely approximates the reach of Section 10(b) and Rule 10b–5. Section 18(a) provides that "[a]ny person" who "shall make or cause to be made" "any" materially "false or misleading" "statement in any application, report, or document filed" with the SEC "shall be liable to any person ... who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance," if the person making the statement cannot show that she acted in "good faith and had no knowledge that such statement was false or misleading." 15 U.S.C. § 78r(a); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 211 n.31 (1976). Section 18(a) thus expressly provides for liability of issuers to aftermarket traders who rely on false statements made by the issuer that affect the price of the issuer's securities.

The parallel to the implied right under Section 10(b) is plain. Section 18(a) is the "[o]nly ... express private right of action in existence as of the time of Section

10(b)'s enactment [that] addresses misrepresentations or omissions that affect aftermarket prices."[18]

C. Section 18(a) expressly requires proof of actual reliance.

Because Section 18(a) is the express right of action "most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294, the Court must use that express right "as the primary model for the § 10(b) action," *Cent. Bank*, 511 U.S. at 178. So "in establishing limits for the 10b–5 action," *Musick, Peeler*, 508 U.S. at 295, the Court must look to the limits established by Congress in Section 18(a).

The most critical limitation that Congress placed on the express Section 18 right is that recovery can be had only by persons who buy or sell "*in reliance upon*" the allegedly false or misleading statement that affects the market price. 15 U.S.C. § 78r(a) (emphasis added). Given this unambiguous text, courts have consistently held that "Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the SEC"[19]—in other words, "'eyeball' reliance," that the plaintiff "actually read and relied on the filed document."[20] As a result, "constructive reliance is not sufficient" under Section 18,[21] and the fraud-on-the-

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[18] Grundfest, *Damages and Reliance*, at 29.

[19] *Ross*, 607 F.2d at 552.

[20] *In re Alstom*, 406 F. Supp. 2d at 479 (citation omitted).

[21] *Heit*, 402 F.2d at 916.

market "presumption of reliance ... is not available for Section 18 claims."[22]

It follows, then, that Section 18(a)'s requirement of actual reliance must also be a prerequisite for the recovery of damages under Section 10(b). That is the only reading of the statute that would "ensure the [Section 10(b)] action does not conflict with Congress' own express right[] of action" for damages in Section 18. *Musick, Peeler*, 508 U.S. at 295. Indeed, to hold otherwise would improperly "'expand ... a judicially implied cause of action beyond the bounds [Congress] delineated for [the] comparable express cause[] of action'" in Section 18(a). *Cent. Bank*, 511 U.S. at 180 (citation omitted).

D. The legislative history of the 1934 Act confirms that Congress would have rejected a presumption of reliance.

The 1934 Act's legislative history leaves no doubt that, had the Seventy-Third Congress addressed the question, it would not have created a private Section 10(b) right unless that right required proof of actual reliance. That history further underscores that Congress would not have condoned a presumption of reliance, rebuttable or not.

The "initial draft" of the "predecessor" of Section 18 contained *no* reliance requirement, and Congress *rejected* that draft for that very reason. *Basic*, 485 U.S. at 257 (White, J., dissenting). That proto-Section 18 would have "allowed recovery by any plaintiff 'who shall have purchased or sold a security the price of

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[22] *Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 433 (S.D.N.Y. 2010); *see also, e.g.*, 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.18[2] (6th ed. 2013).

which may have been affected by such [misleading] statement.'" *Ibid.* (White, J., dissenting; quoting S. 2693, 73d Cong. § 17(a) (1934)). It "would have permitted suits by plaintiffs based solely on the fact that the price of the securities they bought or sold was *affected* by a misrepresentation"—"a theory closely akin" to the fraud-on-the-market presumption of reliance. *Ibid.* (White, J., dissenting; emphasis in original).

But "in congressional hearings on the proposed Securities Exchange Act," witnesses "roundly criticized" the provision's failure to require reliance. *Id.* at 257 (White, J., dissenting). "The really objectionable feature of this provision," testified one stock-exchange president, "is that the civil penalties may be recovered by persons who have not relied upon the inaccurate or misleading statement"; "[t]he penalty provision leaves a wide open door for ... blackmail," testified another.[23] Congress agreed, and inserted a strict requirement of reliance. As Sam Rayburn, then Chairman of the House Committee on Interstate and Foreign Commerce, explained:

> The first provision of the bill as originally written was very much challenged on the ground that reliance should be required. This objection has been met. In other words, if a man bought a security following a prospectus that carried a false or misleading statement, he could not recover from the man who sold to him ... unless the buyer bought the security with knowledge of the

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[23] Stock Exchange Regulation, Hearing on H.R. 7852 and 8720, before the H. Comm. on Interstate and Foreign Commerce, 73d Cong. 226, 262 (1934) (statements of Richard Whitney and Eugene Thompson); *see also Basic*, 485 U.S. at 258 n.8 (White, J., dissenting; citing this and other testimony).

> statement and relied upon the statement. It seemed to us that this is as little as we could do.

78 CONG. REC. 7701 (1934), *quoted in part in Basic*, 485 U.S. at 258 (White, J., dissenting); *see also* 78 CONG. REC. 8040 (1934) (Rep. Rayburn).

Congress deliberately placed "the burden ... on the plaintiff to show ... the fact that the statement was false or misleading, and that he relied thereon to his damage." S. REP. NO. 792, 73d Cong. 13 (1934). "Congress thus anticipated meaningful proof of 'reliance' before civil recovery can be had under the Securities Exchange Act." *Basic*, 485 U.S. at 258 (White, J., dissenting). As a result, presuming reliance, even rebuttably, "negates congressional intent to the contrary expressed during adoption of the 1934 Act," and disregards the clear text of Section 18 that Congress enacted into law. *Ibid.* (White, J., dissenting).[24]

E. *Basic*'s presumption is *de facto* irrebuttable, and has effectively dispensed with the element of reliance under Section 10(b).

Basic's negation of congressional intent is exacerbated by the fact that its ostensibly rebuttable presumption is *de facto* irrebuttable, particularly in class actions.

An essential premise behind *Basic*'s fraud-on-the-market presumption was that "[t]he presumption ... is 'just that'"—a presumption—"'and [can] be rebutted by appropriate evidence.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013)

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[24] For a further discussion of the legislative history, see Grundfest, *Damages and Reliance*, at 33–35.

(quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011)); *see Basic*, 485 U.S. at 248–49. The Court intended the presumption to be rebuttable because reliance has always been a critical element of a private Section 10(b) action. "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action" because "[i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge*, 552 U.S. at 159 (quoting *Basic*, 485 U.S. at 243). Indeed, every Justice who has ever considered the question, whether in the majority or in dissent, has agreed that reliance is an essential element of the inferred Section 10(b) right.[25]

But *Basic*'s promise of rebuttability "r[a]ng[] hollow" from the start. *Basic*, 485 U.S. at 256 n.7 (White, J., dissenting). The lower courts that pioneered the presumption recognized that, "given [its] force," "attempt[s] to rebut the presumption ... would likely be futile in the vast number of cases." *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 n.4 (N.D. Tex. 1980). The presumption "will undoubtedly be conclusive as to most of the class," these courts understood, and, at most, "a defendant may be able to defeat the showing of causation as to a few individual class members."

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[25] *See, e.g.*, *Amgen*, 133 S. Ct. at 1192; *id.* at 1205 (Scalia, J., dissenting); *id.* at 1207–08 (Thomas, J., dissenting); *Janus*, 131 S. Ct. at 2301 n.3; *id.* at 2309 (Breyer, J., dissenting); *Erica P. John Fund*, 131 S. Ct. at 2184–85; *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011); *Stoneridge*, 552 U.S. at 157, 159; *id.* at 170–71 (Stevens, J., dissenting); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005); *Cent. Bank*, 511 U.S. at 178, 180; *Basic*, 485 U.S. at 243; *id.* at 251 (White, J., dissenting); *Blue Chip Stamps*, 421 U.S. at 770 (Blackmun, J., dissenting).

Blackie v. Barrack, 524 F.2d 891, 906–07 n.22 (9th Cir. 1975). Even in 1988, it was thus clear that, "while, in theory, the Court allows for rebuttal of its 'presumption of reliance' ... in practice ... such rebuttal is virtually impossible in all but the most extraordinary case." *Basic*, 485 U.S. at 256 n.7 (White, J., dissenting).

A quarter-century of experience has now established the point beyond peradventure. As numerous commentators have observed,[26] the presumption is rarely rebutted. To be sure, defendants have sometimes successfully prevented it from attaching in the first place, by showing that a market for a security is inefficient, or by establishing a "truth-on-the-market" defense, which "is a method of refuting an alleged misrepresentation's materiality" by showing that accurate information in the market negated its

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[26] *See, e.g.*, Roger A. Cooper, Matthew M. Bunda & Anthony M. Shults, *Rebutting the Presumption of Reliance in Securities Class Actions*, N.Y.L.J., June 10, 2013, *available at* http://bit.ly/19Cfonj ("defendants have had little luck in rebutting the presumption"); Grundfest, *Damages and Reliance*, at 46–49; Patrick Hall, *The Plight of the Private Securities Litigation Reform Act in the Post-Enron Era: The Ninth Circuit's Interpretation of Materiality in* Employer-Teamster v. America West, 2004 BYU L. REV. 863, 870–71 & n.46 (2004) (rebuttal "nearly impossible"); Jeffrey L. Oldham, *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995, 1013 (2003); Andrew R. Simmonds, Kenneth A. Sagat & Joshua Ronen, *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 KY. L.J. 123, 136 (1993) ("virtually impossible"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2077 (1995) (rebuttal is a "null, or close to null, set[]").

effect.[27] Such proof, however, "does not really 'rebut' the presumption, but rather shows that it does not apply in the first place." *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013). For the most part, "true rebuttals [have] require[d] an individualized inquiry into the buying and selling decisions of particular class members." *Id.* at 100. And the cases in which such an individualized inquiry has rebutted the presumption after it has attached "are ... as rare as hen's teeth."[28]

That the theoretically rebuttable presumption of reliance is *de facto* irrebuttable flows from an internal contradiction central to *Basic*. The four-Justice majority there admittedly created the presumption in order to facilitate class actions. But rebuttal is an individualized inquiry, and, if successful, only bars an individual representative plaintiff from proceeding without proof of reliance.[29] If a proposed class representative happens to be one of the "few individual class members" as to whom "a defendant may be able to defeat the showing of causation," *Blackie*, 524 F.2d at 906–07 n.22, then all that plaintiff's counsel need do is find a new one. And there will virtually always be another class member as to whom the presumption cannot be rebutted—which is why rebuttal is "futile in

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[27] *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) (emphasis omitted), *aff'd*, 133 S. Ct. 1184 (2013).

[28] Grundfest, *Damages and Reliance*, at 47 (identifying only five such cases).

[29] *See, e.g.*, *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 45–46 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 281 (S.D.N.Y. 2003); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003); *Saddle Rock Partners, Ltd. v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793, at *5 (S.D.N.Y. Aug. 21, 2000).

the vast number of cases," *In re LTV*, 88 F.R.D. at 143 n.4, why the presumption "will undoubtedly be conclusive as to most of the class," *Blackie*, 524 F.2d at 906–07 n.22, and why "a successful rebuttal ... will be exceedingly rare," *GAMCO*, 927 F. Supp. 2d at 100. To put it bluntly, "rebutting the presumption in a class action context is like inviting the defendant to play a game of 'Whack-A-Mole,' in which the moles always win."[30]

In short, *Basic* effectively dispenses with the element of reliance, not only in defiance of the text of the Exchange Act and its legislative history, but also in contravention of the consistent holdings of this Court that reliance *is* required under Section 10(b).

II. *STARE DECISIS* AND CONGRESSIONAL INACTION DO NOT PRECLUDE REQUIRING PROOF OF ACTUAL RELIANCE IN SECTION 10(b) ACTIONS.

A. *Stare Decisis*

1. The Court need not overrule *Basic* in order to require actual reliance under Section 10(b). *Basic* expressly stated that its "decision ... is not to be interpreted as addressing the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. Indeed, the Court has never addressed that question. To answer it, the Court must again look to Section 18(a), the closest analogue to the Section 10(b) private right. And, once again, Section 18(a) provides the answer. It states that the defendant shall be "liable ... for damages *caused by such reliance*." 15 U.S.C. § 78r(a) (emphasis added).

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[30] Grundfest, *Damages and Reliance*, at 7.

Accordingly, the "proper measure of damages in litigation of this kind," the issue left open in *Basic*, is limited to losses caused by actual reliance. So even if *Basic*'s presumption of reliance suffices to establish Section 10(b)'s element of "'transaction causation,'" *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 341 (2005), proof of actual reliance is still required to satisfy the entirely separate elements of "economic loss" and "'loss causation,'" *id.* at 342.[31]

2. But even if requiring actual reliance were deemed incompatible with *Basic*, the doctrine of *stare decisis* would not stand as a bar. "'*[S]tare decisis* is not an inexorable command,'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997)), but "is a principle of policy and not a mechanical formula of adherence to the latest decision," *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). In particular, "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

The Court has jettisoned precedents "'when subsequent cases have undermined their doctrinal underpinnings,'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (citation omitted); "[w]here a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,'" *Pearson*, 555 U.S. at 235 (quoting *Payne*, 501 U.S. at 829–30); when "'economic realities underlying earlier decisions have changed, or ... earlier judicial

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[31] *See generally* Grundfest, *Damages and Reliance*, 2–6, 17–32.

perceptions of those realities were in error,'" *State Oil*, 522 U.S. at 21 (citation omitted); or when "'experience has pointed up the precedent's shortcomings,'" *Citizens United*, 558 U.S. at 363 (quoting *Pearson*, 555 U.S. at 233). And although the Court is usually "reluctan[t] to overrule decisions involving statutory interpretation," *State Oil*, 552 U.S. at 20, it has been far less hesitant to do so when "the precedent consists of a judge-made rule," *Pearson*, 555 U.S. at 233, or when it involves a law that "the Court has treated ... as a common-law statute," and as to which "'the federal courts [have] act[ed] more as common-law courts,'" *Leegin*, 551 U.S. at 899 (citation omitted).

Basic meets each of these criteria. Its four-Justice majority opinion was badly reasoned: it cast aside the text and structure of the securities laws, in favor of policy decisions that "should [have] come from Congress, and not from the courts." *Basic*, 485 U.S. at 257 (White, J., dissenting). *Basic* reflects a mode of interpretation of Section 10(b) that sharply conflicts with the Court's more recent cases, which hold that "[s]tatutory intent ... is determinative," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and stress that, under the "'separation of powers, ... Congress rather than the courts controls the availability of remedies for violations of statutes,'" *Stoneridge*, 552 U.S. at 165 (citation omitted).

Basic's principal judicial policy choice, moreover, rested upon an economic theory that the Court assumed was settled, but wasn't—a theory indisputably not designed to determine reliance, and one that non-economist judges have "no ability to test" and are "not well equipped" to apply. *Basic*, 485 U.S. at 253 (White, J., dissenting). Indeed, today not even the Nobel Prize Committee can agree on the status of

the economic theory that was so fundamental to *Basic*'s rationale. *See* p. 6, above.

Experience has shown, moreover, that *Basic* has defied consistent application and is unworkable, *see* p. 7, above, which has led Members of this Court to question it, *see Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., dissenting). And experience has proven false a central premise and promise of *Basic*—that the fraud-on-the-market presumption would be rebuttable. Beyond this, of course, *Basic* is as judge-made, and as common-law, as a statutory precedent can get: "[w]hen we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps*, 421 U.S. at 737.

For any of these reasons, *Basic* is ripe to be overruled.[32]

B. Congressional Inaction

Finally, the fact that Congress has not overturned *Basic*'s presumption does not require adherence to it.

As an initial matter, "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). "'It is the intent of the Congress that enacted [the section] ... that controls.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750,

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[32] Nor is the fraud-on-the-market presumption compelled by *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152–54 (1972), which presumed reliance in a Section 10(b) omission case. That unusual case did not involve aftermarket trading of a public company's securities, or any affirmative misstatements, but rather the breach of a fiduciary "duty of disclosure" by a defendant who was "'acting for'" the plaintiffs. *Id.* at 152.

758 (1979) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)). As a result, "'subsequent history is less illuminating than the contemporaneous evidence,'" *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("*SWANCC*") (quoting *Hagen v. Utah*, 510 U.S. 399, 420 (1994)), and is in fact a "'hazardous basis for inferring the intent of an earlier' Congress," *PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

This Court has repeatedly recognized, moreover, that "congressional inaction ... 'deserve[s] little weight in the interpretive process,'" *Alexander*, 532 U.S. at 292 (quoting *Cent. Bank*, 511 U.S. at 187), and that "'Congress' failure to overturn a statutory precedent'" ordinarily provides no "'reason for this Court to adhere to it.'" *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation." *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson*, 491 U.S. at 175 n.1 (quoting *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting))). Accordingly, "[w]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering*, 309 U.S. at 121. Numerous decisions thus reflect this Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (Scalia, J.; plurality opinion).

Indeed, not even Congress's failure to pass a specific bill overriding a precedent precludes this Court from overruling that precedent. "'[F]ailed legislative

proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting *PBGC*, 496 U.S. at 650)); *accord SWANCC*, 531 U.S. at 170; *Cent. Bank*, 511 U.S. at 187. In particular, "'because several equally tenable inferences may be drawn from [congressional] inaction'" on proposed legislation, such "'inaction lacks persuasive significance.'" *Cent. Bank*, 511 U.S. at 187 (quoting *PBGC*, 496 U.S. at 650); *accord Craft*, 535 U.S. at 287. And obviously "'Congressional inaction cannot amend a duly enacted statute,'" as "'Congress may legislate ... only through the passage of a bill which is approved by both Houses and signed by the President.'" *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson*, 491 U.S. at 175 n.1).

Accordingly, the fact that Congress, when it enacted the Private Securities Litigation Reform Act of 1995, failed to pass "an unenacted bill that ... 'would have undone *Basic*,'" *Amgen*, 133 S. Ct. at 1201 (citation omitted), cannot be treated as an endorsement of *Basic*. "'A bill can be proposed for any number of reasons, and it can be rejected for just as many reasons.'" *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1686 (2012) (quoting *SWANCC*, 531 U.S. at 170). "We have no idea whether the Members' failure to act in [1995] was attributable to their belief that [*Basic* and the fraud-on-the-market presumption] were correct, or rather to their belief that the courts would eliminate any excesses, or indeed to their unwillingness to confront the [securities plaintiffs' bar] lobby." *Rapanos*, 547 U.S. at 750 (plurality opinion).

To these might be added any number of other possibilities: "The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting; quoting THE FEDERALIST NO. 62, at 378 (C. Rossiter ed. 1961)). Members of Congress might have failed to act, moreover, in order to spend their political capital on other measures, or to avoid a filibuster. Or—of particular relevance here—they might have been trying to avoid a presidential veto, or to muster enough votes to override one: the PSLRA itself was vetoed, and the veto was overridden—by just *two* votes in the Senate. *See* 109 Stat. 737, 765 (1995); 141 CONG. REC. S19180 (daily ed. Dec. 22, 1995). To extract "a controlling legal principle" from the PSLRA's failure to address *Basic* would thus indeed "walk on quicksand." *Helvering*, 309 U.S. at 121.

But even if "the danger of placing undue reliance on the concept of congressional 'ratification'" were disregarded, *Patterson*, 491 U.S. 175 n.1, what Congress actually did in 1995 refutes such a ratification here. If the PSLRA's legislative history shows anything, it is that Congress *rejected* the *Basic* presumption. The bill that initially passed the House contained a provision that would have explicitly *codified* the presumption. H.R. 1058, 104th Cong. § 4 (Mar. 8, 1995), *available at* http://1.usa.gov/19zAAkR.[33]

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[33] Section 4 of the bill would have added a new Section 10A(d)(3) to the Exchange Act that would have established "a

The version approved by the Senate omitted this provision, *see* S. 240, 104th Cong. (June 19, 1995); 141 CONG. REC. S9219–25 (daily ed. June 28, 1995), as did the conference report that ultimately became law, H. CONF. REP. NO. 104–369, at 1–30 (1995). At the very least, the conflicting inferences that may be drawn from the PSLRA's history suggest that reliance on that history, to use Judge Leventhal's famous metaphor, would be "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Ansikoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

Given what it sought to accomplish through the PSLRA, moreover, it is fanciful to suggest that Congress in 1995 endorsed a presumption that guts the requirement of reliance under Section 10(b).[34] The PSLRA "demonstrate[s] Congress's desire to reduce the amount of meritless securities litigation, an aim that is inconsistent with a sweeping presumption that facilitates more litigation without any relation to the merits of a claim, as found in *Basic*."[35]

Most notably, the PSLRA contains an important damages-limitation provision that is "fundamentally inconsistent with the logic of the efficient market

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rebuttable presumption ... that the plaintiff relied on [the] market price" of a security under circumstances specified in a new Section 10A(d)(2). *Ibid.*

[34] Nor did Congress acquiesce in *Basic* when it passed SLUSA, the Securities Litigation Uniform Standards Act of 1998. SLUSA merely addressed the "shift" in "securities class action lawsuits ... from Federal to State courts" that occurred in the PSLRA's wake. Pub. L. 105–353, § 2(2), 112 Stat. 3227 (1998); *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).

[35] Oldham, 97 NW. U. L. REV. at 998.

theory that serves as the basis for the fraud on the market presumption."[36] That so-called "look-back" provision limits recovery by requiring that damages from a misstatement or omission be calculated not from a security's price when a corrective statement is made, but from "the mean trading price ... during the 90-day period" *after* that point.[37] The logic of this rule is that "stock prices will overreact to corporate information," and that "the market takes a significant period of time to accurately reflect" that information—a notion "fundamentally inconsistent with,"[38] and, indeed, "anathema to,"[39] *Basic*.

In short, "the tea leaves of congressional inaction" in 1995, *Rapanos v. United States*, 547 U.S. at 749 (plurality opinion), provide no reason to annul the action that Congress actually *did* take in 1934, when it enacted Sections 10(b) and 18(a) into law.

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[36] Grundfest, *Reliance and Damages*, at 40; *accord, e.g.*, Oldham, 97 NW. U. L. REV. at 998, 1028; Michael Y. Scudder, Comment, *The Implications of Market-Based Damages Caps in Securities Class Actions*, 92 NW. U. L. REV. 435, 461 (1997).

[37] 15 U.S.C. § 78u–4(e)(1).

[38] Oldham, 97 NW. U. L. REV. at 1027–28.

[39] Grundfest, *Reliance and Damages*, at 42.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR, PETITIONERS,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 1

Argument 4

I. *Basic*'s Use Of Market Efficiency As A Means Of Showing Reliance Is Unnecessary And Counterproductive 4

A. Examining Efficiency Is Unnecessary To Demonstrate "Fraud On The Market" 6

B. *Basic*'s Efficiency Requirement Is Poorly Tailored To Remedy Fraud On The Market 10

C. Market Efficiency Determinations Are Difficult For Courts To Make 12

1. Since *Basic* Was Decided, Research Has Called The Efficiency Of Markets Into Question 13

2. Courts and Commentators Have Struggled With Determining When A Particular Market Is Sufficiently "Efficient" To Support A Presumption Of Reliance 18

II. In Determining Reliance, Courts Should Look To Market Movement Caused By An Alleged Misrepresentation, Rather Than To Overall Market Efficiency 24

A. The Event Study Is the Best Available Tool To Examine Market Distortion And Show Reliance 24

Table of Contents—Continued: **Page**

B. A Proposed Class Unable To Show Market Impact Should Be Entitled To Disgorgement Remedies Only 32

Conclusion 35

TABLE OF AUTHORITIES

Cases: **Page(s)**

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Amgen, Inc. v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2012) 1

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261 F.R.D. 616 (N.D. Ala. 2009) 21

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INTEREST OF AMICI CURIAE[1]

Amici are law professors whose scholarship and teaching focuses on corporate law and federal securities law. Amici have an interest in ensuring that the securities laws are interpreted to accurately reflect both current financial economic scholarship and the law's historical underpinnings. Amici filed amicus briefs in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), and in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2012), both addressing the consideration of market impact and the fraud on the market theory at the class certification stage of Rule 10b-5 securities fraud suits.

Amici include Adam C. Pritchard, the Frances and George Skestos Professor of Law at the University of Michigan Law School; and M. Todd Henderson, Professor of Law at the University of Chicago Law School.

SUMMARY OF ARGUMENT

In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), the Court held that in a Rule 10b-5 securities fraud suit, plaintiffs may invoke a "presumption of reliance" to gain class certification under Federal Rule of Civil Procedure 23(b)(3), which requires that common questions of law or fact "predominate" over questions

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made any monetary contribution to its preparation and submission. The parties have filed letters giving blanket consent to the filing of amicus briefs in this case.

particular to individual class members' claims. *Id.* at 241-48. *Basic* held that this presumption was supported by the "fraud on the market theory," which provides that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.* at 247, 250.

Basic grounded its holding on the understanding that "the market price of shares traded on well-developed markets reflects all publicly available information," including "any public material misrepresentations"—a concept embodied in the "efficient capital markets theory." *Id.* at 246-47 & n.24. *Basic* reasoned that because every public material misrepresentation is reflected in a security's price, an investor's reliance on a misrepresentation "may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247.

Basic thus combined two distinct concepts: the fraud on the market theory and the efficient capital markets hypothesis. The efficient capital markets hypothesis is not necessary to the use of the fraud on the market theory—whenever the market incorporates fraudulent information into the price, a "fraud on the market" has occurred, whether the market is efficient or not. But the two concepts can be combined to allow plaintiffs to invoke a presumption of reliance about an alleged fraud if they can demonstrate that the relevant market was "efficient," *i.e.*, that it "reflect[ed] all publicly available information." *Id.* at 246. In the years before *Basic*, scholars and lower courts championed the simultaneous application of these concepts in the belief that well-developed markets were efficient, and that their stock prices reflected all public

information. And while *Basic* claimed "not to assess the general validity of" these theories, *id.* at 242, courts have read *Basic* to accept them and to hold that a presumption of reliance is appropriate when market efficiency has been established

Basic's view of capital market efficiency was unrealistic. Rather than being totally "efficient" or "inefficient," securities markets enjoy varying degrees of efficiency, and incorporate information at varying rates. Although some well-developed markets incorporate most information into prices relatively quickly, research conducted since *Basic* suggests that even the most open markets are not completely efficient and incorporate some information slowly (if at all). Accordingly, *Basic*'s understanding that a particular alleged fraud will necessarily be incorporated into the stock price is no longer sound.

Moreover, lower courts' attempts to estimate efficiency have been inconsistent and empirically inaccurate. Faced with the difficult task of determining whether a market is "efficient," courts have resorted to examining proxies for efficiency. Many such proxies are highly correlated with each other (and therefore redundant), while others have little empirical relationship with efficiency, and there is confusion about how to weigh the various factors. The result is a doctrinal and empirical muddle for both courts and litigants.

These difficulties are encountered unnecessarily because the fraud on the market theory does not require use of the efficient capital markets hypothesis to show reliance. All that is necessary is evidence of a particular misstatement's effect on a security's

market price. In light of the difficulties in evaluating efficiency, the Court should shift the focus of fraud on the market inquiries from a market's overall efficiency to the question whether the alleged fraud affected market price. The decision below should be reversed because it focuses on efficiency at the class certification stage, rather than on the market effect of the alleged misstatements.

In addition, this Court should clarify the connection between the form of reliance asserted by the plaintiff in a Rule 10b-5 class action and damages. The out-of-pocket measure of damages should be limited to cases in which the plaintiff can show actual reliance or that a material misstatement has distorted the market price for a security. If a plaintiff cannot make that showing, the remedy should be limited to disgorgement.

ARGUMENT

I. *BASIC*'S USE OF MARKET EFFICIENCY AS A MEANS OF SHOWING RELIANCE IS UNNECESSARY AND COUNTERPRODUCTIVE

Plaintiffs bringing a Rule 10b-5 securities fraud claim must prove they relied upon the company's alleged misrepresentation when deciding to trade the company's security. *Basic*, 485 U.S. at 243. Traditionally, such reliance is determined on an individualized basis. Cf. *id.* at 242; see also *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008). But in the context of securities fraud class actions, which can be maintained only when common questions of law or fact predominate over individual questions, see Fed. R. Civ. P. 23(b)(3), "[r]equiring proof of individualized reliance from each

member of the proposed plaintiff class effectively would * * * prevent[] [plaintiffs] from proceeding with a class action, since individual issues then would * * * overwhelm[] the common ones." *Basic*, 485 U.S. at 242.

In *Basic*, the Court allowed class action plaintiffs to invoke a "presumption of reliance" in lieu of showing individual reliance by combining two then-new economic theories. The first of these was the semi-strong version of the efficient capital markets hypothesis, see *In re Res. Am. Sec. Litig.*, 202 F.R.D. 177, 189 n.12 (E.D. Pa. 2001), which postulates that "security prices fully reflect all available information," Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1575 (1991); see *Basic*, 485 U.S. at 246. Second was the fraud on the market theory, which provides that reliance may be presumed where "a fraud affects the price of a publicly traded security [because] investors will be affected even if they trade without knowledge of the misrepresentations that influenced the price at which they traded." *Stark Trading* v. *Falconbridge Ltd.*, 552 F.3d 568, 572 (7th Cir. 2009); accord *Basic*, 485 U.S. at 247.

Combining these concepts, the *Basic* Court concluded:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. The Court observed that then-recent "empirical studies have tended to confirm * * * that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246-47 & n.24.

Based on this language, courts and commentators have often interpreted *Basic* to allow plaintiffs to employ the fraud on the market theory only if they can demonstrate that the relevant market "reflects all publicly available information," a quality known as "efficiency." See, *e.g.*, *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) ("*Basic* clearly requires that a market be efficient in order for the fraud-on-the-market presumption of reliance to be invoked * * * ."). Although *Basic* indicated that a market need only incorporate "most" information, see *Basic*, 485 U.S. at 246 n.24, other language in the opinion, see *id.* at 246, along with many of the sources it cites, state that the market must reflect "all" information to be efficient. See *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 11-12 (1st Cir. 2005) (collecting authorities).

An examination of the efficiency of markets is not, however, necessary for determining reliance or establishing the existence of a fraud on the market; it is not even the best means of determining reliance, even in the context of class actions.

A. Examining Efficiency Is Unnecessary To Demonstrate "Fraud On The Market"

Although "*Basic* seems to insist on" a showing of market efficiency to support a fraud on the market claim, Donald C. Langevoort, *Theories, Assumptions,*

and Securities Regulation: Market Efficiency Revisited, 140 U. Pa. L. Rev. 851, 899 (1992), there is no basis for such a requirement. To maintain a Rule 10b-5 action, a plaintiff must show only that he relied on the particular false statements. Proving that a market is generally highly efficient, and thus tends to incorporate all information quickly, is unnecessary to demonstrating that there has been a fraud on the market as to a specific statement, as long as a market functions well enough to incorporate the specific misrepresentation at issue into a security's price. See Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 Cornell L. Rev. 907, 911 (1989); Jonathan R. Macey et al., *Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic v. Levinson, 77 Va. L. Rev. 1017, 1021 (1991) ("Because security prices react quickly to new information, we can test for the relevant consideration—whether a security's price has been affected by misleading information."). Perfect market efficiency may be "a sufficient reason why an investor relying on market-price integrity would be harmed" by fraud, but is not a necessary one "because fraud can and does distort prevailing prices" even in inefficient markets. Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 161.

The fraud on the market theory effectively "shifts the inquiry from whether an individual investor was fooled to whether the market as a whole was fooled" by a misstatement. *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1479 (N.D. Cal. 1992); see also Fischel, *Efficient Capital Markets*, *supra*, at 907. The efficient capital markets hypothesis, in turn, provides a basis for the assumption that the market would be

fooled by *any and all* instances of fraud. But such a showing is unnecessary to demonstrate that the market was fooled by a particular statement. As one scholar observed, "[t]he only important question is whether the price was distorted" for the individual stock, not whether the market is efficient as a general matter. Langevoort, *Theories, supra*, at 898-99.

This understanding is borne out by the conception of the fraud on the market theory before *Basic*. The efficient capital markets hypothesis was first combined with the fraud on the market theory in the 1980s. See Jeffrey L. Oldham, Comment, *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine after the Private Securities Litigation Reform Act*, 97 Nw. U. L. Rev. 995, 1006-11 (2003). Before then, the fraud on the market presumption was described "as being predicated on a showing that 'the plaintiff establishes that a lie, misleading statement, or omission has affected the price of the stock.'" *Id.* at 1007 (quoting *Flamm* v. *Eberstadt*, 814 F.2d 1169, 1179 (7th Cir. 1987)); see also 4 Alan R. Bromberg & Lewis D. Lowenfels, Bromberg & Lowenfels on Securities Fraud and Commodities Fraud § 7:468 (2d ed. 2000) ("This text first suggested in 1967 that a 10b-5 reliance requirement in open market transactions could be satisfied by showing that an investor who traded with reference to market price and conditions could be treated as indirectly relying on a misrepresentation which affected the market."). Thus, the inquiry concerned the effect of a particular piece of information on the stock price in question.

But courts and commentators began to employ the efficient capital markets hypothesis, emphasizing that if a plaintiff could show that a market was

efficient, then *any* material misrepresentation in a case necessarily affected the price of the security. Oldham, *supra*, at 1010-11 (citing *In re LTV Sec. Litig.*, 88 F.R.D. 134, 142-46 (N.D. Tex. 1980)); Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 9-10 (1982); see also *Peil* v. *Speiser*, 806 F.2d 1154, 1163 (3d Cir. 1986) (stating that "a well-developed market can reasonably be presumed to respond to even a single material misrepresentation or omission concerning a stock * * * traded in that market"); Roger J. Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 Wm. & Mary L. Rev. 373, 374-75 (1984). *Basic* relied on several of these sources for its conclusion that well-developed markets reflect all public information. *Basic*, 485 U.S. at 246 n.24 (citing *LTV*, Fischel, and Dennis). Conversely, it was understood that if a market were *not* completely efficient, the fraud on the market presumption would be inappropriate. See *Reingold* v. *Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1264 (S.D.N.Y. 1984) ("In [inefficient] markets, the price of a security does not necessarily reflect all [information and] an inference of * * * reliance is inapposite." (citation omitted)). Thus, the efficient capital markets hypothesis "effectively became a proxy for showing that the misrepresentation actually affected the stock price." Oldham, *supra*, at 1011; accord Langevoort, *Theories*, *supra*, at 890-91 ("The fraud-on-the-market theory is often understood to carry with it the second presumption that in an efficient market, a material misrepresentation or actionable omission influences the market price, and therefore removes the need to actually prove the impact.").

The fact that total market efficiency is unnecessary to establish fraud on the market is not itself reason to eliminate the requirement of such a showing. But reference to market efficiency has disadvantages that counsel the use of a different mechanism for demonstrating reliance.

B. *Basic*'s Efficiency Requirement Is Poorly Tailored To Remedy Fraud On The Market

Experience has shown that efficiency is not an especially close proxy for reliance, providing a remedy that is both underinclusive in some respects and overinclusive in others.

Basic's focus on the overall efficiency of a market, rather than the effect of the specific misstatement, needlessly limits investors' ability to employ the class-action mechanism with respect to less efficient markets, even when the market price reflects the alleged misstatements. Lower courts have held *Basic*'s presumption of reliance to be unavailable to investors in newly issued securities, see *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); *Freeman* v. *Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990), mortgage-backed bonds, see *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008), collateralized debt obligations, see *Dodona I, LLC* v. *Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 651 (S.D.N.Y. 2012), and securities in less developed markets, see *Krogman* v. *Sterritt*, 202 F.R.D. 467, 474-78 (N.D. Tex. 2001), even when the alleged false statement is significant. The class-action mechanism is frequently unavailable because the class cannot show efficiency.

This outcome is unfortunate because it is "in * * * small companies, traded over the counter or on non-traditional exchanges, that the kinds of fraud Rule 10b-5 was designed to avert are most likely to occur." Geoffrey Christopher Rapp, *Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in* Cammer v. Bloom *and Its Progeny*, 10 U. Miami Bus. L. Rev. 303, 322-23 (2002); see also Advisory Comm. on Smaller Public Companies, Final Report to the U.S. Securities & Exchange Commission 139 (2006) (2006), *available at* www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf (noting that "small firms consistently have more misstatements and restatements of financial information, nearly twice the rate of large firms"). If the rationale for the fraud on the market presumption is that investors should be able to rely on securities markets being free from fraud,[2] it makes little sense to focus on market efficiency, which effectively limits the presumption of reliance to only the largest and most trustworthy securities issuers.

Just as the emphasis on efficiency is underinclusive as to potentially strong fraud cases perpetrated in less efficient markets, it is overinclusive as to weak fraud cases involving more efficient markets. "For large-cap stocks, there is seldom any debate over whether the market is efficient enough: efficiency is assumed." Langevoort, Basic *at Twenty*, *supra*, at 173. Thus, plaintiffs suing

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[2] See *Blackie* v. *Barrack*, 524 F.2d 891, 907 (9th Cir. 1975) ("The statute and rule [of Section 10(b) and Rule 10b-5] are designed to foster an expectation that securities markets are free from fraud—an expectation on which purchasers should be able to rely.").

a widely traded issuer can be certified as a class even where the market, due to the obscurity or complexity of the information (or some other reason), did not actually rely on the misstatements. Although defendants can assert a lack of actual reliance as a defense on the merits, as a practical matter, a class action is overwhelmingly likely to settle once it is certified.[3] Because such settlements are most easily procured from the largest and most well-traded companies (which have the most to lose and can more readily afford them), they create a significant impact on the capital markets. Such an overinclusive standard undermines deterrence by encouraging the class action bar to pursue claims against the largest companies, rather than the ones most likely to have engaged in fraud.

C. Market Efficiency Determinations Are Difficult For Courts To Make

Many courts interpret *Basic* to permit plaintiffs, upon a showing of efficiency, to substitute a rebuttable presumption of reliance for a showing that the alleged misrepresentations actually influenced the market price. This substitution suggests both that the efficient capital markets hypothesis is a sound explanation for market movements and that

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[3] See Jordan Milev et al., *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review* 12 (Dec. 14, 2011) (unpublished manuscript), *available at* www.nera.com/nera-files/PUB_Trends_Year-End_1211_final.pdf (noting that since late 1995, "there have been only 29 securities class action trials, as compared to a total number of over 3,800 filings"); Bryant G. Garth, *Studying Civil Litigation through the Class Action*, 62 Ind. L.J. 497, 501 (1987) (reporting a 78% settlement rate for certified class actions and only a 15% settlement rate for noncertified cases).

evaluating a security's overall efficiency is more practicable than determining whether the misstatement actually distorted the market price. See *Litton Indus., Inc.* v. *Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 748 (2d Cir. 1992) ("To saddle a plaintiff with proving the 'generally indeterminable fact of what would have happened but for * * * the misrepresentations that skewed the market value of stock would reduce the protection against fraud afforded by Section 10(b).'" (brackets omitted) (quoting *duPont* v. *Brady*, 828 F.2d 75, 78 (2d Cir. 1987))). It is now recognized, however, that markets are rarely, if ever, totally efficient. Moreover, showing efficiency is in most cases a more difficult task than demonstrating distortion of market price caused by a particular misstatement.

1. Since *Basic* Was Decided, Research Has Called The Efficiency Of Markets Into Question

In employing the efficient capital markets hypothesis to support a presumption of reliance, *Basic* observed that "empirical studies have tended to confirm * * * that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." 485 U.S. at 246. The decision thus relied on the understanding that "[r]esearchers agree that the efficient capital market model," which "posits that the price of a security reflects all publicly available information[,] * * * accurately represents the pricing behavior of stocks." Dennis, *supra*, at 374-75; see *Basic*, 485 U.S. at 246 n.24 (citing Dennis). On that basis, courts and commentators have concluded that *Basic* implicitly endorsed the

semi-strong form of the efficient capital markets hypothesis, which theorizes that "an efficient market is one in which all publicly available information is reflected in the market price of the stock." *PolyMedica*, 432 F.3d at 10 n.16; see also *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010).

The *Basic* Court's confidence in the efficient capital markets hypothesis was a product of its time. See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 549 (1984) ("Of all recent developments in financial economics, the efficient capital markets hypothesis * * * has achieved the widest acceptance by the legal culture.") However, as economists have deepened their understanding of capital markets, they have tempered their faith in the efficiency of markets.

Contrary to the view of efficiency *Basic* appears to have accepted, "efficiency is not a binary, yes or no question." Langevoort, Basic *at Twenty*, *supra*, at 167. Rather, there is a spectrum of market efficiency, see Gilson & Kraakman, *supra*, at 560, and "[p]erfect efficiency is just a theoretical ideal," Langevoort, Basic *at Twenty*, *supra*, at 167. Levels of efficiency vary even among types of information within the same market: If one piece of information is more easily collected and understood than another, it will be incorporated into the market price more quickly, even if both pieces of information concern the same security. See Brad M. Barber et al., *The Fraud-on-the-Market Theory and the Indicators of Common Stocks' Efficiency*, 19 J. Corp. L. 285, 290-91 (1994);

Gilson & Kraakman, *supra*, at 558-59.[4] "For example, stock prices may reflect certain types of public information (concerning, for instance its own prices, or the interest rate on Treasury Bills) faster than other types of public information (concerning, for example, Iraq's invasion of Kuwait)." Ian Ayres, *Back to* Basics*: Regulating How Corporations Speak to the Market*, 77 Va. L. Rev. 945, 976 (1991).

And because no real-world market is completely efficient, information—even important, publicly disseminated information—is not always rapidly incorporated into prices. For example, there is evidence of large disparities in market reaction to accounting restatements depending on the prominence of the restatement. See Rebecca Files et al., *Stealth Disclosure of Accounting Restatements* (Apr. 27, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1395768. Similarly, there is evidence that the *Wall Street Journal*'s publication of reports of trading by corporate insiders rapidly and significantly affects that corporation's stock price, even though the SEC usually makes such reports public several days earlier. See Saeyoung

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[4] See also Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. Corp. L. 656 (2003):

> Information that is easy to understand and that is trumpeted in the business media—for example, merger announcements or news of a stock split—may be incorporated into market prices almost instantaneously. But information that is "public" but difficult to get hold of, or information that is complex or requires a specialist's knowledge to comprehend, may take weeks or months to be fully incorporated into prices. Indeed it may never be fully incorporated at all.

Chang & David Y. Suk, *Stock Prices and the Secondary Dissemination of Information: The Wall Street Journal's "Insider Trading Spotlight" Column*, 33 Fin. Rev. 115, 115-17 (1998). And "[o]ne of the most common types of material disclosures—an earnings surprise—actually takes a while to be fully impounded, even for large-cap stocks, and even varies depending on whether it is good news or bad." Langevoort, Basic *at Twenty*, *supra*, at 170. The efficient capital markets hypothesis would suggest that such material, public information would be quickly incorporated into stock prices, but empirical evidence indicates otherwise.

In the same vein, in *In re Merck & Co. Securities Litigation*, 432 F.3d 261 (3d Cir. 2005), information regarding Merck—a large and well-followed firm in a well-developed market—was first released to the public in a complicated format through an SEC filing, to no demonstrable market effect. *Id.* at 269-70. As one scholar has noted, "it is hard to imagine any stock more likely traded in an efficient market than Merck," Langevoort, Basic *at Twenty*, *supra*, at 174, and so the efficient capital markets hypothesis would suggest that this information would rapidly be incorporated in price. But when an article in the *Wall Street Journal* "read[] between the lines of this disclosure" several weeks later, the result was a significant decline in price. *Merck*, 432 F.3d at 263, 265. The court of appeals determined on this basis that the information was immaterial—even though the markets' response to the *Journal* article clearly militates against that conclusion—because "the efficient market hypothesis suggests that the market made these basic calculations months earlier." *Id.* at 271. It is also plausible, however, that the market

had not actually incorporated the information when first released in the more obscure format. See, *e.g.*, Langevoort, Basic *at Twenty*, *supra*, at 176 (noting possibility that market missed implications of Merck's initial disclosures). Commentators have identified many other instances in which markets have moved inefficiently.[5]

Early research on the efficient capital markets hypothesis—the research available at the time *Basic* was decided—focused on types of information that are usually rapidly incorporated into market prices (such as "stock splits, dividend changes, corporate mergers, and the like"). Stout, *supra*, at 653. But other "types of information highly relevant to assessing the economic health of firms appear to be incorporated into stock prices far more slowly and incompletely than the conventional view of market efficiency would suggest." *Id.* Researchers also analyzed broad-based indices rather than individual

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[5] See, *e.g.*, Marlene A. Plumlee, *The Effect of Information Complexity on Analysts' Use of That Information*, 78 Acct. Rev. 275, 293 (2003) (concluding that analysts fail to incorporate complex information in forecasts); Gur Huberman & Tomer Regev, *Contagious Speculation and a Cure for Cancer: A Nonevent that Made Stock Prices Soar*, 56 J. Fin. 387 (2001) (noting significant market effect of prominent news item concerning information that had been public for months); Peter Klibanoff et al., *Investor Reaction to Salient News in Closed-End Country Funds*, 53 J. Fin. 673 (1998) (concluding that well-publicized news items were more likely to move the market than redundant information found elsewhere, and that well-publicized news events created short periods in which the relevant markets reacted more quickly to changes); Thomas S.Y. Ho & Roni Michaely, *Information Quality and Market Efficiency*, 23 J. Fin. & Quantitative Analysis 53 (1988) (finding market effect from republication of already available information).

securities, which yielded results showing efficiency and obscured anomalous results involving particular securities. See Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 Del. J. Corp. L. 455, 525 (2006).

Post-*Basic* research has identified significant limitations on the efficient capital markets hypothesis. Markets *sometimes* rapidly incorporate most public information, but there are substantial exceptions to this generalization, even as to material information in relatively efficient markets. In light of this research, *Basic*'s assumption that a market deemed efficient will promptly and reliably incorporate a *particular misstatement* into a security's price—which is, at bottom, what courts consider to be a "fraud on the market"[6]—does not reflect the current understanding in financial economics.

2. Courts And Commentators Have Struggled With Determining When A Particular Market Is Sufficiently "Efficient" To Support A Presumption of Reliance

Basic requires courts to determine whether markets are "efficient" or "not efficient." But as discussed above, markets exist along a spectrum of efficiency rather than at either end, and *Basic* offers no guidance about the point at which a market becomes efficient enough to qualify for the

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[6] See *Verifone*, 784 F. Supp. at 1479 ("The fraud-on-the-market theory * * * shifts the inquiry from whether an individual investor was fooled to whether the market as a whole was fooled.").

presumption of reliance. Moreover, a determination of efficiency is inherently difficult to make. Not even financial economists have been able to develop an agreed-upon test to prove efficiency. Because economists "do not know how to []calculate the price that fully reflects the available information," it is difficult at best to test whether a market fully reflects all publicly available information. Alon Brav & J.B. Heaton, *Market Indeterminacy*, 28 J. Corp. L. 517, 525 (2003); Fama, *supra*, at 1575 ("[M]arket efficiency per se is not testable."). Perfect efficiency is not a realistic scenario. See Fama, *supra*, at 1575.

If efficiency determinations are difficult (if not impossible) for economists, they are harder still for courts: Determining efficiency "requires courts to drift far from their institutional competence." Nathaniel Carden, Comment, *Implications of the Private Securities Litigation Reform Act of 1995 for Judicial Presumptions of Market Efficiency*, 65 U. Chi. L. Rev. 879, 905 (1998). Because of difficulties in determining market efficiency, courts have resorted to examining proxies associated with efficient markets. If the proxies indicate a sufficiently large and developed market, the market is deemed efficient. The most prominent of the tests courts have developed is that set forth in *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989). The proxies *Cammer* employed were the percentage of shares traded weekly; whether "a significant number" of analysts follow and report on the stock; the existence of market makers trading the stock; whether the issuer was qualified to use an S-3 registration statement with the SEC; and whether the plaintiff can "allege empirical facts showing a cause and effect relationship between unexpected corporate events or

financial releases and an immediate response in the stock price." *Id.* at 1286-87. Courts have also looked to other proxies, including market capitalization, see *Krogman*, 202 F.R.D. at 478, bid-ask spread, *id.*, percentage of stock held by insiders, *id.*, and volume of trading by institutional investors, *O'Neil* v. *Appel*, 165 F.R.D. 479, 503 (W.D. Mich. 1996). But these indicators are only proxies for efficiency. See *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 613 (C.D. Cal. 2009) (stating that many *Cammer* factors "indirectly assess market efficiency"); Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes, and Securities Litigation*, 81 Tul. L. Rev. 443, 455 (2006) ("[T]he *Cammer* and *Krogman* factors * * * are best understood as constituting an indirect test by which courts *infer* efficiency for reliance purposes."). These courts, then, took *Basic*'s already-relaxed concept of reliance—essentially a proxy for individual reliance adopted to allow more plaintiffs to bring securities class actions—and relaxed it further by allowing proxies for efficiency rather than the inquiry into actual efficiency that *Basic* required.

What is more, the factors lower courts consider in determining efficiency frequently are unmoored from efficiency. Apart from being highly correlated with each other (and therefore redundant),[7] research indicates that some often-considered factors, such as the number of market makers, issuer size, bid-ask spread, and institutional holdings, are not

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[7] Barber et al., *supra*, at 293 ("[G]iven that most efficiency drivers are correlated, as the volume of trade and firm size are, they cannot be considered as independent efficiency indicators.").

empirically correlated with efficiency. See Barber et al., *supra*, at 285-86; Victor L. Bernard et al., *Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-on-the-Market Theory*, 73 Neb. L. Rev. 781, 796 (1994). As a result of this research, some courts have reduced the emphasis on market makers. See, *e.g.*, *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 324 (5th Cir. 2005). But even these courts persist in considering other less reliable factors, and many other courts continue to use all the *Cammer* factors. See, *e.g.*, *In re Dynex Capital, Inc. Sec. Litig.*, No. 05 Civ. 1897, 2011 WL 781215, at *5 (S.D.N.Y. Mar. 7, 2011) (examining market makers); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 635 (N.D. Ala. 2009); *In re Infineon Techs. AG Sec. Litig.*, 266 F.R.D. 386, 396-97 (N.D. Cal. 2009). And even the *Cammer* factor most closely correlated with efficiency—the speed at which the stock incorporated other information in the past—may not say much about how quickly the market incorporated the information in a particular case, because different types of information, and information disclosed through different sources, are incorporated at different rates.

This problem is compounded by the fact that many proxies closely correlated with efficiency do not actually test efficiency. See David Tabak, *Use and Misuse of Event Studies to Examine Market Efficiency* 2 (Apr. 30, 2010) (unpublished manuscript), *available at* www.nera.com/nera-files/PUB_Use_Misuse_of_Event_Studies_0410_final.pdf) (noting that, with the exception of response of prices to new information, "factors cited by courts are designed to be conditions that are likely to either be conducive to or the result of an efficient market"). Thus, their correlation with

efficiency may be diminished in the future. For example, the studies noted above, which demonstrate that dollar trading volume is indicative of efficiency, were published in 1994. Since then, internet trading has risen in popularity, increasing the number of novice investors and adding to trading volume.[8] This added volume does not mean that the market became more efficient—in fact, internet traders and day traders often add to stock volatility without causing the price to reflect available information more quickly. See William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L.J. 843, 930 (2005) (noting that "large trading volume does not—if significantly including day trading and other online retail brokerage transactions—signal that the mechanism for efficient market pricing is actively working on the stock price"). Thus, trading volume probably is not as closely correlated with efficiency now as it was in 1994.

The relationship between analyst following and efficiency has been questioned in light of similar market trends. See *id.* at 966-68 (noting that analyst bias during the dot-com bubble of 1998-2001 rendered analyst following an unsound predictor of efficiency during that period). More broadly, because most of the *Cammer* factors "are largely *descriptive*, not

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[8] See Brad M. Barber & Terrance Odean, *The Internet and the Investor*, 15 J. Econ. Persp. 41, 41, 47 (2001) (stating that "[f]rom 1995 through mid-2000, investors opened 12.5 million on-line brokerage accounts" and that evidence suggests that access to internet trading leads to a greater volume of trading); Gregory La Blanc & Jeffrey J. Rachlinski, *In Praise of Investor Irrationality*, *in* The Law and Economics of Irrational Behavior 542, 558-59 (Francesco Parisi & Vernon L. Smith eds. 2005).

predictive," and cannot "be used directly to predict efficiency," Rapp, *supra*, at 319, there is a risk that changes such as the internet trading explosion will undermine the factors' correlation with market efficiency. Because there inevitably will be lag time in understanding changes in the securities market, when such changes occur, courts may not apprehend their significance for years. Thus, courts' tests for efficiency may include factors that have little or no connection to market efficiency.

In addition, courts are inconsistent in applying these factors. The case law is unclear about how much of a factor (or a combination of factors) is necessary to show efficiency. Courts are "ill-equipped to determine and analyze the fundamentals of market efficiency; *i.e.*, * * * 'how many' analysts [a]re needed to ensure that information concerning a company finds its way, through buy and sell recommendations, into the price of a company's stock, and 'how many' market makers [a]re needed to ensure the market's 'swift' incorporation of company news into the price of a company's stock." Paul A. Ferillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 93 (2004) (citations omitted). Thus, courts applying *Cammer* factors have come to disparate conclusions when evaluating similar facts. See Rapp, *supra*, at 309-17, 328. The result is "a massive hodgepodge of * * * outcomes." Ferillo, *supra*, at 102 (reviewing cases and concluding "most courts will come to very individual conclusions" on efficiency and find different factors persuasive).

In view of the difficulties courts face in determining market efficiency, this Court should reconsider the role *Basic* has assigned to the efficiency determination in assessing reliance. As set forth below, this Court should abandon *Basic*'s insistence upon a demonstration of efficiency in favor of a showing that the particular misrepresentation caused a market distortion.

II. IN DETERMINING RELIANCE, COURTS SHOULD LOOK TO MARKET MOVEMENT CAUSED BY AN ALLEGED MISREPRESENTATION, RATHER THAN TO OVERALL MARKET EFFICIENCY

Judicial inquiry into market efficiency, despite its difficulties, might still be worthwhile if it were the most reliable means of establishing whether to apply the fraud on the market presumption. But it is not. Apart from the fact that courts have difficulty making determinations of efficiency, see *supra* at 18-24, proving the efficiency of the market as a whole is only an indirect means of proving that the market relied on a particular statement. And as discussed below, determining whether a misstatement distorted the market is typically *easier* than demonstrating efficiency of the market as a whole. It is also a more direct means of inquiring into reliance, and a more reliable method of showing whether the complained-of fraud was, in fact, a "fraud on the market."

A. The Event Study Is The Best Available Tool To Examine Market Distortion And Show Reliance

The central issue in determining whether the fraud on the market presumption may be invoked is

"whether the challenged disclosure artificially inflated ([or] deflated) the market price of the particular security. Inquiry into whether the market price was inflated ([or] deflated) replaces individualized inquiry into the extent to which particular investors were aware of a challenged disclosure." Fischel, *Efficient Capital Markets*, *supra*, at 908. But even without relying on the general efficiency of markets, there remains a reliable and practicable method for courts to determine whether misstatements distorted the market: the event study.

"An event study is a regression analysis that measures the effect of an event, such as a firm's earnings announcement, on a firm's stock price." Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of* Dura Pharmaceuticals, Inc. v. Broudo, 63 Bus. Law. 163, 166 (2007). "[A]n event study [can] determine whether the alleged misrepresentations caused any statistically significant stock price movements when made or when a supposedly corrective disclosure was made, controlling for other possible causes of stock price movements (such as movements of the overall market) and random fluctuations." Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. Chi. L. Rev. 941, 948 (2002). Event studies "are commonly used to isolate the effects on the stock price of the disclosure of the withheld information." Janet Cooper Alexander, *The Value of Bad News in Securities Class Actions*, 41 UCLA L. Rev. 1421, 1433 (1994). Thus,

> [i]f an event study shows that a misrepresentation or a corrective disclosure had a statistically significant effect on the

> price of a stock, then the market may be said to have "relied" on the misrepresentation. And, by the fraud-on-the-market theory, all of the investors who bought (or sold) the stock also "relied" by buying or selling at a market price that included a component reflecting the falsity.

Fisher, *supra*, at 874. Conversely, if an event study shows that a misrepresentation or corrective disclosure[9] had no statistically significant effect on the stock price, then the market cannot be said to have relied on the misrepresentation.

The event study is the "gold standard" technique for determining whether the market relied on a misstatement. Madge S. Thorsen et al., *Rediscovering the Economics of Loss Causation*, 6 J. Bus. & Sec. L. 93, 109 (2006). It is accepted by courts, academics, and the SEC for that purpose. See *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 170 (S.D.N.Y. 2007) (finding "numerous courts have held that an event study is a reliable method for determining market efficiency"), *rev'd on other grounds*, 574 F.3d 29 (2d Cir. 2009); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 460

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[9] When the fraud at issue involves an alleged omission or a misstatement to meet expectations (and accordingly has no effect on stock price), plaintiffs can use an event study to discern the market effect of the corrective disclosure. See David Tabak, *Loss Causation and Damages in Shareholder Class Actions: When It Takes Two Steps to Tango* 6 (May 27, 2004) (unpublished manuscript), *available at* http://www.nera.com/extImage/200405Tabak_Loss_Causation.pdf. However, amici do not contend that the presumption of reliance in cases of pure omissions created by *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), should be altered.

(S.D.N.Y. 2000); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1181 (N.D. Cal. 1993); Fischel, *Market Evidence, supra*, at 948 (describing an event study as a "simple statistical technique, used in thousands of academic studies and employed routinely in securities fraud litigation brought under the federal securities laws"); Mark L. Mitchell & Jeffry M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission*, 49 Bus. Law. 545, 572-84 (1994) (describing SEC enforcement actions using event study analysis).

Event studies are routinely employed to show that a market is efficient at the class certification stage. See, *e.g.*, *Teamsters*, 546 F.3d at 207-10; *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512-14 (1st Cir. 2005); *In re Nature's Sunshine Prods. Inc. Sec. Litig.*, 251 F.R.D. 656, 664-65 (D. Utah 2008). Such studies examine the market effect of various news items relating to an issuer; if the security "change[s] rapidly, and in the expected direction, in response to new information," it supports a finding of market efficiency. *Schleicher*, 618 F.3d at 684; see also *Teamsters*, 546 F.3d at 207-08 ("Evidence that unexpected corporate events or financial releases cause an immediate response in the price of a security has been considered 'the most important[] *Cammer* factor.'" (quoting *Xcelera.com*, 430 F.3d at 512)).

Thus, courts are already considering experts' event studies examining the effect of disclosures at the class certification stage to prove that a market generally incorporates information into prices, to trigger the *Basic* presumption of reliance. But the

same experts could conduct the same analyses to determine directly whether the alleged misstatement was incorporated into the stock price—the added step of determining efficiency as a general matter is unnecessary. Event studies can examine market effects of particular affirmative misstatements by looking to the effect at the time of disclosure; in cases involving omissions, they can look to the date the information was corrected. See David Tabak, *Making Assessments about Materiality Less Subjective through the Use of Content Analysis* 4-5 (Mar. 13, 2007) (unpublished manuscript), *available at* http://www.nera.com/extImage/PUB_Tabak_Content_Analysis_SEC1646-FINAL.pdf.

Amici submit that a direct analysis of the market impact of a specific alleged misstatement, rather than examination of general market efficiency, is a more straightforward and reliable test for whether the fraud on the market theory should be invoked. Such an approach conforms *Basic* to current finance theory and research, and by limiting the over- and underinclusiveness of the current approach, it offers better prospects for allowing meritorious class actions to continue while preventing baseless ones.

Respondent relies on scholarship stating that "finding measurable [price] distortion is often hard" to attack the use of a market-impact test for the fraud on the market presumption. See Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton 10 (Nov. 16, 2013) (unpublished manuscript), *available at* http://scholarship.law.georgetown.edu/facpub/1226; Br. in Opp. 24 n.5. This scholarship posits that event studies cannot always

measure market impact. Langevoort, *Judgment Day*, *supra*, at 10-12. But while it may be more difficult in such instances to show price distortion as a result of a particular misstatement, this increased difficulty should not prevent the adoption of a market-impact inquiry in class actions.

As an initial matter, a market-impact requirement is reasonable and theoretically sound because it demands that a putative class show the presence of a true fraud on the market. A "fraud on the market" occurs if a fraud affects the price of a security. See *Basic*, 485 U.S. at 247; *Stark Trading*, 552 F.3d at 572. Requiring a showing of market impact simply compels that a putative class demonstrate the occurrence of such an event. Indeed, by not requiring proof that an alleged misstatement moved the market, and instead accepting an imprecise proxy for market movement fashioned out of indirect efficiency evidence, a putative class in essence receives the benefits of two presumptions instead of one: first, the presumption of the reliance requirement through the fraud on the market theory, and second, the presumption of an instance of fraud on the market itself, through the proxy of efficiency. Simply put, a class wishing to avail itself of the fraud on the market presumption of reliance should be required to show that a fraud on the market actually occurred.

In addition, worries that a market-impact requirement would improperly frustrate class certification where a fraud on the market has truly taken place are overblown. Although one commentator argues that such frustration would "often" occur, see Langevoort, *Judgment Day*, *supra*,

at 10-12, that same commentator noted that "[e]vent-study-methodology works acceptably well even for thinly traded stocks," Langevoort, Basic *at Twenty*, *supra*, at 179. Commentators have also noted that economic analysis can resolve common event-study issues such as confounding events. See Frederick C. Dunbar & Arun Sen, *Counterfactual Keys to Causation and Damages in Shareholder Class Action Lawsuits*, 2009 Wis. L. Rev. 199, 227-41 (noting that content analysis can separate and clarify the impact of multiple simultaneous events); Ferrell & Saha, *supra*, at 170 (explaining the use of shorter event windows to avoid confounding events); David I. Tabak & Frederick C. Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, *in* Litigation Services Handbook 19.2 (Roman L. Weil et al. eds., 2001) (noting that economists can disentangle the effects of multiple announcements on a single day if the effect of nonfraudulent announcements on that day can be estimated, perhaps through analogues on other days). At least for showing the existence of some market impact (and thus the presence of a fraud upon the market)—even if the precise magnitude of such impact is debatable—event studies are the best available tool.

Indeed, the reliability of event studies is supported by their adoption by courts in determining damages under *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005). *Dura* requires 10b-5 plaintiffs to show that a stock drop is due to fraud and not "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price," *id.* at 343, and many courts have found

event studies indispensable for this purpose.[10] The primacy of event studies in securities class actions in other stages of litigation belies the assertion that they are unworkable at class certification to show market impact.

Moreover, cases in which no market movement can be discerned through current economic methods would likely ultimately fail at the merits stage under *Dura* for lack of demonstrable damages. See *Dura*, 544 U.S. at 346-47 (holding fraud claim insufficient in absence of price drop for corrective disclosure). This is not to say that a market-impact inquiry is a merits-only inquiry that must wait until after class certification. Rather, the concern for putative classes that cannot show market movement may be misplaced, because claims brought by such classes are likely to fail under *Dura's* current demands.

For these reasons, putative classes that cannot show that a fraud on the market took place through

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[10] See, *e.g.*, *United States* v. *Schiff*, 602 F.3d 152, 173 n.29 (3d Cir. 2010) (observing that event studies are the technique "most often used by experts to isolate the economic losses caused by the alleged fraud") (quoting *In re Apollo Grp. Inc. Sec. Litig.*, 509 F. Supp. 2d 837, 844 (D. Ariz. 2007)); *In re Diamond Foods, Inc., Sec. Litig.*, -- F.R.D. --, 2013 WL 1891382, at *12 (N.D. Cal. May 6, 2013) (discussing widespread use of event studies in calculating damages and citing cases); *Bricklayers & Trowel Trades Int'l Pension Fund* v. *Credit Suisse First Boston*, 853 F. Supp. 2d 181, 186 (D. Mass. 2012) ("An event study is an accepted method of measuring the impact of alleged securities fraud on a stock price and often plays a 'pivotal' role in proving loss causation and damages in a securities fraud case. Given the difficulty inherent in proving the effect, if any, of a single news item on the price of a stock, many courts require them in such cases.") (quoting *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1272 (N.D. Okla. 2007)).

proof of market impact should not receive the benefit of a broad presumption of reliance.

B. A Proposed Class Unable To Show Market Impact Should Be Entitled To Disgorgement Remedies Only

Basic reserved the question of the proper measure of damages in cases relying on the fraud on the market theory. See 485 U.S. at 248 n.28. Although putative classes unable to show either actual reliance or an instance of fraud on the market through market impact should not, for the reasons above, enjoy a presumption of reliance, recovery for such classes need not be completely foreclosed. Rather, a class using only evidence of market efficiency to gain class certification could receive disgorgement damages rather than out-of-pocket damages.

Such an approach is supported by the overall structure of the securities laws. This Court has instructed that "[w]hen the text of § 10(b) does not resolve a particular issue, we attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act. For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178 (1994).

The implied right of action in Section 10(b) does not address the appropriate measure of damages in cases in which reliance is shown only through efficiency proxies, rather than through direct evidence or proof of market impact. Consequently, it is appropriate to look to the explicit causes of action

provided by Congress. The private causes of action created by Congress suggest that where reliance is absent, disgorgement is the proper remedy. For example, Sections 11 and 12(a)(2) of the Securities Act of 1933 do not require reliance, but they limit damages to the offering price—in essence, a disgorgement remedy. See 15 U.S.C. §§ 77k, 77l. This measure of recovery is also stipulated for the private causes of action for insider trading in Sections 16(b) and 20A of the Exchange Act of 1934. See *id.* §§ 78p, 78t-1.

In contrast to these causes of action for which reliance is not required, Section 18 of the Exchange Act—perhaps the statutory provision most similar to Rule 10b-5—allows investors purchasing or selling securities "in reliance upon" a misstatement in the company's SEC filings to recover "damages caused by such reliance." *Id.* § 78r. Courts have held that indirect forms of reliance, such as the fraud on the market presumption, do not satisfy Section 18's reliance requirement.

Thus, in the private causes of action expressly created by Congress, recovery is limited to some measure of the defendant's benefit (the disgorgement measure of unjust enrichment). Only when the plaintiff can show reliance on the misstatement has Congress provided for the out-of-pocket measure of damages.

Following *Central Bank*'s instruction to look to the explicit causes of action provided by Congress under the federal securities laws as the model for the Rule 10b-5 cause of action, the remedy for plaintiffs resorting to a fraud on the market presumption based

on indirect efficiency evidence should be disgorgement. Out-of-pocket damages in Rule 10b-5 cases should be limited to actual reliance, or cases in which the plaintiff can establish that the price was distorted by the material misstatement, as outlined above.

In addition to according with the statutory structure enacted by Congress for dealing with securities fraud, limiting plaintiffs using indirect efficiency evidence to disgorgement would more directly deter fraud. In most fraud on the market cases, the corporation does not benefit from the relevant misrepresentation; rather, executives perpetrating the fraud benefit through performance bonuses or stock-option profits. In fact, rather than benefiting the issuer, fraud perpetrated by these executives harms an issuer because it forces that company to pay undeserved bonuses and benefits inflated by fraud. Notwithstanding the lack of benefit to the corporation, the combination of the fraud on the market presumption and the out-of-pocket measure of damages encourages class action plaintiffs to pursue claims against the corporation, rather than wrongdoing officers.

A disgorgement remedy could better allocate remedial sanctions to those most culpable for fraud: the corporate officers who make material misstatements with scienter. Such a remedial scheme would empower investors to strip wrongful gains from those individuals who actually made actionable misstatements, enhancing deterrence. Of equal importance, it would eliminate frequently draconian sanctions for issuers that do not benefit from fraud.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	(i)
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE "FRAUD-ON-THE-MARKET" THEORY OF INDIRECT RELIANCE HAS IMPOSED SIGNIFICANT BURDENS ON THE ECONOMY AND NEGATIVELY IMPACTED THE FINANCIAL MARKETS	4
II. NEITHER THE EXCHANGE ACT'S STATUTORY TEXT NOR LEGISLATIVE HISTORY SUPPORTS *BASIC*'S FRAUD-ON-THE-MARKET PRESUMPTION	10
A. Congress Did Not Create a Private Right of Action Under § 10(b); Accordingly, the Judicially Implied Right of Action Should Be Narrowly Construed	11
1. Congress Did Not Create a Private Right of Action Under § 10(b)	11
2. The § 10(b) Implied Private Right of Action Must Be Narrowly Construed	14

TABLE OF CONTENTS—Continued

Page

B. The Legislative History of § 18 Demonstrates that If Congress Intended to Permit a Private Right of Action Under § 10(b), It Would Have Required Proof of Reliance 14

1. The § 10(b) Implied Private Remedy Must Be Construed Consistently with the Most Analogous Express Remedy Under the 1933 and 1934 Acts 15

2. The Express Private Remedy Under § 18 Is Most Analogous to § 10(b) 16

3. Congress Required Reliance Under § 18 of the Exchange Act 17

4. The 1934 Congress Could Not Have Shared *Basic*'s Solicitude for Class Actions, Which Did Not Exist 19

C. Courts Applying State Law Have Rejected or Declined to Adopt *Basic*'s Fraud-on-the-Market Presumption 20

III. A MIDDLE GROUND APPROACH MODIFYING *BASIC*'S PRESUMPTION WILL NOT REDRESS THE NEGATIVE EFFECTS OF SECURITIES CLASS ACTIONS ON THE FINANCIAL MARKETS 21

TABLE OF CONTENTS—Continued

Page

1. Proof of Price Movement Upon Corrective Disclosure Does Not Necessarily Demonstrate that the Alleged Misrepresentation Affected the Market Price 22

2. Price Impact Is Not Probative of Class-Wide Reliance in an Efficient Market 26

CONCLUSION 30

TABLE OF AUTHORITIES

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532 U.S. 275 (2001) 12, 13

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133 S. Ct. 2304 (2013) 19

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724 S.E.2d 401 (Ga. App. 2012) 21

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346 F. App'x 847 (3d Cir. 2009) 20

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Nos. 92-1608, 02-1607, 1993 WL 65086
(4th Cir. Mar. 10, 1993) 20

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485 U.S. 224 (1988) ..... *passim*

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No. 93-2142, 1994 WL 285458
(4th Cir. June 29, 1994) 21

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898 P.2d 170 (Okla. App. 1995) 21

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33 S.W.3d 809 (Tenn. App. 2000) 21

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437 U.S. 463 (1978)..... 5

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6 F. Supp. 2d 1089 (D. Minn. 1998) 20

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Co.,131 S. Ct. 2179 (2011) 1, 10, 24

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1998 WL 781118 (N.D. Ill. Nov. 4, 1998). 21

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2000 WL 630916
(D. Conn. Mar. 24, 2000) 20

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133 S. Ct. 1216 (2013)..... 1

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131 S. Ct. 2296 (2011) 14

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558 So.2d 144 (Fla. App. 1990) 21

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754 A.2d 1188 (N.J. 2000) 20, 21

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197 F.R.D. 310 (W.D. Mich. 2000) 21

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501 U.S. 350 (1991) 12, 14, 17

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722 A.2d 5 (Del. 1998) 21

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131 S. Ct. 1309 (2011) 1

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Section 12, 15 U.S.C. § 77l 16, 17

Section 15, 15 U.S.C. § 77o..... 16, 17

Securities Exchange Act of 1934.....*passim*

Section 9, 15 U.S.C. § 78i 16, 17

Section 10, 15 U.S.C. § 78j.....*passim*

Section 13, 15 U.S.C. § 78m 15

Section 16, 15 U.S.C. § 78p..... 1, 17

Section 18, 15 U.S.C § 78r .....*passim*

Section 20, 15 U.S.C. § 78t 16, 17

Section 20A, 15 U.S.C. § 78u-1..... 16

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association.

SIFMA regularly files *amicus curiae* briefs in cases that raise legal issues of vital concern to the participants in the securities industry. SIFMA appeared before this Court as *amicus curiae* in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), and regularly appears as *amicus curiae* in many cases involving issues arising under the federal securities laws, most recently in *Gabelli* v. *SEC*, 133 S. Ct. 1216 (2013) (accrual of 28 U.S.C. § 2462's five-year statute of limitations); *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012) (accrual of 15 U.S.C. § 78p(b)'s two-year statute of limitations); and *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011) (pleading standard for materiality in private securities fraud action).

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[1] The parties have filed blanket letters of consent for *amicus* briefs. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

This case involves important issues regarding liability under the federal securities laws for misrepresentations in connection with public-market transactions and the standards governing adjudication of private securities class action claims. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. Resolution of these issues will have a profound effect on SIFMA's members.

SUMMARY OF ARGUMENT

In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), a four-Justice majority endorsed a "fraud-on-the-market" presumption of reliance to permit securities class action plaintiffs to certify classes that otherwise would fail because individual issues of reliance would predominate. In the 25 years since that decision, many of the criticisms and fears articulated by Justice White in his prescient dissent have been realized: the economic theories underpinning the presumption have been debunked, *see id.* at 254 (White, J., dissenting); the expansion of the securities fraud class action has led to "large judgments payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers," *id.* at 262; and there is continued confusion among lower courts with respect to how, if at all, the presumption may be rebutted, *id.* at 251. In short, the "bitter harvest" of the "seeds sown" by *Basic* has been reaped. The negative consequences of excessive and all-too-often meritless securities class actions have been well chronicled. Defendants, faced with massive potential exposures and the distraction of lengthy and costly litigation, frequently are constrained to submit to *in terrorem* settlements. Moreover, there is little evidence that providing securities plaintiffs with a virtual free pass to certify

a class has had a deterrent effect on misconduct by publicly traded companies, improved the quality of corporate disclosure, or resulted in meaningful recoveries that actually benefit investors in the aggregate, as opposed to their lawyers. "[F]rom a compensatory perspective . . . the securities class action performs poorly."[2]

Compounding these concerns is the fact that *Basic* drastically expanded a judge-made private right of action—one that finds no support in either the text or legislative history of the Securities Exchange Act of 1934 (the "Exchange Act") and has in recent years required repeated narrowing by Congress and this Court. In fact, the most analogous express right of action—§ 18, which does require actual reliance—compels the conclusion that if Congress had considered the issue in 1934, it would have required actual reliance for § 10(b) plaintiffs.

To redress the lack of empirical support for the fraud-on-the-market theory, the practical difficulties defendants face to rebut it, and the huge burdens it has imposed unfairly on countless companies, the Court should overrule *Basic*. One of the alternatives before the Court is to modify *Basic*'s presumption to require § 10(b) plaintiffs to demonstrate an actual price impact caused by a defendant's alleged misrepresentation. Although this would be better than leaving *Basic* unchanged, it lacks a sound economic basis. Even assuming the validity of the presumption that all investors rely on the integrity of market prices, that proposed modification would not

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[2] John C. Coffee, Jr., *Reforming the Securities Class Action: an Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1545 (2006).

reliably establish that any plaintiff relied on a distorted price *at the time* of the transaction. Plaintiffs commonly argue that price deflation in response to a purported corrective disclosure is circumstantial evidence that the alleged misrepresentation previously inflated price. However, a variety of market factors render it nearly impossible to prove earlier price inflation through later price declines, particularly given the complex market dynamics that have developed since *Basic* was decided. Nor is price impact itself necessarily probative of class-wide reliance: such impact would need to be shown to have occurred in a market that is efficient with respect to the particular information alleged to have been misrepresented in order for plaintiffs to demonstrate that they relied on the integrity of the market price to convey that information.

Rather than perpetuate the problems and burdens created by *Basic*, the Court should overrule the fraud-on-the-market presumption entirely. It should leave to Congress the task of analyzing global markets and evaluating economic theory to determine whether and to what extent§ 10(b) plaintiffs should be relieved of the burden of proving actual reliance in a class setting.

ARGUMENT

I. THE "FRAUD-ON-THE-MARKET" THEORY OF INDIRECT RELIANCE HAS IMPOSED SIGNIFICANT BURDENS ON THE ECONOMY AND NEGATIVELY IMPACTED THE FINANCIAL MARKETS

The "fraud-on-the-market" theory of indirect reliance, endorsed by the four-justice majority in *Basic*, permits plaintiffs asserting claims under § 10(b) of the Exchange Act to pursue fraud claims on a class basis. To certify a class of plaintiffs seeking damages

under Rule 23 of the Federal Rules of Civil Procedure, a district court must first find that issues common to the class predominate over individualized issues. Under traditional principles of fraud and Rule 23, a securities fraud plaintiff could rarely, if ever, satisfy this requirement because the reliance element of fraud at common law is a classic individual inquiry, involving the facts and circumstances of each plaintiff's decision to engage in a particular transaction.[3] As the *Basic* Court put it, "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." 485 U.S. at 242. By "presuming," first, that all public information about a company in an efficient market is known to the market and reflected in its stock price and, second, that investors "rel[y] on the integrity of [the market] price," *id.* at 246–47, *Basic* unleashed the most potent, and abuse-prone, form of securities litigation—the Rule 10b-5 class action.

A decision to certify a class exerts enormous and undue settlement pressure on a defendant, even one with a meritorious defense.[4] This problem is

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[3] The federal courts have looked to rules governing common-law fraud to define the Rule 10b-5 cause of action. *See Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 343 (2005) ("Judicially implied private securities-fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions.").

[4] *See, e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense."); Fed. R. Civ. P. 23(f) 1998 Advisory

especially acute in the context of private securities litigation. Between 2000 and 2012, 75 percent of decided certification motions in securities litigation resulted in the certification of a class. *See* Renzo Comolli, *et al.*, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review 20 (2013) (examining 2000–2012). And research shows that if putative class securities lawsuits survive dismissal and a large class is certified, even weak cases will result in "blackmail settlements" induced by a small probability of an immense judgment.[5] *Cf.* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The consequences of proceeding to summary judgment or

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Committee Note ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants.").

[5] *See* Tom J. Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, U. Pa. L. Rev. 755, 757–58 (2009) (observing that the merits of securities fraud claims are essentially irrelevant to settlement of securities class actions); Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013) ("[B]ecause securities litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle."); Denise N. Martin, *et al.*, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121, 156 (1999) ("Generally, we find that the merits do not have much, if any, explanatory power on settlement size."); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 523 (1991) (study of securities class action settlements concluding that "the merits did not affect the settlement amounts").

trial include a risk of massive, if not ruinous, monetary liability even if the likelihood of loss is small, as well as heavy costs to conduct document and deposition discovery and to engage experts. Indeed, the punitive costs of such class actions have prompted repeated legislative efforts to curtail meritless private securities fraud cases,[6] and call into question the continued validity of *Basic*.[7]

The costs of overbroad class action litigation burden not only defendants, but the economy as a whole. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). Instead, it is well recognized that the costs of abusive class actions inevitably "get passed along to the public." *Id.* These costs also affect markets: the average securities class action reduces a defendant company's equity value by 3.5 percent. *See* Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Inst. for Legal

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[6] *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737.

[7] Among other concerns, the fraud-on-the-market presumption creates significant procedural advantages for plaintiffs, which are difficult to justify if, in fact, investors do not rely on the integrity of the market when deciding whether to sell or buy securities. Indeed, in one of the few instances where the question has been actually litigated at the merits stage, the plaintiff was found not to have relied on the market price. *See GAMCO Investors, Inc.* v. *Vivendi, S.A.*, 927 F. Supp. 2d 88, 104 (S.D.N.Y. 2013) (defendant successfully rebutted presumption of institutional investors' reliance on misstatements, created pursuant to fraud-on-the-market theory).

Reform 2005). As this Court has observed, the costs associated with class actions often are "payable in the last analysis . . . for the benefit of speculators and their lawyers." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC* v. *Tex. Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, C.J., concurring)). Particularly in securities class actions, the result often is a transfer of wealth from current to former shareholders, with the plaintiffs' lawyers collecting a sizable tax on the transfer.[8] *See, e.g.*, Janet Cooper Alexander, *Rethinking Damages in*

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[8] The enormous financial incentives to bring such cases have engendered illegal or questionable conduct on the part of the plaintiffs' bar. *See United States* v. *Lazar*, 05 Cr. 587 (C.D. Cal.) (in which named partners of Milberg Weiss, formerly one of the nation's leading plaintiffs' securities class action firms, pleaded guilty to paying kickbacks to lead plaintiffs); *United States* v. *Lerach*, 07 Cr. 964 (C.D. Cal.) (same); *see also* Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. Empirical Legal Studies 650 (2011) (concluding that larger institutional investors serving as lead plaintiffs negotiate lower attorneys' fees, but that public pension funds whose officials receive political contributions from class counsel negotiate attorneys' fees that are statistically indistinguishable from those negotiated by individual investors serving as lead plaintiffs); Drew T. Johnson-Skinner, *Paying-to-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. Rev. 1725, 1750 (2009) (finding that, in the majority of cases in which a public pension fund served as a lead plaintiff, at least one appointed law firm made a political contribution to a relevant elected official); John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 De Paul L. Rev. 241, 244 (2001) (noting examples of plaintiffs' firms making political contributions to state treasurer candidates in "distant states" and questioning whether the firms' "desire to fund good government could have been satisfied closer to home").

Securities Class Actions, 48 Stan. L. Rev. 1487, 1503 (1996).

It is imperative that our markets remain attractive to outside investment and to companies considering where to list their securities, and that companies attract qualified individuals to serve on boards and in management positions. Yet it is widely perceived that the United States legal system imposes greater costs on businesses than the legal systems of other major capital markets. *See, e.g.*, Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii (2007). As a result, "foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." *Id.* at 101. The perception of higher litigation costs frequently is cited as one reason for the decline in the competitiveness of American capital markets. *See, e.g.*, Fin. Servs. Forum, *2007 Global Capital Markets Survey* 8 (2007) (senior executives from nine of ten foreign companies that delisted from the United States between 2003 and 2007 cited litigation risk as a factor); Comm. on Capital Mkts. Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006). *Cf. Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." (internal citations omitted)).

As a policy matter, *Basic*—a policy-driven judicial intervention—has proved to be a paradigmatic example of the law of unintended consequences.

Justice White's fear that Rule 10b-5 would be converted into a "scheme of investor's insurance" has been realized. *Basic*, 485 U.S. at 252 (citation omitted) (White, J., dissenting).

II. NEITHER THE EXCHANGE ACT'S STATUTORY TEXT NOR LEGISLATIVE HISTORY SUPPORTS BASIC'S FRAUD-ON-THE-MARKET PRESUMPTION

As this Court recently noted, the fraud-on-the-market presumption of reliance is not the "traditional" or "most direct" way to prove reliance. *Halliburton I*, 131 S. Ct. at 2185. Conspicuously absent from *Basic*'s four-Justice opinion is any support in the text or legislative history of § 10(b) or Rule 10b-5 for this jettisoning of the traditional common-law reliance requirement. Rather, *Basic's* stated rationale for dispensing with actual reliance was the "problem of balancing" the substantive requirement of the statute with the procedural requisites of Rule 23. *Id.* at 243. But the Exchange Act did not authorize any such "balancing." To the contrary, the text and history of the Exchange Act confirm that, had Congress authorized a private cause of action under § 10(b), it would have insisted upon actual reliance.

Nor does *Basic*'s approach of redefining the elements of a judge-made § 10(b) action to permit plaintiffs easily to satisfy Rule 23 comport with this Court's more recent Exchange Act jurisprudence. This Court's subsequent § 10(b) cases have adopted the approach of Justice White's *Basic* dissent, and placed dispositive weight on the limits that Congress placed on analogous express rights of action. *See, e.g.*, *Central Bank*, 511 U.S. at 176; *Musick, Peeler & Garrett* v. *Emps. Ins. of Wassau*, 508 U.S. 286, 294 (1993). Even if *Basic* had engaged in *bona fide* statutory

interpretation affecting primary conduct (which it did not)—rather than creating a judge-made procedural rule (which it did)—overruling *Basic* would be warranted to "promote stability in the law" in light of the "virtually unbroken line of cases" adopting an incompatible interpretive approach. *Hubbard* v. *United States*, 514 U.S. 695, 713 (1995).

A. Congress Did Not Create a Private Right of Action Under § 10(b); Accordingly, the Judicially Implied Right of Action Should Be Narrowly Construed

The § 10(b) private action is a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps*, 421 U.S. at 737. This analogy should not be "mistake[n] for praise rather than condemnation." *Morrison* v. *Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869, 2880 n.4 (2010). Since *Basic*, this Court consistently has refused to expand the availability of the § 10(b) private action. *Basic* is now an outlier, rather than part of the "cohesive canopy." *Id.* It is a dangerous branch that should be removed.

1. *Congress Did Not Create a Private Right of Action Under* § 10(b). The existence of a § 10(b) private right of action has long been "assumed," but never properly considered, by this Court. *Aaron* v. *SEC*, 446 U.S. 680, 689 (1980). It was first recognized, as a fait accompli, in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), without briefing as to its existence, despite the Court having explicitly reserved the question of "who, if anyone, may bring private actions under § 10(b) and Rule 10b-5" just two years earlier. *SEC* v. *Nat'l Sec., Inc.*, 393 U.S. 453, 572 n.9 (1969) (emphasis added); *see also Blue Chip Stamps*, 421 U.S. at 730 (noting that there

was "virtually no discussion" of the issue in *Superintendent of Insurance*).

The § 10(b) private right of action is "one of those so-called 'implied' causes of action that, for several decades, this Court was prone to discover in—or, more accurately, create in reliance upon—federal legislation." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring). Were it a question of first impression, this Court undoubtedly would hold today that Congress did not create an implied § 10(b) private right of action in 1934.[9] Under current doctrine, congressional "intent to create not just a private right but also a private remedy" is the *sine qua non* of an implied cause of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87.[10]

This Court repeatedly has acknowledged that Congress did not have the requisite intent to create a § 10(b) private right of action in 1934.[11] This was not

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[9] The Private Securities Litigation Reform Act of 1995 (PSLRA) placed limits on "any private action" arising under the Exchange Act. 15 U.S.C. § 78u-4(b). This was not a ringing endorsement of the § 10(b) private right of action, and this Court has properly followed the narrow construction rule since its enactment.

[10] Although policy concerns should not determine the scope of the implied private right of action, it of course "does not follow that the objectives of the statute are better served" by a "more far reaching" remedy. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

[11] *See Stoneridge*, 552 U.S. at 164 ("The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("[T]here is no indication that Congress, or

an accidental omission, but rather stands in stark "contrast" to the "numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934." *Blue Chip Stamps*, 421 U.S. at 730. In fact, the Exchange Act pared down some of the express private rights of action created by the Securities Act of 1933 (the "Securities Act"), due to "congressional concern over the impact of *even these limited remedies* on the new issues market." *Id.* at 754 (emphasis added). In light of these facts, the § 10(b) private right of action could not pass this Court's test for an implied right of action today.

It also is black-letter law that the Securities and Exchange Commission ("SEC") could not create a Rule 10b-5 private right of action beyond what Congress did (or did not) create under § 10(b). *See Alexander*, 532 U.S. at 285–86 (citing *Cent. Bank*, 511 U.S. at 173). In any case, the SEC did not intend to create a private right of action when it promulgated Rule 10b-5 in 1942. *See Blue Chip Stamps*, 421 U.S. at 730 ("Ther[e] is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under this provision.").[12]

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the Commission when adopting Rule 10b-5, contemplated such a remedy."); *Blue Chip Stamps*, 421 U.S. at 729 ("Nor does the history of [§ 10(b)] provide any indication that Congress considered the problem of private suits under it at the time of its passage.").

[12] Milton V. Freeman, the Assistant Solicitor of the SEC who drafted Rule 10b-5 and was present when the Commissioners adopted it, put it bluntly: "It was intended to give the Commission power . . . . It had no relation in the Commission's contemplation to private proceedings." Remarks of Milton V. Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967).

2. *The § 10(b) Implied Private Right of Action Must Be Narrowly Construed.* Since *Basic*, this Court has recognized the "awkward task" of construing a "cause of action [Congress] really never knew existed." *Lampf*, 501 U.S. at 358, 359. The Court has held that it "must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge*, 552 U.S. at 167).

Basic is not compatible with this principle of narrow construction. To the contrary, *Basic* stands alone in casting aside an essential element of common law fraud: reliance. In fact, since *Basic*, the Court has consistently construed the § 10(b) private right of action to be *as or more limited* than that for common law fraud. *See Stoneridge*, 559 U.S. at 162 (noting that § 10(b) "'must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation'" (quoting *SEC* v. *Zanford*, 535 U.S. 813, 820 (2002)).

B. The Legislative History of § 18 Demonstrates that If Congress Intended to Permit a Private Right of Action Under § 10(b), It Would Have Required Proof of Reliance

Basic relied on the following clear misinterpretation of legislative history:[13] "In drafting [the Exchange] Act Congress expressly relied on the premise that

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[13] There is, of course, no legislative history directly on point as to whether Congress might have enacted *Basic* in 1934 because Congress never contemplated any private right of action under § 10(b) at all. *See supra* Part II.A.1.

securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." 485 U.S. at 245–46 (citing H.R. Rep. No. 1383, at 11). The cited passage of the House Report, however, concerned § 13 of the Exchange Act, which required issuers to file periodic and other reports with the SEC. Exchange Act, § 13, 48 Stat. at 894–95.

The *Basic* opinion ignored evidence concerning the § 18 private right of action—cited in Justice White's dissent—that Congress anticipated meaningful proof of actual reliance before permitting civil recovery under the Exchange Act for misleading statements. *See* 485 U.S. at 257–58 (White, J., dissenting). In effect, the four-Justice majority in *Basic* elevated an extrapolation of a partial rationale for requiring SEC filings over the express limits that the statute placed on private actions concerning misstatements in those filings.

1. *The § 10(b) Implied Private Remedy Must Be Construed Consistently with the Most Analogous Express Remedy Under the Securities Acts.* Since *Basic*, the approach set forth in Justice White's Basic dissent has become the Court's "settled methodology in § 10(b) cases." *Cent. Bank*, 511 U.S. at 176. Under that now-settled methodology, the Court's "task is not to assess the relative merits of the competing rules," *Musick*, 508 U.S. at 294, but rather "'to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act,'" *Cent. Bank*, 511 U.S. at 173 (quoting *Musick*, 508 U.S. at 294). "For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action." *Cent. Bank*, 511 U.S. at 178.

Applying this methodology, this Court consistently has placed limits on § 10(b) actions that are "symmetrical and consistent with" the limits Congress drafted in "those portions of the 1934 Act *most analogous*" to the § 10(b) private right of action. *Musick*, 508 U.S. at 294 (emphasis added). This is necessary "to ensure the [§ 10(b)] action does not conflict with Congress' own express rights of action." *Id.* at 295. Were it otherwise, the § 10(b) action would "nullify the effectiveness of the carefully drawn procedural restrictions on these express actions" in other sections of the Securities Acts. *Ernst & Ernst*, 425 U.S. at 210; *see also Blue Chip Stamps*, 421 U.S. at 736 n.8 (declining to "extend a [10b-5] private right of action . . . to those whom Congress excluded from the express civil remedies provided in the 1933 Act").

2. *The Express Private Remedy Under § 18 Is Most Analogous to § 10(b).* The Securities Act and the Exchange Act created seven express private rights of action: §§ 11, 12, and 15 of the Securities Act and §§ 9, 16, 18, and 20 of the Exchange Act. *Musick*, 508 U.S. at 295–97.[14] Of those "seven candidates," the "easy answer" is that § 18 of the Exchange Act is the most analogous to § 10(b). Joseph A. Grundfest, *Damages and Reliance under Section 10(b) of the Exchange Act 21* (Stanford Law Sch. & the Rock Ctr. for Corporate Governance Working Paper No. 150 Aug. 28, 2013), http://www.law.stanford.edu/publications/damages-and-reliance-under-section-10b-of-the-exchange-act. Section 18 was the "[o]nly express private right of action in existence at the time of Section 10(b)'s

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[14] In 1988, Congress added an express insider trading-related right of action for contemporaneous traders in § 20A of the Exchange Act, but that provision "was not an original liability provision in that Act." *Musick*, 508 U.S. at 296.

enactment [that] addresses misrepresentations or omissions that affect after-market prices." *Id.* at 29.[15]

The six private rights of action other than that created by § 18 are very different from § 10(b), and thus are not useful to this Court's inquiry into whether Congress would have required actual reliance had it created a § 10(b) private right of action. *Id.* at 19–32. Sections 9 and 16 of the Exchange Act do not address misstatements, but rather market manipulation and short-swing trading, respectively. 15 U.S.C. §§ 78i, 78p. Sections 11 and 12 of the Securities Act and § 16 of the Exchange Act do not require proof of scienter, and impose essentially strict liability (subject to "due diligence" and "negative causation" defenses for §§ 11 and 12). 15 U.S.C. §§ 77k, 77*l*, 78p. Section 12 does not apply to the aftermarket at all, while § 11's "tracing" requirement excludes nearly all aftermarket purchasers. And § 15 of the Securities Act and § 20 of the Exchange Act impose secondary liability on control persons of primary violators. 15 U.S.C. §§ 77o, 78t.

3. *Congress Required Reliance Under § 18 of the Exchange Act.* Section 18 of the Exchange Act, which provided a private right of action for misstatements in SEC filings, limited the action to persons that

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[15] In *Lampf* and *Musick*, the Court noted that §§ 9 and 18 of the Exchange Act are "of particular significance" because they "'target the precise dangers that are the focus of § 10(b).'" *Musick*, 508 U.S. at 295–96 (quoting *Lampf*, 501 U.S. at 360). The other express private remedies are of less significance because they "stand in marked contrast" to § 10(b). *Id.* at 296. While § 9 had relevance to the issues presented in those cases (the applicable statute of limitations and the availability of contribution), § 9 is not relevant to the elements of the § 10(b) private right of action because it addresses manipulation rather than misstatements.

purchased or sold "in reliance upon such statement." Exchange Act § 18(a), 48 Stat. 881, 897 (codified at 15 U.S.C. § 78r(a)). As Justice White's *Basic* dissent explained, Congress specifically considered the issue of reliance with respect to § 18. See 485 U.S. at 257–58 (White, J., dissenting). An initial draft of the Exchange Act would have created a private cause of action for plaintiffs who "purchased or sold a security the price of which *may have been affected* by such [misleading] statement" in an SEC filing. *Id.* at 257 (quoting S. 2693, 73d Cong., 2d Sess., § 17(a) (1934)) (emphasis added). The lack of a reliance element was widely criticized in the Congressional hearings. *Id.* at 257 & n.8 (citing hearings of the Senate Committee on Banking and Currency and the House Committee on Interstate and Foreign Commerce). Rep. Sam Rayburn, the Chairman of the House Committee, acknowledged that the draft was "very much challenged on the ground that reliance should be required" and that "[t]his objection has been met." *Id.* at 257 (quoting 78 Cong. Rec. 7701 (1934)). *A fortiori*, a Congress that required proof of actual reliance on SEC filings, which specifically were designed to provide information to investors, would not have endorsed a presumption of reliance on *all* publicly available information.

Consistent with this text and legislative history, a consistent line of lower court decisions has required actual, "eyeball" reliance under § 18. *See, e.g.*, *Ross* v. *A.H. Robins Co., Inc.*, 607 F.2d 545, 552 (2d Cir. 1979) ("Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the S.E.C."); *Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968) ("[C]onstructive reliance is not sufficient."). Indeed, in *Blue Chip Stamps*, this Court appeared to

assume that "eyeball" reliance also would be required under § 10(b) when it restricted its parade of horribles to plaintiffs who actually read a misstatement.[16] For example, the Court worried that plaintiffs might recover based on false oral testimony of reliance.[17] *Basic* replaced that risk of false oral testimony reliance with the guarantee of a faulty presumption of reliance as a matter of law.

4. *The 1934 Congress Could Not Have Shared* Basic*'s Solicitude for Class Actions, Which Did Not Exist.* This Court does not assume that Congress's express (much less implied) remedies are intended to be amenable to class treatment. Rather, Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). This observation applies *a fortiori* to statutes like the Exchange Act that were enacted "before adoption of class-action procedures." *Id.* at 2311.[18]

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[16] *See Blue Chip Stamps*, 421 U.S. at 745 (noting the dramatic expansion of liability for misstatements that reach the "subscribers to financial journals" and the "readership of the Nation's daily newspapers"); *id.* at 746 (noting again that a large number of plaintiffs could show reliance by "reading of a prospectus" or "reading of information contained in the financial pages of a local newspaper"); *id.* at 754 (noting that the "potential plaintiffs" would be those who "read" the misstatement "in the financial pages of their local newspaper").

[17] *See Blue Chip Stamps*, 421 U.S. at 746 (noting the "very real risk" of recovery by a plaintiff who "offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him").

[18] Rule 23 was first adopted in 1938, but "modern class action practice emerged in the 1966 revision of Rule 23." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 833 (1999).

Because § 10(b) was adopted at a time when individual actions were the sole form of private money-damages litigation, Congress could not have been concerned with imposing an "unrealistic evidentiary burden" on class action plaintiffs. *Basic*, 485 U.S. at 245.

C. Courts Applying State Law Have Rejected or Declined to Adopt Basic's Fraud-on-the-Market Presumption

In the years since *Basic* was decided, state courts—which developed the common law principles to which this Court has looked in fleshing out § 10(b), *see Dura*, 544 U.S. at 344—have had the opportunity to reconsider the fraud-on-the-market doctrine, and have "cast a jaundiced eye on [its] worth." *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1190 (N.J. 2000). Where courts have interpreted a state statute or cause of action that requires a showing of reliance, they have overwhelmingly rejected *Basic*'s approach. Indeed, nearly every court to consider the fraud-on-the-market presumption in an analogous state law fraud context has either rejected or declined to apply it. *Aubrey* v. *Sanders*, 346 F. App'x 847, 849–50 (3d Cir. 2009); *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 435–36 (4th Cir. 2003) (applying South Carolina law); *Basham* v. *Gen. Shale Prods. Corp.*, Nos. 92-1608, 02-1607, 1993 WL 65086, at *4 n. 4 (4th Cir. Mar. 10, 1993) (applying West Virginia law); *Gerstein* v. *Micron Tech.*, Civ. No. 89-1262, 1993 WL 735031, at *9 (D. Idaho Jan. 9, 1993); *In re Metro. Sec. Litig.*, No. CV-04-25-FVS, 2009 WL 36776, at *4–5 (E.D. Wash. Jan. 6, 2009); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 644 (S.D. Tex. 2003); *Freedman* v. *Value Health, Inc.*, Nos. 3:95CV2038 JCH, 3:97CV2711, 2000 WL 630916, at *9 (D. Conn. Mar. 24, 2000) (applying New Mexico law); *In re Digi*

Int'l, Inc. Sec. Litig., 6 F. Supp. 2d 1089, 1104 (D. Minn. 1998); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1123 (D. Nev. 1998); *In re Medimmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 968 (D. Md. 1995); *Borow* v. *nVIEW Corp.*, No. 93-2142, 1994 WL 285458, at *2 n* (4th Cir. June 29, 1994) (applying Virginia law); *Simpsonv. Specialty Retail Concepts*, 149 F.R.D. 94, 102 (M.D.N.C. 1993); *Anderson* v. *Daniel*, 724 S.E.2d 401, 404 (Ga. App. 2012); *Contreras* v. *Host Am. Corp.*, 453 F. Supp. 2d 416, 420 (D. Conn. 2006); *Krieger* v. *Gast*, 197 F.R.D. 310, 320 (W.D. Mich. 2000); *Constantine* v. *Miller Indus., Inc.*, 33 S.W.3d 809, 814 (Tenn. App. 2000); *Kaufman*, 754 A.2d at 1190; *In re First Merchants Acceptance Corp. Sec. Litig.*, No. 97 C 2715, 1998 WL 781118, at *13 (N.D. Ill. Nov. 4, 1998); *Malone* v. *Brincat*, 722 A.2d 5, 13 (Del. 1998); *Rosenthal* v. *Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995); *Bunch* v. *Kmart Corp.*, 898 P.2d 170, 171–72 (Okla. App. 1995); *Mirkin* v. *Wasserman*, 858 P.2d 568, 580 (Cal. 1993); *Kahler* v. *E.F. Hutton Co.*, 558 So.2d 144, 145 (Fla. App. 1990).

III. A MIDDLE GROUND APPROACH MODIFYING *BASIC*'S PRESUMPTION WILL NOT REDRESS THE NEGATIVE EFFECTS OF SECURITIES CLASS ACTIONS ON THE FINANCIAL MARKETS

One of the alternatives before this Court is to modify *Basic*'s presumption to bring it more in line with the reality of the financial markets and current economic theory. While this approach would be preferable to leaving the presumption as it currently stands, the core flaw of *Basic* is not merely that it got the economic analysis wrong, but that it arrogated to the judiciary a task that properly belongs to the legislature. "[T]he Congress, with its superior resources and expertise, is

far better equipped than the federal courts for the task of determining how modern economic theory and global financial markets require that established legal notions of fraud be modified." *Basic*, 485 U.S. at 254 (White, J., dissenting).

For the reasons set forth below, requiring proof of price impact—though a logical prerequisite to the *Basic* presumption—is insufficient to correct *Basic*'s error. Requiring such proof would not provide an effective method of establishing class-wide reliance, or redress the negative effects of fraud-on-the-market class actions on the financial markets. Thus, rather than attempting, with the limited resources and expertise available to assist it, to select among economic theories and develop rules or modify presumptions to implement them, this Court should overturn *Basic*'s presumption entirely.

1. *Proof of Price Movement Upon Corrective Disclosure Does Not Necessarily Demonstrate that the Alleged Misrepresentation Affected the Market Price.* Traditionally, price impact has been demonstrated by showing either price inflation after the alleged misrepresentation or price deflation after a purportedly corrective disclosure. *See, e.g.*, *Greenberg* v. *Crossroads Sys., Inc.*, 364 F.3d 657, 662 (5th Cir. 2004). In practice, plaintiffs overwhelmingly take the latter approach because it is far easier to establish a "lie-truth-drop" pattern of price movement to argue that the stock price was previously inflated by a prior misrepresentation. See Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 L. & Contemp. Probs. 55, 86 (2012).

Price movement in response to a corrective disclosure, however, does not prove that prices were

distorted, *ex ante*, as a result of fraud. *First*, the two reflect temporally distinct—even disparate—market reactions to different information. *See* Jill E. Fisch, *The Trouble With* Basic: *Price Distortion After Halliburton*, 90 Wash. U. L. Rev. 895, 922 (2013). There simply is no "systematic relationship" between *ex ante* and *ex post* price distortion. *Id.*

Second, multiple factors may affect the market's reaction to a corrective disclosure, such as other corporate disclosures preceding or accompanying the correction or uncertainty about possible future developments. *See* Jay W. Eisenhofer, *et al.*, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward a Corporate Finance-Based Theory of Loss Causation*, 59 Bus. Law. 1419, 1420 (2004). Indeed, speculation about the possibility of future adverse disclosures or even concerns about costly securities litigation might affect the market's reaction to a corrective disclosure, causing the market to overreact beyond what the disclosure itself would otherwise warrant.[19] *Third*, intervening market developments may distort the impact of the fraudulent statements when they are subsequently disclosed, rendering the corrective disclosure more or less important to market

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[19] This type of market overreaction was the driving force behind congressional enactment of the 90-day "bounce-back" (or "look-back") provision as part of the PSLRA. *See* S. Rep. No. 104-98, at 19–20 & n.58 (1995); *see also* Robert A. Fumerton, *Market Overreaction and Loss Causation*, 62 Bus. Law. 89, 90 (Nov. 2006). The 90-day provision places a ceiling on recoverable damages by limiting a plaintiff's potential recovery to the difference between the price paid for a security and the "mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. § 78u-4(e)(1).

price than it would have been at the time of the alleged misrepresentation. *See* Fisch, 90 Wash. U. L. Rev. at 922 (citing extreme example where an intervening event so damages the issuer company as to render corrective disclosure irrelevant). Permitting plaintiffs to demonstrate price impact merely by showing evidence of price movement after a corrective disclosure improperly conflates the required showing of reliance, which focuses on price impact *at the time of the transaction*, with that of loss causation, which focuses on *subsequent economic loss* as a result of the corrective disclosure. *See* Fisch, 90 Wash. U. L. Rev. at 923; *Halliburton I*, 131 S. Ct. at 2186 ("Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock."). The conflation of these temporally distinct concepts—*ex ante* price distortion, which is part of the reliance inquiry, and *ex post* price distortion, which is a component of loss causation—was expressly rejected by this Court in *Halliburton I*. *See* 131 S. Ct. at 2186–87 (rejecting the Fifth Circuit's confusion of loss causation showing with price impact, but leaving for future cases the examination of whether plaintiffs must prove price impact to invoke the fraud-on-the-market presumption).

Further, as an evidentiary matter, price movement in response to a purportedly corrective disclosure is a poor measure of the price impact of an alleged misrepresentation. *See* Kaufman & Wunderlich, 75 L. & Contemp. Probs. at 88. In part, this is because plaintiffs widely rely upon event studies to address the loss causation analysis required by *Dura*, but such studies are ill-suited to show *ex ante* price distortion. Not every misrepresentation moves stock prices at the time it is conveyed to the market (for example, a

misrepresentation that falsely portrays a deteriorating business as unchanged may prevent, rather than cause, price movement), and thus the amount of price distortion cannot consistently be demonstrated with an event study. *See* Esther Bruegger & Frederick C. Dunbar, *Estimating Financial Fraud Damages with Response Coefficients*, 35 J. Corp. L. 11, 25–26 (2009).

Compounding the difficulty of discerning price impact through evidence of ex post price distortion is the fact that the misrepresentations at issue in complex securities class action litigation often are multifaceted, comprising recurring or related statements made to the public over time. *See* Frank Torchio, *Proper Event Study Analysis in Securities Litigation*, 35 J. Corp. L. 159, 165 (2009). Depending on the nature of the alleged misrepresentations and the form of the disclosures, recurring or related alleged misrepresentations might result in dynamic price inflation throughout the class period, while corrective disclosures might not necessarily correct each distinct misrepresentation. As a result, certain economists have argued that event studies may overestimate or underestimate the price inflation per share if the corrective disclosure contains more or less information than was known during the class period. *See* Kaufman & Wunderlich, 75 L. & Contemp. Probs. at 88; Donald C. Langevoort, *Compared to What? Econometric Evidence and the Counterfactual Difficulty*, 35 J. Corp. L. 183, 184 (2009) ("Corrective disclosure often reveals either too much (information beyond that known or knowable at the time of the fraud, or extraneous information bundled together with the correction) or too little (excluding information already impounded into the market price through leakage or other informational mechanisms) to be a particularly precise baseline.").

Thus, the presence or absence of price movement—whether at the time of the alleged misstatement or of the corrective disclosure—is a poor measure of market transmission of a false or misleading statement. It sets an unduly low and too easily satisfied threshold for invoking the *Basic* presumption.

2. *Price Impact Is Not Probative of Class-Wide Reliance in an Efficient Market.* In an "efficient market," as the *Basic* Court understood that term, all publicly available information is transmitted to investors in the form of a market price. *See Basic*, 485 U.S. at 244. Therefore, the Court reasoned, if plaintiffs could show that the defendant's security traded in an efficient market, it would be highly likely that the defendant's alleged misrepresentation affected the stock price, and, as a result, the Court should presume class-wide reliance on that misrepresentation. *See id.* at 244–47; *see also* Jeffrey L. Oldham, *Taking "Efficient Markets" Out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 Nw. U. L. Rev. 995, 1011 (2003); Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 890–91 (2003). If the market is efficient, the hypothesis posits, then stock prices should adjust quickly to reflect any new information. *See* Jonathan P. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059, 1083 (1990). As a result, plaintiffs must show that they traded in an efficient market to invoke the presumption, a showing that by and large is presumed when the security at issue is traded on a large stock exchange. *See, e.g.*, Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 157, 173.

Since *Basic*, however, scholarship has demonstrated that market efficiency is not a "binary, yes or no question." *See* Langevoort, 2009 Wis. L. Rev. at 167; *see also Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1197–98 n.6 (2013) (acknowledging "modern economic research tending to show that market efficiency is not a 'binary, yes or no question,'" but instead that "differences in efficiency can exist within a single market"). Instead, scholars widely agree that whether a market operates efficiently ought to be determined with respect to the particular *type* of information alleged to have been misrepresented. This is because the market price of a security will not be uniformly efficient as to all types of information. *See* Macey & Miller, 42 Stan. L. Rev. at 1083. Market participants will find some types of information more costly to obtain and complex to assimilate than others; the more difficult it is for those participants to internalize a particular type of information, the less efficient the market is likely to be with respect to that information. *See* Ronald J. Gilson & Reiner H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 612–13 (1984) (explaining differentiation of efficient responses occurs due to varying levels of information accessibility and diffusion). "Where the payoff from new information is very high or the costs of obtaining new information are very low, market prices will adjust quickly. But share prices will adjust more slowly to reflect information where high costs are involved in obtaining and analyzing the information." Macey & Miller, 42 Stan. L. Rev. at 1086.[20]

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[20] For example, some studies have shown that the prices of securities traded in high-volume markets tend to react more slowly to changes in quarterly earnings announcements. *See* Dan

As a result, evidence of price impact is far less valuable in establishing indirect reliance. Any indication of price impact—particularly one that relies on price movement following a corrective disclosure—would need to be shown to have occurred in a market that is efficient with respect to the particular information alleged to have been misrepresented. This is because while shareholders might reasonably rely on the efficiency of the market to price a certain security correctly with regard to certain easily processed information, it might be less reasonable for shareholders to rely on the efficiency of the market to price a security correctly for information that is more difficult to obtain and analyze. *See* Macey & Miller, 42 Stan. L. Rev. at 1083 (1990). Thus, before the fraud-on-the-market presumption may properly be invoked, plaintiffs would have to show the misrepresentation was of a type that the market digests quickly and accurately *and* affected the price. Both showings are necessary to warrant the presumption that the information at issue was transmitted to investors through the market price.

Attempting to salvage the flawed *Basic* presumption requires careful analysis of the operation of global financial markets, examination of the way in which those markets react to disclosure of information, and sensitive policy judgments regarding the costs and

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Givoly & Josef Lakonishok, *The Information Content of Financial Analysts' Forecasts of Earnings: Some Evidence on Semi-Strong Efficiency*, 1 J. Acct. & Econ. 165 (1979). Conversely, the same security traded in a thin market might adjust very quickly to an announcement regarding information in which that market's participants specialize. *See, e.g.*, Macey & Miller, 42 Stan. L. Rev. at 1085–86 ("[T]he prices of securities traded in very thin markets may adjust quickly to a takeover announcement, because many investors specialize in decoding takeover news.").

benefits of private litigation under § 10(b). These are tasks appropriate to the legislative branch, not the judiciary. The majority in *Basic* erred when it appropriated those tasks to itself. This Court should not repeat that error, even in service of an improved legal standard. It should overrule the fraud-on-the-market presumption.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR VIVENDI S.A. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED BY *AMICUS*

Whether this Court should abrogate the fraud-on-the-market presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

CORPORATE DISCLOSURE STATEMENT

Vivendi, S.A. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION ADDRESSED BY *AMICUS* i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The *Basic* Presumption Distorts Pre-Trial Proceedings 3

II. The *Basic* Presumption Distorts Trial Proceedings 10

III. The *Basic* Presumption Distorts Post-Trial Proceedings 17

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Federal Cases

In re Am. Int'l Grp., Inc. Sec. Litig.,
689 F.3d 229 (2d Cir. 2012) 4

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 4, 7, 10, 15

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

In re Bristol-Myers Squibb Sec. Litig.,
No. 00-cv-1990, 2005 WL 2007004
(D.N.J. Aug. 17, 2005) 13

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) 11, 15

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989) 6

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 11, 15

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 12

FindWhat Investor Grp. v. FindWhat.com,
658 F.3d 1282 (11th Cir. 2011) 13

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
574 F.3d 29 (2d Cir. 2009) 13

GAMCO Investors, Inc. v. Vivendi, S.A.,
927 F. Supp. 2d 88 (S.D.N.Y. 2013) ..... *passim*

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.,
No. 02-civ-5893, 2012 WL 4343223
(N.D. Ill. Sept. 21, 2012) 13, 21

Nuveen Mun. High Income Opportunity Fund v. City of Alameda,
730 F.3d 1111 (9th Cir. 2013) 14

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 19

RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.,
185 F. Supp. 2d 389 (S.D.N.Y. 2002) 19

Schaffer v. Weast,
546 U.S. 49 (2005) 19

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.,
No. 05-cv-1898, 2006 WL 2161887
(S.D.N.Y. Aug. 1, 2006) 19

In re Vivendi Universal S.A. Sec. Litig.,
284 F.R.D. 144 (S.D.N.Y. 2012) 20

In re Vivendi Universal, S.A. Sec. Litig.,
765 F. Supp. 2d 512
(S.D.N.Y. 2011) 12, 16, 17, 18

Zubulake v. UBS Warburg LLC,
220 F.R.D. 222, 217 (S.D.N.Y. 2003) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

15 U.S.C. § 78j(b) (2012) 1, 2, 17, 21

15 U.S.C. § 78u-4 (2012) 8, 11

Rules

Fed. R. Civ. P. 23 ..... 19, 20

Sup. Ct. R. 37 1

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John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006) 10

S. Rep. No. 104-98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679. 8

INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT[1]

Amicus curiae Vivendi, S.A. is an international entertainment and media company based in Paris, France, whose common stock (ordinary shares) trade on the Paris Bourse; Vivendi also has had American Depository Receipts that traded on the New York Stock Exchange. For more than a decade, Vivendi has been litigating the unforeseen consequences of this Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Vivendi has a strong interest in ensuring that the securities laws are properly interpreted to reflect market realities for the protection of public companies and their investors alike.

Vivendi offers a unique perspective on the fraud-on-the-market presumption due to its position as a defendant in several related securities fraud lawsuits that present various aspects of the distortive effects of the fraud-on-the-market presumption, including a class action tried to judgment before a jury—a rarity in modern securities litigation.

In 2002 a group of investors sued Vivendi under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), following a drop in the price of Vi-

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[1] Pursuant to Rule 37, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

vendi's shares. The district court, invoking the fraud-on-the-market presumption, certified a class action; the named plaintiffs then tried their securities theories to a jury, and obtained a verdict—all without ever proving that a single investor has relied on any public statement made by Vivendi. Now in post-trial proceedings, Vivendi must try to *disprove* the element that plaintiffs failed to prove: that individual claimants who purchased shares more than a decade ago did so in reliance on Vivendi's public statements. Meanwhile, in a related case brought against Vivendi by a single investor the district court found that the reliance element was not satisfied. And in a third case arising out of the same events, the class action verdict was given collateral estoppel effect in a trial that resulted in a billion-dollar judgment against Vivendi.

Vivendi therefore offers a firsthand perspective into the failures of *Basic* at all stages of securities litigation. A class was certified against Vivendi on the basis of the *Basic* presumption. Vivendi also has experienced *Basic*'s unforeseen consequences during trial and post-trial proceedings—an exceedingly rare experience, given that issuers typically settle securities lawsuits before trial, and therefore do not experience, as Vivendi has, the full distorting effects of the presumption.

Vivendi submits this brief *amicus curiae* to provide the Court a real-world "test case" of how *Basic* plays out at each stage of trial level litigation—not just on class certification, but at trial and beyond. Vivendi's experiences over the course of this decade-long litigation should inform the Court's decision on whether to retain, modify, or abandon the *Basic* presumption of reliance. Vivendi urges total abrogation

of the fraud-on-the-market presumption, which has proven nearly unworkable in practice, manifestly unfair to defendants, and flatly at odds with market realities.

ARGUMENT

I. THE *BASIC* PRESUMPTION DISTORTS PRE-TRIAL PROCEEDINGS

The *Basic* presumption rests on the assumption that virtually all investors rely on the integrity of market price when buying or selling a security. That assumption, however, is demonstrably untrue: Many sophisticated traders, such as hedge funds, investment advisers, and other institutional investors do not believe that market price accurately reflects a company's value based upon publicly available information. And because, along with market efficiency, reliance on the integrity of market price is an essential premise of the *Basic* presumption, there is no basis to apply the presumption to a large class of sophisticated investors, who increasingly dominate the equity markets. This market reality is vividly illustrated by the *Vivendi* litigation.

Basic envisioned a plaintiff class made up almost exclusively of investors who trade securities "in reliance on the *integrity* of [market] price." *Basic*, 485 U.S. at 247 (emphasis added); *see also id.* at 246–47 ("it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity") (internal quotation marks omitted). This supposition was critical to *Basic*'s conclusion that "an investor's reliance on any public material misrepresentations . . . may be presumed." *Id.* at 247. Market efficiency by itself, without investors' reliance on the integrity of market price, would not be enough to justify the

fraud-on-the-market presumption.[2] If investors did not believe or did not care whether the market correctly incorporated information relating to an alleged misrepresentation, there would be no reason to presume the investor had relied on the misrepresentation. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013) (courts may presume reliance because "most investors . . . will rely on the security's market price as an unbiased assessment of the security's value in light of all public information").

Basic acknowledged only one kind of investor who would trade stocks "without relying on the integrity of the market," as to whom, the Court held, the presumption of reliance would be rebutted: an investor who disbelieved the misrepresentation and therefore thought that the stock was wrongly priced at the time of the transaction. 485 U.S. at 249. But it is now clear there are many others who do not rely on the integrity of market price.

Some investors who defy *Basic*'s core assumption are individuals or institutions who employ trading strategies that are indifferent to the alleged misrepresentation, such as day traders who base trading decisions on a stock's intra-day volume and volatility,

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[2] *See, e.g., In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 234 n.3 (2d Cir. 2012) ("The fraud-on-the-market theory involves *two* rebuttable presumptions that permit a finding of class-wide reliance . . . : that (1) misrepresentations by an issuer affect the price of securities traded in the open market, *and* (2) investors rely on the market price of securities as an accurate measure of their intrinsic value.") (internal quotation marks omitted) (emphasis added).

rather than price or underlying business fundamentals. Indeed, sophisticated, institutional investors may use a variety of complex trading strategies and techniques that drive trading irrespective of stock price or the underlying information the price supposedly reflects. Some institutional investors, like volatility arbitragers, can profit regardless of whether a stock's price moves up or down. Volatility arbitragers purchase a delta-neutral portfolio of both an option and its underlying asset (*e.g.*, a stock). They are indifferent to whether the underlying asset increases or decreases in price; instead they profit (or lose) according to whether the asset's volatility (*i.e.*, price fluctuation) differs from the volatility implied by the option price.

Other sophisticated "value" investors eschew market pricing in favor of private, and often proprietary, valuation models. One such investor, GAMCO Investors Inc., sought to recover millions of dollars from Vivendi for alleged securities fraud. Because GAMCO opted out of the plaintiff class, it was subject to extensive discovery and the reliance issue was tried individually while the class action claims administration process was still underway. The reliance trial showed why GAMCO and other, similar institutional investors have no legitimate claim to a presumption of reliance based on fraud on the market. GAMCO had no "non-public corrective information about Vivendi's misstatements." *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 90 (S.D.N.Y. 2013), *appeal pending*, Nos. 13-1194, -1377 (2d Cir.). But, as the district court held after a bench trial, GAMCO did not rely on those alleged misstatements—even assuming market efficiency—because its trading decisions were based on its own,

private valuation of Vivendi's stock and not on the integrity of market pricing. *Id.* at 101–04.

An asset manager for institutional investors and high net-worth individuals, GAMCO seeks to identify companies "selling at substantial discounts to their intrinsic Private Market Values," or PMV, which is "the price that an informed industrialist would be willing to pay for [the company] if each of its segments were valued independently in a private market sale." *Id.* at 94–95. GAMCO views PMV as a more reliable measure of a company's value than public market capitalization, which "can be irrational and sentimental, thereby providing value-based investors an opportunity to make a profit." *Id.* at 95. GAMCO uses proprietary methods to determine a company's PMV and to assess whether a "catalyst" will eventually cause market price to align with PMV. *Id.*

It was undisputed that the market for Vivendi stock was "efficient" during the class period under the standard *Cammer* test. *Id.* at 90–91 & n.5 (citing *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989)). Nonetheless, at the same time as Vivendi's stock price was found in the class action to be artificially inflated in this efficient market, GAMCO bought the stock because it determined that "Vivendi securities were trading at a substantial *discount* to Vivendi's PMV." *Id.* at 95 (emphasis added). Thus, GAMCO plainly did not rely on the integrity of the market price when purchasing Vivendi securities. It bought the securities because it believed the market was *under*valuing them. And price inflation resulting from alleged misrepresentations did not induce GAMCO to purchase the stock. On the contrary, if not for that "inflation," GAMCO "would have seen

Vivendi as a *more* attractive investment" because the discount to PMV would have been even larger. *Id.* at 102. Indeed, when Vivendi's stock price dropped after alleged corrective disclosures, GAMCO "doubled or tripled" its Vivendi position. *Id.*

The fraud-on-the-market presumption rests on the premise that "most investors . . . know[] that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information." *Amgen*, 133 S. Ct. at 1192. This premise is false when it comes to GAMCO and many other sophisticated, institutional investors, who receive an outsized share of securities class action recoveries. They *do* believe that they can outperform the "irrational and sentimental" market in the long run. *GAMCO*, 927 F. Supp. 2d at 95.[3] In many cases, their business models depend on that belief. And, most important for purposes of reliance, their trading decisions depend on it too. GAMCO, for example, bought more Vivendi stock after purported corrective disclosures because it viewed the disclosures as "a short-term concern, which would not trouble a longer-term investor." *Id.* at 96.

GAMCO, of course, was not the only institutional investor that traded Vivendi securities during the class period. Quite the contrary, institutional investors like GAMCO have become the rule, and not (as

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[3] *See also Basic*, 485 U.S. at 256 ("many investors purchase or sell stock because they believe the price *inaccurately* reflects the corporation's worth") (White, J., concurring in part and dissenting in part) (internal quotation marks omitted).

the majority in *Basic* imagined) the exception.[4] There are many sophisticated, institutional traders among the *Vivendi* plaintiff class members. And, not surprisingly given the large positions they ordinarily trade, institutions are claiming the lion's share of the damages sought to be recovered in the class action. For example, according to data provided by the claims administrator, although only 270 of the more than 10,400 filed claims are seeking $20,000 or more in damages, those 270 claims account for 96.2% of all claimed damages in the *Vivendi* class action. The vast majority of these 270 larger claims were submitted by institutions. No factual record about these institutional claimants has been developed yet, but at least some of them—claiming tens of millions of dollars in recoveries—appear to be "value" investors. Others may apply different, sophisticated trading strategies that are not dependent on the integrity of market price.

The concentration of institutional investors among the *Vivendi* plaintiff class reflects the predominant role now played by institutions in the equity markets. In 1980, not long before *Basic* was decided, institutions owned 34% of all stocks, according

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[4] Recognizing the prevalent role of institutional investors in securities class actions, the Private Securities Litigation Reform Act of 1995 creates a rebuttable presumption that the lead plaintiff should be the one with "the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (2012). The intent of this provision is "to increase the likelihood that institutional investors will serve as lead plaintiffs." S. Rep. No. 104-98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690.

to one recent analysis.[5] By 2010, institutional ownership had nearly doubled to 67%, and the value of U.S. common stocks had increased from $1.4 trillion to $17.1 trillion.[6] And because institutions trade stocks far more often than individuals, institutions are more likely to have purchased a stock within any given class period. This gives rise to an unintended consequence of securities class actions: They tend to transfer wealth from individuals to institutions. Liability incurred in a securities class action reduces the wealth of shareholders of the defendant company who bought stock outside the class period and increases the wealth of those who bought within the class period. "Ironically, the clear winner under such a system is the more rapidly trading, undiversified investor—which is the profile of the contemporary hedge fund. The clearest loser is the small investor who buys and holds for retirement—exactly the profile of the American retail investor." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1560 (2006).

When the district court held that GAMCO had not relied on Vivendi's alleged misrepresentations, it admonished that its ruling "should not be taken to suggest that sophisticated institutional investors or value-based investors are not entitled to the fraud on

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[5] *See* Marshall E. Blume & Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships* 5, The Wharton School, University of Pennsylvania (Aug. 21, 2012) (unpublished working paper), *available at* http://finance.wharton.upenn.edu/~keim/research/ChangingInstitutionPreferences_21Aug2012.pdf.

[6] Blume & Keim, *supra*, at 5.

the market presumption in general." *GAMCO*, 927 F. Supp. 2d at 102. But why should plaintiffs of that stripe be permitted to obtain massive recoveries without offering any proof whatsoever on an essential element of their claim? "[R]equiring proof of direct reliance" might place an "unrealistic evidentiary burden" on *retail* investors. *Amgen*, 133 S. Ct. at 1192 (internal quotation marks omitted). But hedge funds, institutional asset managers, and other sophisticated traders stand on very different footing. They rely on highly compensated research analysts and portfolio managers to make trading decisions. Unlike many retail investors, they know why they determined that a security was a good investment when they purchased it. And if they did, in fact, rely on a particular public statement, they would be in a position to prove it.

II. THE *BASIC* PRESUMPTION DISTORTS TRIAL PROCEEDINGS

The fraud-on-the-market presumption's unfair effect on Vivendi did not terminate when the class was certified. At trial, the presumption continued to prejudice Vivendi by altering the loss causation element of the plaintiffs' claim. In a private action for securities fraud, the plaintiff bears the burden of proving "a causal connection between the material misrepresentation and the loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Congress underscored the loss causation element in 1995, mandating that "the plaintiff shall have the burden of proving that the act or omission of the defendant ... caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). Although loss causation and reliance are distinct elements of a claim for securities fraud, the fraud-on-the-market

presumption has blurred the distinction and distorted the loss causation element in practice.

If a stock's price on a given date is presumed to reflect the market's reliance on an issuer's alleged material misstatements, then those misstatements must cause an immediate effect on price. *See Basic*, 485 U.S. at 243 ("Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.) ("[E]fficient markets are those in which information important to reasonable investors ... is immediately incorporated into stock prices."). Conversely, the absence of a price effect in an efficient market signals the absence of materiality and causation. Thus, to satisfy the statutory burden of proving loss causation, a plaintiff who invokes the presumption of reliance must show that any allegedly material misstatement, and any revelation of a previously undisclosed material fact, produced an immediate and measureable effect on stock price.

In practice, however, courts have allowed plaintiffs to employ the fraud-on-the-market theory *and* avoid showing any causal nexus between material misstatements and price. To justify use of the presumption in these cases, courts have indulged in a variety of fictions in an attempt to reconcile the fraud-on-the-market presumption with plaintiffs' burden of proving that each material misstatement "affected the integrity of the market price." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011). These fictions lack any empirical basis and, as we explain below, have elided the element of loss causation in securities fraud actions.

"*Unitary Omission.*" Some courts have entertained the fiction that an issuer's public statements need not have any immediate effect on stock price if they can be deemed to merge into a "unitary omission" that causes price inflation over time. In this way, the plaintiff is excused from proving that *each* alleged misstatement has a discernible and immediate effect on stock price, as would be required if the court were faithfully to apply the fraud-on-the-market presumption. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-05571, D.E. 929, at 4–5 (S.D.N.Y. Aug. 18, 2009) (allowing plaintiffs to prove inflation by choosing "'anchor points' for the beginning of stock price inflation and the date of maximum inflation" and using a "proxy" to "allocate inflation over time"); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 561–62 & n.36 (S.D.N.Y. 2011) (holding that plaintiffs need not show that any alleged misstatement corresponds to a change in stock price inflation).

"*Maintenance Theory.*" Similarly, some courts have imagined that issuers' public statements that have no effect on stock price over time can nonetheless be deemed to "cause" investor losses under a "maintenance" theory. As this theory goes, an issuer's allegedly false or misleading statements or omissions serve to "maintain" stock at a constant price, thereby exactly counteracting the price declines that would otherwise have occurred. *See, e.g.*, *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1314–15 (11th Cir. 2011) (holding that an alleged misstatement need not affect price inflation to cause investor losses), *cert. denied*, 133 S. Ct. 109 (2012); *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-cv-1990, 2005 WL 2007004, at *17 (D.N.J. Aug. 17, 2005) ("[A] misstatement could serve to maintain the stock price

at an artificially inflated level without also causing the price to increase further."). Courts deploying this theory have thus attempted to maintain the pretense that the fraud-on-the-market theory, on which the class was certified and the case tried, has some basis in fact.

"Materialization"/"Leakage." Still other courts have held that stock price declines need not be tied to any specific disclosure of fraud if a class of plaintiffs can simply argue that the price declines resulted from a "materialization" or "leakage" of some previously hidden risk. *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 40 n.5 (2d Cir. 2009) ("We do not take issue with the plausibility of Plaintiffs' 'leakage' theory."); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-civ-5893, 2012 WL 4343223, at *2 (N.D. Ill. Sept. 21, 2012) (jury was free to adopt plaintiffs' "Leakage Model" that "did not isolate as to any given day the inflation caused by a misstatement or omission regarding each of the three subjects presented to the jury"). In its most extreme and controversial form, the "materialization of the [concealed] risk" theory posits the existence of loss causation "where a plaintiff shows that 'misstatements and omissions concealed the price-volatility risk (or some other risk) that materialized and played some part in diminishing the market value' of a security." *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1120 (9th Cir. 2013); *see also id.* at 1122 n.5 (noting that "[t]he Ninth Circuit has not adopted the materialization of the risk approach"). Here again, courts have completely abandoned the teaching of the fraud-on-the-market theory that material misstatements in an efficient market must cause immediate and identifiable effects on stock price.

All of these fictions have sprung from the misguided efforts of some courts to explain how the fraud-on-the-market theory can be reconciled with allegedly material misstatements that have no demonstrable effect on stock price. And all of these fictions have been, and are currently being, applied to Vivendi in an erroneous attempt to conform the elements of an action for securities fraud to the fraud-on-the-market theory on which that action was tried. Vivendi's experience illustrates how the fraud-on-the-market presumption can distort the element of loss causation and radically alter securities plaintiffs' statutory burden of proof.

Despite invoking the fraud-on-the-market presumption and its underlying efficient-market hypothesis, the class plaintiffs in the Vivendi litigation admittedly could not prove at trial that any individual public statement made by Vivendi corresponds to a change in Vivendi's stock price. That failure of proof should have resulted in a judgment for Vivendi because an alleged misstatement that does not affect stock price in an efficient market is neither material nor the cause of investor losses. *See Amgen*, 133 S. Ct. at 1195 ("[I]mmaterial information, by definition, does not affect market price ...."); *Dura*, 544 U.S. at 342 (loss causation is the "causal connection between the material misrepresentation and the loss"); *In re Burlington*, 114 F.3d at 1425 (where a public statement had no effect on price in an efficient market, "it follows that the information disclosed ... was immaterial as a matter of law"). Instead, the plaintiffs sought to preserve the fraud-on-the-market presumption by altering the statutory elements of materiality, loss causation, and scienter. The plaintiffs argued that "[t]here is no legal or economic requirement that inflation must correspond to particular

misstatements or omissions," and that "inflation also reflects other factors, such as defendants' scienter, that do not necessarily correspond in any direct way to particular public statements." *In re Vivendi*, D.E. 1051, at 47 (citing no authority).

Therefore, the plaintiffs and their causation expert concocted the theory that all of Vivendi's public statements merged into a unitary omission spanning a two-year period from 2000 through 2002, and that this "omission"—not any specific public statement—was the efficient cause of the alleged price inflation. *See In re Vivendi*, D.E. 1051, at 47 (arguing that the alleged omission "*extended across* numerous public statements" and that inflation could be shown "using straight-line extrapolation") (emphasis added). And the district court accepted this theory, even going so far as to allow the plaintiffs to try their entire case without telling the jury—or Vivendi—exactly which public statements were allegedly false. *See In re Vivendi*, 765 F. Supp. 2d at 579 (holding that it was sufficient that plaintiffs had identified the allegedly actionable statements on the eve of summations). The plaintiffs thus avoided showing that *any* public statement made by Vivendi had an effect on Vivendi's stock price or corresponded to an increase in price inflation—in direct conflict with the fraud-on-the-market theory.

Moreover, to avoid tying any public statement to later price declines, the plaintiffs and their expert theorized that negative news in 2002 about Vivendi (and the media sector generally) was in fact a "materialization of the liquidity risk" that Vivendi had supposedly concealed in 2000 and 2001. *In re Vivendi*, D.E. 1051, at 44. With the trial court's imprimatur, a jury accepted this theory and returned a ver-

dict against Vivendi. *See In re Vivendi*, 765 F. Supp. 2d at 555 (noting that the "'materialization of risk' method" allowed the plaintiffs to rely on "revealing events that negatively affect stock price" and "do not identify prior company statements as misleading"). Thus, the plaintiffs again subverted the loss causation element in order to retain the benefits of the fraud-on-the-market theory.

Then, in a strained effort to conform the jury's verdict to the fraud-on-the-market theory, the district court felt compelled to adopt the additional fiction that, although Vivendi's public statements had no discernible effect on stock price or price inflation, they must have "maintained" Vivendi's shares at artificially high prices. *In re Vivendi*, 765 F. Supp. 2d at 579. In an efficient market, however, that conjecture works only if one shows that the stock price otherwise would have fallen by the *exact amount* of the inflation caused by the alleged misstatement. Suffice it to say, the plaintiffs put forth no evidence to support this bizarre, *ex post* theory.

Vivendi's experience graphically illustrates the lengths to which courts have gone to bridge the analytical gap between the fraud-on-the-market theory—and its necessary implications—and the requirement that securities plaintiffs must show that each material misstatement or omission has proximately caused investor losses. A district court that uses the fraud-on-the-market presumption to certify a class and relieve plaintiffs of their burden of proving actual reliance must also accept the legal and logical implications of that theory. Too often, however, courts have allowed securities plaintiffs to enjoy the presumption of reliance while advancing theories of materiality and loss causation that are fundamen-

tally at odds with the efficient-market hypothesis. The result is a degradation of the traditional elements of a cause of action under § 10(b). In extreme examples, as in Vivendi's case, plaintiffs are allowed effectively to dispense with the element of loss causation altogether.

Private plaintiffs under § 10(b) "must prove elements that are similar to those in actions for common-law fraud," including materiality, reliance, loss causation, and scienter. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376–77 (1991) (Kennedy, J., dissenting). Overturning the fraud-on-the-market presumption would correct an empirically untenable doctrine and restore to securities plaintiffs their burden of proving these elements in every case.

III. THE *BASIC* PRESUMPTION DISTORTS POST-TRIAL PROCEEDINGS

Although post-trial proceedings in the *Vivendi* class action are still underway, Vivendi's experience shows that the presumption of reliance distorts securities fraud actions after the verdict no less than before. Recognizing that the presumption adopted by *Basic* is supposed to be rebuttable, the district court rejected a motion by the class plaintiffs for immediate entry of final judgment after the verdict, and held that Vivendi must first have the opportunity to rebut the presumption of reliance as to particular class members. *In re Vivendi*, 765 F. Supp. 2d at 584–87. This "individualized inquiry," the court explained, could take place only after the trial because when the class action verdict was entered Vivendi did "not yet know the identity of most class members." *Id.* at 584–85. Class members have submitted claim forms and the process of challenging reliance

on an individualized basis will soon begin, as *Basic* allowed.

As it turns out, however, this process is fundamentally unfair. *Basic* invoked the presumption of reliance to resolve a *procedural* "problem," *i.e.*, to allow class actions to proceed without "individual issues . . . overwhelm[ing] the common ones." *Basic*, 485 U.S. at 242. But the effect of the presumption in the post-trial stage—as in the trial itself, see *supra* Point II—is decidedly *substantive*: It permits class members to recover without presenting any proof that they relied on alleged misrepresentations. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (holding that under the Rules Enabling Act "rules of procedure [including Rule 23] shall not abridge, enlarge or modify any substantive right") (internal quotation marks omitted).

The most obvious problem is that Vivendi bears the burden of *disproving* an element of each plaintiff's claim, as to which the plaintiffs themselves have not presented even a modicum of proof. This is the opposite of where the burdens in civil litigation are supposed to fall. *See Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("'Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that plaintiffs bear the burdens on the elements in their claims.'") (quoting Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 3.1 (3d ed. 2003)). And while burden-shifting presumptions are not uncommon, they ordinarily require the presentation of at least *some* evidence by the plaintiff that bears on the issue in dispute. *Basic*'s presumption, in contrast, is routinely applied whenever the defendant is a large company; indeed, many courts presume market effi-

ciency if the defendant's stock is traded on a national exchange.[7] Nothing (apart from trading during the class period) needs to be established *about the plaintiffs* to invoke a presumption of reliance, even though reliance is ultimately a question about the plaintiffs' behavior. Thus, in order to help plaintiffs meet the procedural requirements of Rule 23, the fraud-on-the-market presumption unjustifiably reduces the substantive elements of the plaintiffs' claim.

The unjust effects of this presumption, which are present even in an individual action, are compounded in a class action. It is simply not feasible for Vivendi to attempt to rebut the presumption of reliance in individualized proceedings for each of the more than 10,400 class members claiming recovery. And for all those Vivendi does not challenge, the reliance element of their cause of action has, in practice, simply disappeared. At no stage of the proceedings—class certification, trial, or post-trial—will they have presented any evidence suggesting that they relied on the purported misrepresentations or even that they assumed the integrity of the market price when purchasing the stock.

For those relatively few class members whose reliance Vivendi does challenge, the presumption con-

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[7] *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05-cv-1898, 2006 WL 2161887, at *8 (S.D.N.Y. Aug. 1, 2006) ("If . . . a security is listed on the NYSE, AMEX, NASDAQ, or a similar national market, the market for that security is presumed to be efficient."), *aff'd*, 546 F.3d 196 (2d Cir. 2008); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 185 F. Supp. 2d 389, 404–05 (S.D.N.Y. 2002) ("[N]umerous courts have held that stocks trading on the AMEX are almost always entitled to the presumption.").

tinues to cause undue prejudice. The district court set out complex procedures for individualized reliance challenges. *See In re Vivendi Universal S.A. Sec. Litig.*, 284 F.R.D. 144, 155 (S.D.N.Y. 2012). Vivendi may propound discovery to a "limited number" of investors, after which a special master will make a "quasi-summary judgment determination" whether the discovery responses raise a triable issue as to reliance. *Id.*[8]

These procedures place Vivendi at a stark disadvantage when compared with those that *should* govern reliance proceedings: The plaintiffs—especially sophisticated institutions and hedge funds—should have been required to prove by a preponderance of the evidence that they, in fact, relied on the purported misrepresentations. Instead, Vivendi must disprove reliance and must overcome procedural hurdles at each stage of the post-trial process. All these procedural gateways will tend to reduce the number and the scope of reliance challenges by Vivendi. But reliance is an unproved element of the claimants' case, so the onus of establishing reliance should fall on them. Vivendi should not bear the burden of disproving reliance fourteen years after the trades in issue, especially since it is the claimants who solely

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[8] The district court in *Household International*, another of the few securities fraud class actions to proceed through trial, adopted post-trial claims procedures that similarly disadvantaged the defendants' ability to challenge individual reliance. In that case, defendants were allowed to take discovery of only a limited number of institutional investors, and a special master would determine which reliance challenges could be resolved as a matter of law and which ones required a trial. *See Household Int'l*, 2012 WL 4343223, at *5–7.

possess (and may not have retained) evidence regarding the reasons for their trades.

In the few § 10(b) class actions that have gone through trial, the claims administration process often occurs, as here, long after the class period in which the trades were executed. Unlike GAMCO, which opted out of the class, absent class members are not named parties to litigation and probably do not implement controls to preserve relevant evidence.[9] This makes it highly likely that claimants have destroyed evidence such as emails and memos explaining their reasons for buying a security at a given time. For example, the class period during which Vivendi's stock price was supposedly inflated by fraud runs from October 30, 2000 – August 14, 2002. Vivendi did not learn the identities of the class claimants until more than ten years later, when they submitted proof of claim forms, due in August 2013. These class claimants were never notified that they may be subject to a proceeding in which their reliance would be disputed. Nor were prospective class members ever notified that they must preserve evidence regarding their decisions to trade Vivendi securities during the class period. Consequently, it is exceedingly likely that some records, documents or witnesses relevant to a claimant's trading decision

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[9] As a named plaintiff, GAMCO was presumably well aware of its duty to preserve evidence relating to Vivendi and to its trading decisions. *Cf. Zubulake v. UBS Warburg LLC*, 220 F.R.D. 222, 217 (S.D.N.Y. 2003) ("[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.").

have become unavailable in the intervening decade.[10]

Any loss of reliance evidence *should* count solely against the plaintiff, either because the failure to preserve evidence would give rise to an adverse inference or simply because a dearth of evidence would prevent the plaintiff from carrying *its* burden of proof. But in the current posture, it is Vivendi that bears the burden of disproving reliance by each claimant. Only the claimants themselves—not Vivendi—would possess evidence relevant to that proof. Yet in the decade or more that has elapsed since they made the subject trades, the claimants were not named parties to the litigation; were never apprised that they would need to produce evidence of reliance; and presumably did not institute litigation holds or

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[10] Documentary evidence, particularly emails and text messages, has featured prominently in insider trade cases brought by the government against hedge funds. *See, e.g.*, Verified Compl. ¶ 37, *United States v. S.A.C. Capital Advisors, L.P.*, No. 13-cv-5182 (S.D.N.Y. July 25, 2013) (discussing e-mails from traders confirming that their trading recommendations were based on non-public information); Compl. ¶ 37, *SEC v. Guttenberg*, No. 07-cv-1774 (S.D.N.Y. Mar. 1, 2007) (alleging that UBS executive director sent coded text messages to Wall Street trader containing upcoming UBS analyst recommendations, in insider trading scheme involving, *inter alia*, three hedge funds). Evidence of this kind reveals the *actual* reasons institutional investors make trading decisions, whether based on "inside" information, other non-public information, proprietary valuation models, or other factors. Yet, because of the fraud-on-the-market presumption, institutional claimants in securities class actions are not required to present this evidence in order to recover, and, at least in Vivendi's case, are not even told that they must preserve it.

other practices to preserve relevant evidence. Nor did Vivendi have an opportunity to take early depositions of portfolio managers or other persons with critical knowledge of the transactions, whose memories now may have faded or who may now be unavailable. Indeed, Vivendi did not even learn the claimants' identities until 2013, when claim forms were filed.

The evidentiary records regarding reliance by claimants in the *Vivendi* action have not yet been developed. When they are, if there has been any loss of relevant evidence, the only just outcome would be to assume that all missing evidence is adverse to the claimant. Otherwise, the presumption of reliance is rendered irrebuttable merely because the claimants—the only parties in a position to know why they traded the securities—have not held on to the evidence necessary to adjudicate the issue. No claimant should be permitted to recover on that basis, especially institutional claimants who, if they actually did rely on a misrepresentation, would be able to prove it.

* * *

As Vivendi's experience shows, in practice *Basic* has provided substantial substantive benefits to plaintiffs in securities cases, while distorting securities-fraud litigation at the pre-trial, trial, and post-trial stages. Many investors stand to recover without presenting any evidence of reliance whatsoever—even in the rare cases, like *Vivendi*, that are tried to verdict. The main beneficiaries of this arrangement are sophisticated, institutional investors, who claim the largest share of damage awards, yet who are least likely to have relied on the integrity of market price and who are in the best position to prove the

grounds they actually did rely upon. To put an end to these untoward results, the *Basic* presumption should be abrogated.[11]

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[11] If the Court does not abrogate the fraud-on-the-market presumption completely, it should, at a minimum, confine the presumption to class certification proceedings. Afterward, the named class representatives should bear the burden of establishing their own reliance at trial, without the benefit of the presumption. And, after trial, each claimant seeking to recover should bear the burden of establishing its own individual reliance. As a practical matter, a sophisticated institutional investor or hedge fund engaged in multi-million dollar trades in a fiduciary capacity, and which periodically informs its investors about its trading strategies and why its investments performed as they did, is more likely to have documentary evidence bearing on the question of reliance than a retail investor trading for his own account. Such evidence may be pivotal to the outcome of its claim, yet in the case of Vivendi, claimants were neither required to retain this evidence, nor did the plaintiff, an institutional investor, have the burden of testifying about its own alleged reliance.

CONCLUSION

The decision of Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC.,
F/K/A ARCHDIOCESE OF MILWAUKEE
SUPPORTING FUND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Court Should Overrule or Substantially Modify *Basic*. 5

II. Alternatively, Defendants Should Be Allowed To Rebut the Fraud-on-the-Market Presumption at the Class Certification Stage with Price Impact Evidence. 5

A. Price impact is a fundamental prerequisite to *Basic*'s fraud-on-the-market presumption of reliance and should be rebuttable at class certification. 6

1. Neither *Amgen* nor its rationale precludes price impact rebuttal evidence at class certification. 7

2. Price impact is not dispositive as to loss causation and, as a result, the *Amgen* analysis is inapplicable. 10

B. The Court should harmonize its Rule 10b-5 affirmative misstatement and omission jurisprudence by permitting defendants to present price impact evidence to rebut the judicially created fraud-on-the-market presumption at class certification. 13

1. Under *Ute*, defendants may rebut the judicially created reliance presumption at class certification in cases alleging a fraudulent omission. 13

2. To harmonize the affirmative misrepresentation and omission strands of its Rule 10b-5 jurisprudence, the Court should permit price impact evidence to rebut the reliance presumption at class certification in affirmative misrepresentation cases. 15

C. Establishing the absence of price impact at the class certification stage comports with the purposes of Federal Rule of Civil Procedure 23 and ensures that individual class members will not suffer undue prejudice. 17

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Affiliated Ute Citizens of Utah v. United States,
406 U.S. 128 (1972) ..... *passim*

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) 21, 22

Amgen, Inc. v. Conn. Ret. Plans and Trust Funds,
133 S. Ct. 1184 (2013) ..... *passim*

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Binder v. Gillespie,
184 F.3d 1059 (9th Cir. 1999) 13

Blackie v. Barrack,
524 F.2d 891 (9th Cir. 1975) 13

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 2, 3

EP Medsystems, Inc. v. EchoCath, Inc.,
235 F.3d 865 (3d Cir. 2000) 12

Erica P John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) ..... *passim*

Erica P. John Fund, Inc. v. Halliburton Co.,
718 F.3d 423 (5th Cir. 2013) ..... *passim*

Geiger v. Solomon-Page Group, Ltd.,
933 F. Supp. 1180 (S.D.N.Y. 1996) 10

Hall v. Variable Annuity Life Ins. Co.,
727 F.3d 372 (5th Cir. 2013) 22

In re Salomon Analyst Metromedia Litig.,
236 F.R.D. 208 (S.D.N.Y. 2006) 16

In re Smith Barney Transfer Agent Litig.,
290 F.R.D. 42 (S.D.N.Y. 2013) 16

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 16, 21

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 21

Levitt v. J.P. Morgan Sec., Inc.,
710 F.3d 454 (2d Cir. 2013) 14

Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,
416 F.3d 940 (9th Cir. 2005) 12

Margolies v. Deason,
464 F.3d 547 (5th Cir. 2006) 21

Matrixx Initiatives, Inc. v. Siracusano,
131 S. Ct. 1309 (2011) 1, 9

McCabe v. Ernst & Young, LLP,
494 F.3d 418 (3d Cir. 2007) 12

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970) 13

Morrison v. Nat'l Austl. Bank Ltd.,
561 U.S. 247 (2010) 1

No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.,
320 F.3d 920 (9th Cir. 2003) 10

Police and Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 21

Regents of the Univ. of Cal. v. Credit Suisse First Boston,
482 F.3d 372 (5th Cir. 2007) 14, 15, 16

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 1, 14

United States v. Bilzerian,
926 F.2d 1285 (2d Cir. 1991) 10

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1

STATUTES

28 U.S.C. § 1658(b) 21

28 U.S.C. § 1658(b)(2) 19, 20, 21, 22

RULES

Fed. R. Civ. P. 23 ..... 17, 18, 22

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

7 William B. Rubenstein, Newberg on Class Actions § 22.1 (4th ed. 2013) 18

18A Charles Alan Wright, et al., Fed. Prac. & Proc. § 4455 (2d ed. 2013). 18

Brief in Opposition, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. Oct. 11, 2013) 6

Thomas L. Hazen, *The Law of Securities Regulation* § 12.9[11][B] (6th ed. 2009 & 2010 Supp.) 9

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). WLF has also participated extensively in litigation in support of its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF also filed an amicus brief when this case was previously before the Court. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

WLF agrees with Petitioners that the fraud-on-the-market presumption adopted by the Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), is based on flawed economic premises, has proven to be unworkable in practice, and ought to be abandoned or at least substantially modified. WLF writes separately to focus on why, in the alternative, defendants should be allowed to rebut the fraud-on-the-market presumption of reliance at the class certification stage with "price impact" evidence. Not only is there no legal barrier to allowing this type of rebuttal, but it will both harmonize how the element of reliance is addressed by the lower courts in misstatement claims (as in the instant case) and omission claims (as contemplated by *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972)) and protect the rights of investors who may have viable individual claims even if a case cannot proceed on a class basis.

SUMMARY OF THE ARGUMENT

Price impact is a fundamental prerequisite for the application of the fraud-on-the-market presumption of reliance created by the Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) ("*Basic*"). Indeed, *Basic* expressly permits defendants to rebut the presumption by showing that the alleged misrepresentations did not have any impact on the market price of the security. *Id.* at 248. A key question for defendants in securities class actions, however, is *when* this rebuttal can be presented. As the Court has recognized, once a securities class is certified, the defendants face such "increase[d] * * * potential damages liability and litigation costs that [they] may find it economically prudent to settle and to *abandon a meritorious defense*." *Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (emphasis added). Accordingly, the inability to present a price impact rebuttal to the fraud-on-the-market presumption at the class certification stage has a significant practical effect.

In two recent decisions – *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) ("*EPJ Fund*") and *Amgen, Inc. v. Connecticut Ret. Plans and Tr. Funds*, 133 S. Ct. 1184 (2013) ("*Amgen*") – the Court has addressed issues related to class certification in securities fraud cases, but it has not resolved whether class certification is an appropriate stage in the proceedings for a price impact rebuttal to be presented. Indeed, in *EPJ Fund*, the Court expressly reserved this question. 131 S. Ct. at 2187. Nevertheless, based on its reading of *Amgen*, the Fifth Circuit incorrectly concluded in this case that price impact rebuttal "should not be considered at class certification." *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 435 (5th Cir. 2013).

First, nothing in the *EPJ Fund* and *Amgen* decisions supports the Fifth Circuit's holding here at issue. The touchstone of the relevant analysis is whether a defendant's successful rebuttal as to price impact will necessarily cause a "failure of proof" on an element of the securities fraud claim that "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Amgen*, 133 S. Ct. at 1196. Price impact does not meet these requirements. It is not an element of a securities fraud claim. Moreover, while a lack of price impact may be probative evidence as to materiality and loss causation, it is not dispositive as

to those elements for all class members. *See infra* Part II, at pp. 6-13.

Second, allowing defendants to rebut price impact at the class certification stage would harmonize how courts address rebuttals of the fraud-on-the-market presumption of reliance (in affirmative misstatement cases) and the *Ute* presumption of reliance (in omission cases). Under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972) ("*Ute*") and its progeny, there exists a presumption of reliance on alleged omissions, which defendants may rebut at the class certification stage by showing that they did not have a class-wide duty of disclosure. *See infra* Part II.B, at pp. 14-18.

Finally, allowing price impact rebuttal at the class certification stage would better protect the interests of class members who may be able to make an individualized showing of actual reliance. If the court certifies a class, only to determine later that plaintiffs may not rely on the fraud-on-the-market presumption due to the absence of price impact, individual class members' ability to then pursue their claims may be severely compromised due to *res judicata* or statute of repose issues. *See infra* Part II.C, at pp. 18-23.

For the foregoing reasons, and the reasons contained in the briefs of the Petitioners and their other supporting *amici*, WLF urges this Court to reverse the Fifth Circuit's decision.

ARGUMENT

I. The Court Should Overrule or Substantially Modify *Basic*.

The Court should overrule *Basic* and require plaintiffs to show actual reliance on affirmative misstatements to maintain a Rule 10b-5 implied cause of action. Alternatively, the Court should substantially modify *Basic* by requiring class plaintiffs to prove that the alleged affirmative misstatements actually distorted the security's market price. WLF agrees with the extensive arguments supporting these positions that have been presented by the Petitioners and the other amici.

II. Alternatively, Defendants Should Be Allowed To Rebut the Fraud-on-the-Market Presumption at the Class Certification Stage with Price Impact Evidence.

Even if the Court declines to overrule or substantially modify *Basic*, there are significant jurisprudential reasons to allow defendants to rebut the fraud-on-the-market presumption at class certification by showing the absence of price impact. First, price impact is a fundamental prerequisite to the fraud-on-the-market presumption and nothing in the Court's *Basic*, *Amgen*, or *EPJ Fund* decisions prevents a court's consideration of a price impact rebuttal at class certification. Second, the courts have consistently held that defendants may rebut the related *Ute* presumption of reliance for Rule 10b-5 claims based on a fraudulent omission at class certification with evidence showing the absence of a fundamental prerequisite of that presumption—a class-wide duty of

disclosure. Given that private actions under Rule 10b-5 are judicially created, the Court has a vested interest in harmonizing how lower courts address these two related reliance presumptions. Finally, failing to allow defendants to rebut price impact at class certification may prejudice investors with meritorious individual claims whose ability to bring those individual claims would be compromised.

A. Price impact is a fundamental prerequisite to *Basic*'s fraud-on-the-market presumption of reliance and should be rebuttable at class certification.

In *EPJ Fund*, the Court recognized that "[u]nder *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation ***if that 'information is reflected in [the] market price' of the stock at the time of the relevant transaction***." 131 S. Ct. at 2186 (quoting *Basic*, 485 U.S. at 247) (emphasis added). Therefore, if a misrepresentation is not reflected in the market price (*i.e.*, the absence of price impact), the *Basic* presumption of reliance fails. *Amgen*, 133 S. Ct. at 1195 (reaffirming that a misrepresentation that "does not affect market price . . . cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity"). This is pure common sense, *cf. Basic*, 485 U.S. at 246 (recognizing that the fraud-on-the-market presumption is "supported by common sense and probability"), and neither the Fifth Circuit nor Respondent have disputed this fundamental point in this case. *See generally* 718 F.3d 423; Brief in Opposition, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. Oct. 11, 2013).

Nor can this point be disputed, for "***[a]ny showing*** that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added). This rebuttal can include a "show[ing] that the misrepresentation in fact did not lead to a distortion of price." *Id.* Indeed, in this case, the Fifth Circuit expressly conceded that "in the absence of price impact, 'the basis for finding that fraud has been transmitted through market price would be gone.'" 718 F.3d at 433 (quoting *Basic*, 485 U.S. at 248). Nonetheless, the Fifth Circuit erroneously affirmed the district court's grant of class certification, reasoning incorrectly that the "*Amgen* Court's analysis leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be considered at class certification." *Id.* at 435.

1. Neither *Amgen* nor its rationale precludes price impact rebuttal evidence at class certification.

In this case, the Fifth Circuit held that *Amgen* prohibits a defendant from proffering price impact evidence at class certification to rebut the fraud-on-the-market presumption. 718 F.3d at 435. Not so. *Amgen*'s reasoning suggests that price impact rebuttal evidence is not only appropriate, but also necessary, at class certification.

First, *Amgen* did not address whether a defendant may proffer price impact evidence at class certification to rebut the fraud-on-the-market presumption of reliance. Instead, in *Amgen*, the defendant presented

a truth-on-the-market defense to show that misrepresentations would not have been material to the reasonable investor. 133 S. Ct. at 1203. As the Fifth Circuit noted in this case, the "*Amgen* Court did not discuss whether [price impact] evidence offered for this purpose [*i.e.*, to rebut the presumption of reliance] could be considered at class certification." 718 F.3d at 433.

Second, price impact is not an essential element of a Rule 10b-5 claim. In *Amgen*, the Court held that materiality, although "indisputably" an "essential predicate of the fraud-on-the-market theory," need not be proved by a plaintiff at the class certification stage to ensure predominance. 133 S. Ct. at 1195-96, 1198-99. In *Amgen*, the Court distinguished materiality from market efficiency and publicity, reasoning that even though all three are "essential predicates" of the fraud-on-the-market theory, and each "can be proved on a classwide basis," market efficiency and publicity are not "indispensable elements of a Rule 10b-5 claim," unlike materiality. *Id.* at 1199, 1212. The Court reasoned: "While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class." *Id.* at 1199.

Price impact is analogous to market efficiency and publicity. It is not an "indispensable" element of a Rule 10b-5 claim. And if a defendant at class certification successfully rebuts the existence of price impact and thus, the fraud-on-the-market presumption of reliance, this does not "end the case for one and for all." *Amgen*,

133 S. Ct. at 1196. A plaintiff can still "attempt to establish reliance through the 'traditional' mode of demonstrating that she was personally 'aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation.' " *Id.* at 1199 (quoting *EPJ Fund*, 131 S. Ct. at 2185). Although individual issues of reliance would predominate, the "plaintiff's claim would remain live; it would not be 'dead on arrival.' " *Id.* (citation omitted); *see also* 718 F.3d at 431 (Fifth Circuit notes in this case that a "plaintiff can fail to establish publicity, market efficiency, or trade timing, and therefore lose the class-wide presumption of reliance, but still establish individual reliance and prove fraud") (citing *Amgen*, 133 S. Ct. at 1198-99).

Finally, a successful price impact rebuttal would not defeat materiality. To be sure, courts treat price impact evidence as probative of materiality. But this does not render such evidence "essential" to a plaintiff's Rule 10b-5 claim. As the Court in *Basic* noted, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." 485 U.S. at 236; *see also Matrixx*, 131 S. Ct. at 1318-19 (reiterating the Court's rejection of "bright-line" rules for materiality).

With *Basic*'s admonition in mind, commentators have recognized that price impact alone is not dispositive on the issue of materiality. *See, e.g.*, Thomas L. Hazen, *The Law of Securities Regulation* § 12.9[11][B] (6th ed. 2009 & 2010 Supp.) ("While the impact of information on the market price may be evidence of materiality, courts should be reluctant to

view the absence of an effect on the stock price to negate a finding of materiality."). Many lower courts have agreed. *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (holding that lack of immediate market reaction does not preclude a finding that misrepresentations are material); *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (observing that "whether a public company's stock price moves up or down or stays the same after [filing] . . . does not establish the materiality of the statements made, though stock movement is a factor the jury may consider relevant"); *Geiger v. Solomon-Page Group, Ltd.*, 933 F. Supp. 1180, 1188 (S.D.N.Y. 1996) (holding that evidence of stock price movement may be relevant to materiality, but is not determinative). Accordingly, evidence of a lack of price impact would not dispose of materiality "for one and for all." *Amgen*, 133 S. Ct. at 1196.

2. Price impact is not dispositive as to loss causation and, as a result, the *Amgen* analysis is inapplicable.

In this case, the Fifth Circuit apparently agreed that *Amgen* does not directly prevent a defendant's presentation of rebuttal price impact evidence at class certification. Instead, it found, based on the *Amgen* "analysis," that because "a showing of negative price impact is required to establish loss causation, plaintiffs who cannot establish price impact cannot establish loss causation." 718 F.3d at 434. As a result, if a defendant "were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could

not establish an essential element of the fraud action." *Id.* However, the Fifth Circuit's conclusion that price impact and loss causation are indistinguishable has been expressly rejected by this Court and is incorrect as a matter of law.

The Court in *EPJ Fund* held that the Fifth Circuit "erred by requiring [plaintiff] to show loss causation as a condition of obtaining class certification." 131 S. Ct. at 2186. The Court was not persuaded by Halliburton's attempt to characterize the Fifth Circuit's inquiry as "whether EPJ Fund had demonstrated 'price impact'" (instead of loss causation). *Id.* at 2187. In particular, the Court found that it did not "accept Halliburton's wishful interpretation of the Court of Appeals' opinion. As we have explained, loss causation is a familiar and distinct concept in securities law; ***it is not price impact***." *Id.* (emphasis added).

In *EPJ Fund*, the Court did not hold that price impact evidence is prohibited, if introduced to rebut the fraud-on-the-market presumption at class certification. To the contrary, it specifically reserved any such issue, explaining in no uncertain terms: "Because we conclude the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage, we need not, and do not, address any other question about *Basic*, its presumption, or how and when it may be rebutted." *Id.*

Those "other question[s]" are now before the Court, which has an opportunity to confirm its correct conclusion that loss causation "is not price impact." *Id.* Contrary to the Fifth Circuit's decision, if a defendant demonstrated the absence of price impact, this would *not* mean that individual plaintiffs necessarily were

unable to establish loss causation. Unlike materiality, which is subject to an "objective test" that applies to every Rule 10b-5 claim based on the alleged misrepresentations (whether or not the claim relies on the fraud-on-the-market theory), loss causation can be subject to individual proof. If an individual plaintiff were able to establish "reliance through the 'traditional' mode of demonstrating that she was personally 'aware of [the defendant's] statements and engaged in a relevant transaction,'" *Amgen*, 133 S. Ct. at 1199 (citation omitted), she also may be able to establish loss causation through some means *other* than the statements' effect on the market price of the securities.

Indeed, lower courts have made it clear that price impact is merely *one* of the ways that an individual plaintiff can demonstrate loss causation, even as to publicly traded securities. *See, e.g.*, *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 425-426 (3d Cir. 2007) (in case involving private purchase of public company's stock, "non-typical" loss causation allegations may still support viable claim); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 949 & n.2 (9th Cir. 2005) (purchaser in "private sale" adequately pleaded loss causation without reference to exchange-listed price); *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 871 (3d Cir. 2000) (plaintiff sufficiently alleged a Rule 10b-5 claim against a publicly traded company even though the plaintiff "d[id] not base its claim on public misrepresentations or omissions that affected the price of the stock").

Because loss causation and price impact are distinct issues, a denial of class certification based on the

absence of price impact would not mean that "no claim would remain in which individual reliance issues could potentially predominate." *Amgen*, 133 S. Ct. at 1196. Instead, it would simply mean that individual questions of reliance *and* loss causation were predominant over common ones.

B. The Court should harmonize its Rule 10b-5 affirmative misstatement and omission jurisprudence by permitting defendants to present price impact evidence to rebut the judicially created fraud-on-the-market presumption at class certification.

1. Under *Ute*, defendants may rebut the judicially created reliance presumption at class certification in cases alleging a fraudulent omission.

"Reliance . . . is an essential element of the § 10(b) private cause of action" because it ensures "a proper connection between a defendant's misrepresentation and a plaintiff's injury." *EPJ Fund*, 131 S. Ct. at 2184 (citations and internal quotations omitted). However, the Court has recognized that plaintiffs who allege a fraudulent omission face unique difficulties in proving actual reliance, as "reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove[.]" *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 382 n.5 (1970) (emphasis in original); *see also Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (same). Accordingly, the Court has created a *rebuttable* reliance presumption (the "*Ute* presumption"), which plaintiffs can use upon showing (1) the existence of a material omission; and (2) that the defendant had a duty to

disclose. *Ute*, 406 U.S. at 152-53; *Stoneridge*, 552 U.S. at 159.

Importantly, the *Ute* presumption is rebuttable at class certification. In particular, the lower courts permit class action defendants to rebut the *Ute* presumption by showing that they had no class-wide duty to disclose. *Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 468-70 (2d Cir. 2013) (upholding denial of class certification and holding *Ute* presumption inapplicable where defendant clearing firm owed no fiduciary duty to disclose a broker-dealer's scheme to manipulate an initial public offering to plaintiffs-customers of the introducing broker-dealer); *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 384-85 (5th Cir. 2007) ("*Credit Suisse First Boston*") (reversing order certifying class and holding *Ute* presumption inapplicable where defendant banks owed no fiduciary duty to plaintiffs who purchased securities); *cf. Stoneridge*, 552 U.S. at 159 (affirming lower court's dismissal of action because, *inter alia*, the *Ute* presumption was inapplicable where defendants merely transacted business with the issuer of plaintiffs' securities, as defendants owed plaintiffs no duty to disclose the issuer's allegedly fraudulent business practices).[2]

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[2] Post-*Amgen*, it remains proper for defendants to rebut the *Ute* reliance presumption by showing that a defendant had no class-wide duty to disclose. Unlike materiality, the existence of a duty to disclose can involve individualized facts that render the issue unsuitable for class treatment. *See, e.g.*, *Credit Suisse First Boston*, 482 F.3d at 383 (denying class certification because the *Ute* presumption was inapplicable where defendant banks owed no class-wide duty of disclosure, but specifying that plaintiffs could still prove individual reliance on defendants' conduct).

2. To harmonize the affirmative misrepresentation and omission strands of its Rule 10b-5 jurisprudence, the Court should permit price impact evidence to rebut the reliance presumption at class certification in affirmative misrepresentation cases.

As set forth immediately above, a defendant may rebut *Ute*'s judicially created reliance presumption at class certification with evidence of no class-wide duty of disclosure. The Court should harmonize its two strands of Rule 10b-5 jurisprudence by ensuring that affirmative misstatement defendants also have an equivalent opportunity to rebut the judicially created fraud-on-the-market presumption at class certification with price impact evidence.

As a threshold matter, the issues of the defendant's duty of disclosure and price impact are analogous, warranting their equivalent treatment at class certification. First, a failure to prove price impact, like a failure to prove a class-wide duty to disclose, will not "end the case for one and for all," unlike a failure to prove materiality. *Amgen*, 133 S. Ct. at 1196; *Credit Suisse First Boston*, 482 F.3d at 383. Second, the duty to disclose is an essential prerequisite of the *Ute* presumption, 406 U.S. at 154, and similarly, price impact is an essential prerequisite of the fraud-on-the-market presumption, *Basic*, 485 U.S. at 248. Put differently, just as a class cannot be presumed to rely on disclosures that it was not required to receive, so too a class cannot presumptively rely in common when it purchases at a market price unaffected by affirmative misstatements. Finally, a plaintiff in an omission case

could potentially show individual reliance on a defendant's statements that omitted material information, even where the defendant lacked a class-wide duty to disclose. *See Credit Suisse First Boston*, 482 F.3d at 383. Likewise, a plaintiff in an affirmative misstatement case could potentially show individual reliance without price impact. *See Amgen*, 133 S. Ct. at 1199 (describing a plaintiff's ability to "establish reliance through the 'traditional' mode of demonstrating that she was personally 'aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation.' ") (citation omitted).

Moreover, harmonization will discourage plaintiffs from engaging in "artful pleading" in an attempt to lower their class certification hurdle. As numerous lower courts have recognized: "The distinction between misstatements and omissions is often illusory. A statement is misleading when it omits the truth. Thus, in most securities fraud cases, an affirmative misstatement can be cast as an omission and vice versa." *In re Smith Barney Transfer Agent Litig.*, 290 F.R.D. 42, 47 (S.D.N.Y. 2013); *see also In re Salomon Analyst Metromedia Litig.*, 236 F.R.D. 208, 219 (S.D.N.Y. 2006) ("[A]ffirmative misleading statements always omit *something*; namely, they omit the information that would correct or mitigate their misleading nature and thereby render the statements true." (emphasis in original)). In light of this "illusory" distinction, plaintiffs often seek to characterize their claims so as to follow the path of least resistance to obtaining class certification. *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1163 (10th Cir. 2000) (finding that despite the plaintiff's "valiant[]" struggle to plead ". . .

in such a manner as to intertwine affirmative acts with omissions in a strained attempt to recharacterize the . . . alleged conduct within the definition of 'omission,' " plaintiff's claims were based on affirmative acts). Harmonization will significantly reduce, if not eliminate, the incentive to engage in such manipulative conduct.

C. Establishing the absence of price impact at the class certification stage comports with the purposes of Federal Rule of Civil Procedure 23 and ensures that individual class members will not suffer undue prejudice.

It might appear to confer an unqualified advantage upon a proposed class if a defendant is barred from using price impact evidence to rebut the fraud-on-the-market presumption at the class certification stage. In truth, however, delaying the use of such evidence until later in the litigation potentially imperils the rights of class members and undermines the basic purposes of Federal Rule of Civil Procedure 23 ("Rule 23").

As the Court has recognized, even where a plaintiff cannot establish reliance on a class-wide basis, there may be members of the class who can make an individualized showing of actual reliance. *Amgen*, 133 S. Ct. at 1199. If a defendant who possesses rebuttal price impact evidence is allowed to present such evidence only at trial, this could create barriers to these class members proceeding upon their individualized proof.

Because reliance is an essential element of a Rule 10b-5 claim, a defendant who successfully rebuts the

fraud-on-the-market-presumption at trial is entitled to judgment as a matter of law as to the entire class. Under elementary principles of *res judicata*, this entry of judgment ordinarily extinguishes the underlying fraud claim against the defendant and bars any subsequent action on that same claim—including, potentially, any actions by individual class members. As has been observed: "Preclusion by representation lies at the heart of the modern class action developed by such procedural rules as Civil Rule 23. The central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court." 18A Charles Alan Wright, et al., Fed. Prac. & Proc. § 4455 (2d ed. 2013).[3]

Indeed, it is precisely because of the principle of "preclusion by representation" that the need exists for close scrutiny at class certification of the "predominance" and other certification prerequisites. 7 William B. Rubenstein, Newberg on Class Actions § 22.1 (4th ed. 2013) ("A 'rigorous analysis' of the propriety of certification is necessary because, among other things, a class action judgment has *res judicata* effect with respect to absent class members.")

Of note, Rule 23 itself does not compel a district court in a securities class action to permit class

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[3] *See also id.* ("A host of motives underlie the intention to achieve preclusion. These motives cover a range as broad as the divergent desires to avoid the burden of multiple individual actions that would occur without a class action and to avoid the nonenforcement of claims that would not be pursued in individual actions. ...")

members to pursue fraud claims individually, after the court has entered judgment in defendant's favor due to the lead plaintiff's inability following class certification to prove an essential element of the claim, such as reliance. Nor does *Basic*, or any subsequent decision of the Court, mandate in these circumstances that a district court adopt some mechanism to preserve the ability of class members who did not previously intervene in the case or file their own complaints, to resurrect and litigate the dismissed fraud claim based on evidence of individualized reliance. Circuit courts likewise have not provided explicit guidance on this issue.

Rather, whether in these circumstances there is some mechanism by which individual class members may litigate their own claims (*e.g.*, based on an individualized showing of actual reliance)—and what the specific contours of this protective mechanism should be—has effectively been left as a matter of judicial administration to district courts' discretion. As such, upon receiving notice of a proposed securities fraud class action, members of the proposed class generally cannot predict with any degree of certainty how the district court may eventually exercise its discretion with regard to their individual claims.

Even where a lead plaintiff has failed on behalf of the class to prove the element of reliance and the district court wishes to permit individual claims to be litigated, ***the five-year statute of repose governing Rule 10b-5 securities fraud claims (28 U.S.C. § 1658(b)(2) ("Section 1658")) may as a matter of law bar such claims***. If a defendant's ability to rebut the fraud-on-the-market presumption is delayed until

trial, there is a distinct risk that more than five years will have elapsed from when the earliest misrepresentation alleged in the Complaint was made and the issue of reliance is fully and finally litigated in the class action.

This risk is not merely hypothetical, given that in securities class actions: (i) complaints often allege misrepresentations that occurred many months (and sometimes a year or more) prior to the filing of the complaint (under Section 1658, it is the date of the misrepresentation that triggers the running of the period of repose); (ii) complaints often are amended, further delaying the litigation; (iii) district courts often take many months (and sometimes a year or more) to issue a ruling on a defendant's motion to dismiss; (iv) if the motion to dismiss is denied, fact and expert discovery is often highly protracted; (v) discovery disputes between the parties frequently arise and spawn satellite motion practice that can require months or a year or more to resolve; (vi) the briefing of Rule 56 motions is notoriously time-consuming, and district courts can take months or a year or more to decide such motions; and (vii) the pre-trial phase of the case (motions *in limine*, etc.) obviously can take many additional months. In some instances, final resolution of the securities class action is further delayed by appeals.

The facts of this case illustrate the point. The operative complaint in this case is the plaintiffs' Fourth Consolidated Amended Complaint, N.D. Tex. Docket No. 02-1152 (April 4, 2006), which alleges claims based on misrepresentations that allegedly were made prior

to December 7, 2001. With regard to these alleged misrepresentations, the statute of repose lapsed long ago.[4]

Thus, if a defendant has conclusive evidence of a lack of price impact, but is not permitted to present that evidence until trial, then this opens the door to the possibility that by the time the plaintiff's fraud-on-the-market presumption is adjudicated, the period of repose provided for by Section 1658 will have run—and a district court might determine (absent controlling precedent to the contrary[5]) that Section 1658 precludes

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[4] Effective July 30, 2002, the period of repose under 28 U.S.C. § 1658(b) was amended from three years to five years. *See Margolies v. Deason*, 464 F.3d 547, 550 (5th Cir. 2006). Because the complaint in this case was filed prior to July 30, 2002, the applicable repose period is three years.

[5] Under the Court's decision in *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." In a later case, however, the Court found that federal statutes of repose (such as the statutes of repose in the federal securities laws) are not subject to equitable tolling. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). The Second Circuit recently concluded that because Rule 23 does not expressly create a class action tolling rule, tolling under the Court's decision in *American Pipe* is best understood as a judicially created rule based on equitable considerations and, as a result, cannot extend a statute of repose. *Police and Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) ("[p]ermitting a plaintiff to file a complaint or intervene after the repose period . . . has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act."). *But see Joseph*, 223 F.3d at 1167-68 (holding that statute of repose for Rule 10b-5 claims is

any class members from pursuing their own claims and using any individualized proof of reliance that they may have in support of their claims.

It also is possible that a district court could conclude (correctly or not) that Section 1658 does ***not*** have the effect of barring class members in a securities fraud class action from proceeding based on individualized proof of actual reliance. But until and unless the issue is decided in the case, members of the proposed class cannot predict whether a Section 1658 issue will arise in the first place, much less how the district court will resolve it.

Thus, delaying a defendant's ability to present rebuttal price impact evidence until the merits stage of a class action is tantamount to requiring every class member who might make an individualized showing of actual reliance to take the drastic prophylactic step of seeking to intervene in the action or filing a separate individual action long before the class claims are decided. But many class members do not have the practical ability to do so (and therefore their potential claims may always remain at risk). Moreover, effectively forcing members of the proposed class to pursue their own claims would result in the kind of duplicative litigation that Rule 23 was designed to avoid. In contrast, permitting the fraud-on-the-market presumption to be tested at the class certification

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subject to *American Pipe* tolling). It is not clear how the Fifth Circuit would resolve the issue in this case—the court has recognized there is a circuit split on the issue but has expressly declined to decide the issue. *See Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013).

stage—and thereby avoiding the uncertainty and potential prejudice to class members that might otherwise arise—strikes an appropriate balance between efficiently litigating class-wide common issues and treating individual members of the proposed class fairly.

CONCLUSION

For the reasons stated above, WLF respectfully urges the Court to reverse the Fifth Circuit's decision. Even if the Court declines to overrule or substantially modify the fraud-on-the-market presumption created in *Basic*, it should clarify that price impact evidence can be used to rebut the presumption at the class certification stage of a case.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 13 2014
OFFICE OF THE CLERK

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX
VOLUME 1 OF 2

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January 13, 2014

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 2013
CERTIORARI GRANTED NOVEMBER 15, 2013

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TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries:

- United States Court of Appeals for the Fifth Circuit 1
- U.S. District Court, Northern District of Texas (Dallas) 17

Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof In The United States District Court Northern District Of Texas Dallas Division Filed September 17, 2007 165

- Appendix In Support Of Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof 198
- Report Of Jane D. Nettesheim 198
- Appendix To Report Of Jane D. Nettesheim: Regression Analysis And Event Study 288

Exhibits To Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof In The United States District Court Northern District Of Texas Dallas Division Filed September 17, 2007:

- Exhibit 1 ..... SA1
- Exhibit 2 ..... SA7

TABLE OF CONTENTS—Continued

Page

Exhibit 3 ..... SA9

Exhibit 4 ..... SA28

Exhibit 5 ..... SA33

Exhibit 6 ..... SA35

Exhibit 7 ..... SA45

Exhibit 8 ..... SA47

Exhibit 9 ..... SA49

Exhibit 10 ..... SA52

Exhibit 11 ..... SA54

Exhibit 12 ..... SA70

Exhibit 13 ..... SA87

Exhibit 14 ..... SA89

Exhibit 15 ..... SA91

Exhibit 16 ..... SA93

Exhibit 17 ..... SA96

Exhibit 18 ..... SA110

Defendants' Response To Lead Plaintiff's Motion For Class Certification In The United States District Court For The Northern District Of Texas Dallas Division Dated November 16, 2007 346

Excerpts Of Deposition Of Jane Nettesheim In The United States District Court For The Northern District Of Texas Dallas Division, Dated October 16, 2007 400

TABLE OF CONTENTS—Continued

Page

Expert Report Of Lucy P. Allen, In The United States District Court Northern District Of Texas Dallas Division Dated November 16, 2007 446

Excerpts From Appendix To Defendants' Response To Lead Plaintiff's Motion For Class Certification In The United States District Court For The Northern District Of Texas Dallas Division Dated November 16, 2007:

Exhibit 11 ..... SA454

Exhibit 12 ..... SA464

Exhibit 13 ..... SA467

Exhibit 14 ..... SA471

Exhibit 15 ..... SA475

Exhibit 16 ..... SA478

Exhibit 17 ..... SA482

Lead Plaintiff's Reply In Support Of Its Motion For Class Certification In The United States Court For The Northern District Of Texas, Dated December 21, 2007 535

Exhibit To Lead Plaintiff's Reply In Support Of Its Motion For Class Certification In The United States Court For The Northern District Of Texas, Dated December 21, 2007 ..... SA486

Rebuttal Report Of Jane D. Nettesheim, United States District Court, Northern District Of Texas, Dallas Division, Dated December 20, 2007 572

TABLE OF CONTENTS—Continued

Page

Supplemental Expert Report Of Lucy P. Allen, United States District Court, Northern District Of Texas Dallas Division, Dated January 18, 2008 649

Transcript of Motions Hearing, United States District Court, Northern District Of Texas, Dallas Division, Dated March 21, 2008 748

Order Denying Motions To Strike The Report Of Jane Nettesheim And Expert Report Of Lucy Allen, United States District Court, Northern District Of Texas, Dallas Division, Dated March 25, 2008 834

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 12-10544

ERICA P. JOHN FUND, INCORPORATED, formerly known as Archdiocese of Milwaukee Supporting Fund Inc, On Behalf of Itself and All Others Similarly Situated,

v.

HALLIBURTON COMPANY, et al.

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
05/22/2012	PRIVATE CIVIL FEDERAL CASE docketed. NOA filed by Appellants Halliburton Co and Mr. David J Lesar [12-10544] (MVM)
05/22/2012	PERMISSION TO APPEAL GRANTED. Case transferred from miscellaneous case number 12-90007. Fee due on 06/05/2012 for Appellants Halliburton Co, David J Lesar. Notice of Certified ROA due on 06/06/2012. [12-10544] (MVM)
05/30/2012	Attorney Mr. Donald Everett Godwin, Esq. for Appellant Mr. David J Lesar is advised to resubmit appearance form. Reason: Multiple forms attached. Each

DATE FILED	DOCKET TEXT
	attorney must file his/her own form separately. [12-10544] (MAS)
05/30/2012	Attorney Mr. Robert Alan York for Appellant Mr. David J Lesar is advised to resubmit appearance form. Reason: The submitted appearance form does not match the registered attorney. [12-10544] (MAS)
05/30/2012	APPEARANCE FORM FILED by Attorney Robert Alan York for Appellant David J Lesar in 12-10544 [12-10544] (CNF)
05/30/2012	APPEARANCE FORM FILED by Attorney Donald Everett Godwin for Appellant David J Lesar in 12-10544 [12-10544] (CNF)
06/01/2012	APPEARANCE FORM FILED by Attorney Emery Lawrence Vincent for Appellee Erica P. John Fund, Incorporated in 12-10544 [12-10544] (NFD)
06/01/2012	NOTICE RECEIVED FROM DISTRICT COURT. ROA Certified by DCt, FILED Certified ROA due deadline satisfied. [12-10544] (CNF)
06/01/2012	NOTICE RECEIVED FROM DISTRICT COURT. SUPPLEMENTAL ROA Cert by DCt, FILED [12-10544] (CNF)

DATE FILED	DOCKET TEXT
06/01/2012	NOTICE RECEIVED FROM DISTRICT COURT.2nd SUPPLEMENTAL ROA Cert by DCt, FILED [12-10544] (CNF)
06/04/2012	FEE PAID by Appellants Halliburton Co and Mr. David J Lesar. Fee deadline satisfied [12-10544] (POK)
06/04/2012	APPEARANCE FORM FILED by Attorney(s) Aaron Michael Streett for party(s) Appellant Halliburton Co, in case 12-10544 [12-10544] (POK)
06/04/2012	APPEARANCE FORM FILED by Attorney David Dykeman Sterling for Appellant Halliburton Co in 12-10544 [12-10544] (POK)
06/04/2012	APPEARANCE FORM FILED by Attorney(s) Robert Lawrence Voyles for party(s) Appellant Halliburton Co, in case 12-10544 [12-10544] (POK)
06/04/2012	APPEARANCE FORM FILED by Attorney Jessica Bateman Pulliam for Appellant Halliburton Co in 12-10544 [12-10544] (POK)
06/07/2012	NOTICE RECEIVED FROM DISTRICT COURT 3rd Supplemental ROA Cert by DCt, FILED [12-10544] (CNF)

DATE FILED	DOCKET TEXT
06/08/2012	LETTER OF ADVISEMENT. Reason: To explain and provide changed caption [12-10544] (MBC)
06/14/2012	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 07/24/2012 for Appellants Halliburton Co, David J Lesar. [12-10544] (CNF)
07/10/2012	PHONE EXTENSION CONFIRMED for Appellants Halliburton Co and Mr. David J Lesar. Extension granted to and including 08/07/2012. A/Pet's Brief deadline updated to 08/07/2012 for Appellants Halliburton Co, David J Lesar [12-10544] (MFY)
08/07/2012	APPELLANT'S BRIEF FILED by Halliburton Co and David Lesar Date of service: 08/07/2012 via email - Attorney for Appellants: Godwin, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boles, Federman, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED. APPELLANT'S BRIEF FILED by Mr. David J Lesar # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 08/14/2012 for

DATE FILED	DOCKET TEXT
	Appellants Halliburton Co, David J Lesar.. Appellee's Brief due on 09/10/2012 for Appellee Erica P. John Fund, Incorporated [12-10544] (Robert Lawrence Voyles)
08/07/2012	RECORD EXCERPTS FILED by Appellant Halliburton Co. and David J. Lesar Date of service: 08/07/2012 via email - Attorney for Appellants: Godwin, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boies, Federman, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED. RECORD EXCERPTS FILED by Appellant Mr. David J Lesar. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 08/14/2012 for Appellants Halliburton Co, David J Lesar. [12-10544] (Robert Lawrence Voyles) 08/07/2012 APPEARANCE FORM FILED by Attorney(s) John Benjamin Lawrence for party(s) Appellant Halliburton Co, in case 12-10544 [12-10544] (CNF)
08/15/2012	PHONE EXTENSION CONFIRMED for Appellee Erica P. John

DATE FILED	DOCKET TEXT
	Fund, Incorporated. Extension granted to and including 10/10/2012. E/Res's Brief deadline updated to 10/10/2012 for Appellee Erica P. John Fund, Incorporated [12-10544] (MCS)
08/16/2012	Paper copies of joint appellant brief filed by Appellants Halliburton Co and Mr. David J Lesar in 12-10544 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-10544] (CNF)
08/16/2012	Paper copies of record excerpts filed by Appellants Halliburton Co and Mr. David J Lesar in 12-10544 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [12-10544] (CNF)
10/10/2012	APPELLEE'S BRIEF FILED by Appellee Erica P. John Fund, Incorporated Date of service: 10/10/2012 via KB email - Attorney for Appellants: Godwin, Sterling, Streett, Voyles, York [12-10544] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED # of Copies Provided: 0

DATE FILED	DOCKET TEXT
	E/Res's Brief deadline satisfied. Paper Copies of Brief due on 10/16/2012 for Appellee Erica P. John Fund, Incorporated.. Reply Brief due on 10/29/2012 for Appellants Halliburton Co, David J Lesar [12-10544] (Carl Edward Goldfarb)
10/10/2012	RECORD EXCERPTS FILED by Appellee Erica P. John Fund, Incorporated. Date of service: 10/10/2012 via email - Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boies, Federman, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED.. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 10/16/2012 for Appellee Erica P. John Fund, Incorporated. [12-10544] (Carl Edward Goldfarb)
10/15/2012	APPEARANCE FORM FILED by Attorney Carl Edward Goldfarb for Appellee Erica P. John Fund, Incorporated in 12-10544 [12-10544] (CNF)

DATE FILED	DOCKET TEXT
10/15/2012	APPEARANCE FORM FILED by Attorney(s) Justin Daniel Fitzdam for party(s) Appellee Erica P. John Fund, Incorporated, in case 12-10544 [12-10544] (CNF)
10/15/2012	Paper copies of appellee brief filed by Appellee Erica P. John Fund, Incorporated in 12-10544 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-10544] (CNF)
10/15/2012	Paper copies of record excerpts filed by Appellee Erica P. John Fund, Incorporated in 12-10544 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [12-10544] (CNF)
10/16/2012	APPEARANCE FORM FILED by Attorney David Boies for Appellee Erica P. John Fund, Incorporated in 12-10544 [12-10544] (CNF)
10/29/2012	APPELLANT'S REPLY BRIEF FILED by Halliburton Co and David J. Lesar Date of service: 10/29/2012 via email - Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett,

DATE FILED	DOCKET TEXT
	Voyles, York; Attorney for Appellees: Boies, Federman, Fitzdam, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED by Mr. David J Lesar . # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief de on 11/05/2012 for Appellants Halliburton Co, David J Lesar. [12-10544] (Robert Lawrence Voyles)
11/02/2012	Paper copies of appellant reply brief filed by Appellant Halliburton Co in 12-10544 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-10544] (CNF)
11/02/2012	RECORD ON APPEAL REQUESTED FROM DISTRICT COURT. ROA due on 11/19/2012 [12-10544] (CNF)
11/20/2012	EXTENSION OF TIME GRANTED to the District Court to prepare the ROA until 12/10/2012. Record on Appeal deadline updated to 12/10/2012 [12-10544] (MBC)

DATE FILED	DOCKET TEXT
12/07/2012	RECORD ON APPEAL FILED. Electronic Pleadings, 46; Paper Transcript, 4; Electronic Transcript, 1; Exhibits, 1 box (attachment to pleadings - always send with record); [12-10544] (CNF)
12/10/2012	1st SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; Supp Electronic Tran, 1; [12-10544] (CNF)
12/10/2012	SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [12-10544] (CNF)
12/10/2012	SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [12-10544] (CNF)
12/12/2012	SUPPLEMENTAL RECORD ON APPEAL FILED. SuppPaper Transcript, 2; ROA deadline satisfied. [12-10544] (CNF)
01/07/2013	CASE TENTATIVELY calendared for oral argument for the week of 03/04/2013. [12-10544] (GAM)
01/17/2013	CASE CALENDARED for oral argument on Wednesday, 03/06/2013 in New Orleans in the East Courtroom – PM session. In accordance with our policy, lead counsel only will receive via email at a later date a copy of the court's docket and an acknowledgment form. All other counsel of record

DATE FILED	DOCKET TEXT
	should monitor the court's website for the posting of the oral argument calendars.. [12-10544] (SMH)
02/27/2013	ORAL ARGUMENT panel has requested of the parties the following: The court has directed that each party file a letter brief by 12 o'clock p.m., on Monday, March 4, 2013, not in excess of 7 pages on the effect of the Supreme Court's February 27 opinion in Amgen v. Connecticut Retirement Plans & Trust Funds, 2013 WL 691001, on the issues in this appeal. Miscellaneous (Letter Briefs due for all parties on 03/04/2013, by 12o'clock noon, for Appellee Erica P. John Fund, Incorporated and Appellants Halliburton Co and David J Lesar [12-10544] (SMH)
03/04/2013	APPELLANT'S SUPPLEMENTAL BRIEF FILED by Halliburton Co. Date of service: 03/04/2013 via email - Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boles, Federman, Fitzdam, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-

DATE FILED	DOCKET TEXT
	10544] REVIEWED AND/OR EDITED. APPELLANT'S SUPPLEMENTAL BRIEF FILED by Mr. David J Lesar. # of Copies Provided: 0 Miscellaneous deadline satisfied [12-10544] (Aaron Michael Streett)
03/04/2013	APPELLEE'S SUPPLEMENTAL LETTER BRIEF FILED by Erica P. John Fund, Incorporated Date of service: 03/04/2013 via email - Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boies, Federman, Fitzdam, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED. # of Copies Provided: 0 [12-10544] (Carl Edward Goldfarb)
03/06/2013	ORAL ARGUMENT HEARD before Judges Davis, Graves, Higginson. Arguing Person Information Updated for: David Boles arguing for Appellee Incorporated Erica P. John Fund; Arguing Person Information Updated for: David Dykeman Sterling

DATE FILED	DOCKET TEXT
	arguing for Appellant Halliburton Co [12-10544] (SMH)
04/30/2013	PUBLISHED OPINION FILED. [12-10544 Affirmed] Judge: WED, Judge: JEG, Judge: SAH. Mandate pull date is 05/21/2013 [12-10544] (JRC)
04/30/2013	JUDGMENT ENTERED AND FILED. [12-10544] (JRC)
05/09/2013	UNOPPOSED MOTION filed by Appellant Halliburton Company and Appellant Lesar to extend the time to a rehearing until 05/24/2013 at 11:59 pm [7361304-2]. Date of service: 05/09/2013 via email – Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boies, Federman, Fitzdam, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] (Aaron Michael Streett)
05/10/2013	CLERK ORDER granting joint motion to extend the time to file a petition for rehearing filed by Appellant Halliburton Company and Appellant David Lesar to and including May 24, 2013. [7361304-

DATE FILED	DOCKET TEXT
	2] Mandate pull date updated to 05/24/2013. [12-10544] (NFD)
05/24/2013	PETITION filed by Appellants Halliburton Company and David J. Lesar for rehearing en banc [7372307-2]. Date of Service: 05/24/2013, via email - Attorney for Appellants: Godwin, Lawrence, Powers, Pulliam, Sterling, Streett, Voyles, York; Attorney for Appellees: Boies, Federman, Fitzdam, Goldfarb, Stanley; US mail - Attorney for Appellants: Gonzalez, Hail, Quinn; Attorney for Appellees: Lerach, Miller, Scott, Shingler, Thornton, Vincent [12-10544] REVIEWED AND/OR EDITED. [7372307-2] Number of Copies: 0. Mandate pull date canceled. Paper Copies of Rehearing due on 05/29/2013, for Appellants Halliburton Company and David J. Lesar. [12-10544] (Aaron Michael Streett)
05/29/2013	Paper copies of petition for rehearing en banc filed by Appellants Mr. David J. Lesar and Halliburton Company in 12-10544 received. Paper copies match electronic version of document? Yes, However, the Caption is incorrect. (attorney has been notified by email regarding the

DATE FILED	DOCKET TEXT
	caption. He will overnight covers. # of Copies Provided: 0. Paper Copies of Rehearing due deadline satisfied.. Sufficient Paper Copies of Rehearing due on 05/31/2013 for Appellants Halliburton Company and David J. Lesar. [12-10544] (NFD)
05/30/2013	Paper copies of Rehearing En Banc [7375643-2] received as sufficient. # of Copies Provided: 0 Sufficient Paper Copies of Rehearing due deadline satisfied. [12-10544] (NFD)
06/11/2013	COURT ORDER denying petition for rehearing en banc filed by Appellants Mr. David J. Lesar and Halliburton Company [7372307-2] Without Poll. Mandate pull date is 06/18/2013 [12-10544] (NFD)
06/19/2013	MANDATE ISSUED. Mandate pull date satisfied. [12-10544] (NFD)
09/13/2013	SUPREME COURT NOTICE that petition for writ of certiorari [7457662-2] was filed by Appellants Halliburton Company and Mr. David J. Lesar on 09/09/2013. Supreme Court Number: 13-317. [12-10544] (LGL)
11/15/2013	SUPREME COURT ORDER received granting petition for writ

DATE FILED	DOCKET TEXT
	of certiorari filed by Appellants Mr. David J. Lesar and Halliburton Company in 12-10544 on 11/15/2013 [7506613-1] [12-10544] (LGL)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

Civil Docket For Case #: 3:02-cv-01152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of itself and All Others Similarly Situated,

v.

HALLIBURTON COMPANY, et al.,

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
06/03/2002	1	Class Action COMPLAINT for violations of the Federal Securities Laws filed. Filing Fee $ 150.00 Receipt # 169594 (15+) (jrb) (Entered: 06/04/2002)
06/03/2002	1	DEMAND for jury trial by plaintiff Richard Moore (jrb) (Entered: 06/04/2002)
06/03/2002	2	SUMMONS(ES) issued for defendant Halliburton Co (issued-1) (jrb) (Entered: 06/04/2002)
06/03/2002		PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (jrb) (Entered: 06/04/2002)

DATE FILED	#	DOCKET TEXT
06/25/2002	3	RETURN OF SERVICE executed 6/20/02 upon Arthur Anderson to appear on 7/22/02 at 9:30am at the Office of Stanley, Mandel and Iola LLP (7) (jyg) (Entered: 06/26/2002)
07/01/2002	4	STIPULATION by plaintiff Richard Moore, defendant Halliburton Co to enlarge time for dft to respond to plaintiffs securities complaint. (5) (jrb) (Entered: 07/02/2002)
07/02/2002	5	WAIVER OF SERVICE Returned Executed as to Halliburton Co 6/4/02 Answer due on 8/5/02 for Halliburton Co (2) (jrb) (Entered: 07/03/2002)
08/02/2002	6	MOTION by plaintiff Richard Moore for consolidation and transfer of related cases, for appt of the Archidiocese of Milwaukee Supporting Fund, Inc and John Miletello as lead plaintiffs and for approval of lead plaintiffs' selection of counsel (11) (jrb) (Entered: 08/05/2002)
08/02/2002	7	MEMORANDUM by plaintiff Richard Moore in support of [6-1] motion for consolidation and transfer of related cases, for appt of the Archidiocese of

DATE FILED	#	DOCKET TEXT
		Milwaukee Supporting Fund, Inc and John Miletello as lead plaintiffs and for approval of lead plaintiffs' selection of counsel (15+)(exhibits not imaged) (jrb) (Entered: 08/05/2002)
08/02/2002	8	MOTION by movant Benec Group for appointment as lead plaintiffs and approval of their selection of lead counsel (2) (jrb) (Entered: 08/05/2002)
08/02/2002	9	MEMORANDUM by movant Benec Group in support of [8-1] motion for appointment as lead plaintiffs and approval of their selection of lead counsel (11) (jrb) (Entered: 08/05/2002)
08/02/2002	10	Declaration of William B Federman in support Re: [8-1] motion for appointment as lead plaintiffs and approval of their selection of lead counsel (15+) (jrb) (Entered: 08/05/2002)
08/02/2002	11	CERTIFICATE OF SERVICE Re: [10-1] affidavit, [9-1] support memorandum, [8-1] motion for appointment as lead plaintiffs and approval of their selection of lead counsel by movant Benec Group (3) (jrb) (Entered: 08/05/2002)

DATE FILED	#	DOCKET TEXT
08/05/2002	12	MOTION by movant Private Asset Mgmt to consolidate actions, to be appointed lead plaintiff, for approval of lead plaintiffs selection of lead counsel and liaison counsel (8) (jrb) Modified on 08/07/2002 (Entered: 08/06/2002)
08/05/2002	13	MEMORANDUM by movant Private Asset Mgmt in support of [12-1] motion to consolidate actions, to be appointed lead plaintiff, for approval of lead plaintiffs selection of lead counsel and liaison counsel (15+) (jrb) (Entered: 08/07/2002)
08/05/2002	14	AFFIDAVIT of John G Emerson Re: [12-1] motion to consolidate actions, to be appointed lead plaintiff, for approval of lead plaintiffs selection of lead counsel and liaison counsel (15+) (jrb) (Entered: 08/07/2002)
08/07/2002	15	Corrected MEMORANDUM by movant Benec Group in support of [8-1] motion for appointment as lead plaintiffs and approval of their selection of lead counsel (13) (jrb) (Entered: 08/08/2002)
08/12/2002	16	ORDER TO CONSOLIDATE The following cases are ordered closed and consolidated under

DATE FILED	#	DOCKET TEXT
		case 3:02cv1152-L: 3:02cv1168-L, 3:02cv1238-L, 3:02cv1247-L, 3:02cv1248-L, 3:02cv1261-L, 3:02cv1267-L, 3:02cv1268-L, 3:02cv1368-L, 3:02cv1633-L, 3:02cv1634-L. (Signed by Judge Sam A. Lindsay) Copies to counsel: 8.12.02 Page(s) 2 (mlh) Modified on 08/12/2002 (Entered: 08/12/2002)
08/12/2002		Consolidated Lead Case (mlh) (Entered: 08/13/2002)
08/12/2002	17	ORDER REASSIGNING CASE/ SPECIAL ORDER NO. 3-211 Effective 8/12/02, the cases listed on Exhibit A attached to this Order are transferred from the docket of Honorable Sam Lindsay to the docket of Honorable David C. Godbey and shall henceforth carry the suffix letter "N". The clerk of court will notify counsel by providing to each counsel a copy of this Order with attached exhibit. (Pages 2) (Signed by Judge A. Joe Fish) Copies to counsel: 8/13/02 Page(s) 2 (jrb) (Entered: 08/13/2002)
08/27/2002	18	JOINT STIPULATION See order for specifics. (Signed by Judge David C. Godbey) Copies

DATE FILED	#	DOCKET TEXT
		to counsel: 8/27/02 Page(s) 5 (aat) (Entered: 08/27/2002)
10/22/2002	19	MOTION by consolidated defendant Arthur Andersen LLP to substitute Lea F Courington and Lindsey C Cummings for Jonathan C. Medow, John J. Tharp, and Brian J. Massengill (11) (aat) (Entered: 10/23/2002)
10/24/2002	20	ORDER SUBSTITUTING COUNSEL granting [19-1] motion to substitute Lea F Courington and Lindsey C Cummings for Jonathan C. Medow, John J. Tharp, and Brian J. Massengill. (Signed by Judge David C. Godbey) Copies to counsel: 10/25/02 Page(s) 6 (aat) (Entered: 10/25/2002)
12/06/2002	21	ORDER TO CONSOLIDATE The Court consolidates the following cases: 3:02CV1532-N, 3:02CV1615-N, 3:02CV2067-N, 3:02CV2082-N, 3:02CV2089-N, 3:02CV2129-N, 3:02CV2130-N, 3:02CV2373-N. Ordered that the aforementioned cases be closed and consolidated under 3:02CV1152- N, and that the consolidated case be styled Richard Moore, et al v. Halliburton Co., et al. All

DATE FILED	#	DOCKET TEXT
		pleadings shall be filed under 3:02CV1152-N. (Signed by District Judge David C. Godbey) Copies to counsel: 12/6/02 Page (s) 2 (aat) (Entered: 12/06/2002)
12/06/2002		Consolidated Lead Case (aat) (Entered: 12/06/2002)
12/06/2002	22	JOINT STIPULATION AND PRETRIAL ORDER NO. 1 CONSOLIDATING THE ACTIONS, APPOINTING LEAD PLAINTIFFS AND APPROVING LEAD PLAINTIFFS' SELECTION OF LEAD COUNSEL, EXECUTIVE COMMITTEE AND CO-LIASON COUNSEL. See order for specifics. (Signed by Judge David C. Godbey) Copies to counsel: 12/6/02 Page(s) 20 (aat) (Entered: 12/06/2002)
01/15/2003	23	MOTION by defendant Halliburton Co, consolidated defendant Gary V Morris, consolidated defendant David J Lesar for John H. Mathias, Jr., David M. Kroeger adn John P. Wolfsmith of Jenner & Block, LLC to withdraw as attorney (5) (aat) (Entered: 01/16/2003)
01/29/2003	24	OPPOSED MOTION by movant Private Asset Mgmt, movant

DATE FILED	#	DOCKET TEXT
		Archdiocese of Mil, movant Forrest Lead Plainti, movant Benec Group to extend time to file consolidated amended complaint (9) (aat) (Entered: 01/30/2003)
01/31/2003	25	SUPPLEMENTAL DOCUMENT / Supplement to [24-1] motion to extend time to file consolidated amended complaint by movant Private Asset Mgmt, movant Benec Group, movant Forrest Lead Plainti, movant Archdiocese of Mil and notice that such mtn is unopposed. (8) (jrb) Modified on 02/03/2003 (Entered: 02/03/2003)
01/31/2003	26	ORDER granting [24-1] motion to extend time to file consolidated amended complaint. on or before 2/25/03. (Signed by Judge David C. Godbey) Copies to counsel: 2/3/03 Page(s) 1 (jrb) (Entered: 02/03/2003)
02/20/2003	27	JOINT STIPULATION extending time to file consolidated amended complaint by Arthur Andersen LLP, Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 02/21/2003)

DATE FILED	#	DOCKET TEXT
02/28/2003	28	ORDER granting joint stipulation extending time to file consolidated amended complaint. Amended Pleading due by 4/11/2003. No additional extensions will be granted. (Signed by Judge David C Godbey on 2/28/03) (aat,) (Entered: 03/03/2003)
03/11/2003	29	NOTICE OF CHANGE OF FIRM NAME AND ADDRESS by Corey D Holzer. New address is: Holzer Holzer & Cannon LLC, 1117 Perimeter Center West, Suite E-107, Atlanta, GA 30338. (aat,) (Entered: 03/12/2003)
04/11/2003	30	CONSOLIDATED AMENDED CLASS ACTION COMPLAINT against Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr, filed by Forrest Lead Plaintiffs, Private Asset Management, The Archdiocese of Milwaukee Supporting Fund, Inc., and Paul J. Benec.(aat,) (Entered: 04/14/2003)
04/30/2003	31	ORDER granting 23 motion to withdraw as attorney. Jenner & Block, LLC, John H. Mathias, Jr., David M. Kroeger and John P. Wolfsmith are relieved of any

DATE FILED	#	DOCKET TEXT
		further responsibility as counsel for Halliburton Company. (Signed by Judge David C Godbey on 4/30/03) (aat,) (Entered: 05/01/2003)
06/02/2003	32	MOTION to amend/Correct 30 amended class action complaint, by Paul J Benec, Gabriel T Forrest, Private Asset Management, The Archdiocese of Milwaukee Supporting Fund, Inc. (Exhibits not imaged) (aat,) (Entered: 06/02/2003)
06/10/2003	33	RESPONSE in Opposition re 32 MOTION to Amend/Correct 30 Amended Complaint, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 06/11/2003)
06/10/2003	34	DECLARATION of Willie C. Briscoe re 33 Response in Opposition to motion for leave to amend consolidated amended class action complaint by The Archdiocese of Milwaukee Supporting Fund, Inc. (Exhibits not imaged) (aat,) (Entered: 06/11/2003)
06/13/2003	35	MOTION for Order to Show Cause by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 06/16/2003)

DATE FILED	#	DOCKET TEXT
06/13/2003	36	Memorandum in Support re 35 MOTION for Order to Show Cause filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 06/16/2003)
06/13/2003	37	AFFIDAVIT of Willie Briscoe re 35 MOTION for Order to Show Cause by The Archdiocese of Milwaukee Supporting Fund, Inc. (Exhibits not imaged) (aat,) (Entered: 06/16/2003)
06/16/2003	38	AMENDED MOTION to Amend/Correct 30 Amended consolidated class action complaint, by Paul J Benec, Gabriel T Forrest, Private Asset Management. (Exhibits not imaged) (aat,) (Entered: 06/17/2003)
06/19/2003	39	STATEMENT concerning 35 MOTION for Order to Show Cause filed by Paul J Benec. (aat,) (Entered: 06/20/2003)
06/25/2003	40	RESPONSE in Opposition re 38 purportedly amended and unopposed motion to amend 30 consolidated amended class action complaint; (and REQUEST for temporary stay and oral argument) filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 06/26/2003)

DATE FILED	#	DOCKET TEXT
06/25/2003		(Response in Opposition re 38 purportedly amended and unopposed motion to amend 30 consolidated amended class action complaint); and REQUEST for temporary stay and oral argument filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) See #40 for image. (Entered: 06/26/2003)
06/30/2003	41	Application and Order for appearance pro hac vice by Patrick Slyne for Gabriel T Forrest. (Signed by Judge David C Godbey on 6/30/03) Copy to Slyne.(aat,) (Entered: 07/01/2003)
06/30/2003	42	Application and Order for appearance pro hac vice by Jules Brody for Gabriel T Forrest. (Signed by Judge David C Godbey on 6/30/03) Copy to Brody. (aat,) (Entered: 07/01/2003)
07/03/2003	43	MEMORANDUM in Opposition re 35 MOTION for Order to Show Cause filed by Private Asset Management. (aat,) (Entered: 07/07/2003)
07/03/2003	44	DECLARATION of John C. Sherwood in support of 43

DATE FILED	#	DOCKET TEXT
		memorandum in Opposition to AMS' motion for order to show cause. (Exhibits not imaged) (aat,) (Entered: 07/07/2003)
07/03/2003	45	STATEMENT regarding 35 MOTION for Order to Show Cause filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 07/07/2003)
07/07/2003	46	CERTIFICATE OF SERVICE by Private Asset Management re 43 Memorandum in Opposition to motion for order to show cause. (aat,) (Entered: 07/08/2003)
07/07/2003	47	CERTIFICATE OF SERVICE by Private Asset Management re 44 declaration of John C. Sherwood. (aat,) (Entered: 07/08/2003)
07/18/2003	48	REPLY MEMORANDUM to Response to Motion re 35 MOTION for Order to Show Cause filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 07/22/2003)
07/18/2003	49	AFFIDAVIT of Willie Briscoe re 48 Reply Memorandum to Response to Motion for order to show cause by The Archdiocese

DATE FILED	#	DOCKET TEXT
		of Milwaukee Supporting Fund, Inc.. (Exhibits not imaged) (aat,) (Entered: 07/22/2003)
07/28/2003	50	REQUEST for Oral Argument re 35 MOTION for Order to Show Cause by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 07/29/2003)
07/31/2003	51	Application and Order for appearance pro hac vice by Neil Rothstein for Diana L Parkes (Signed by Judge David C Godbey on 7/31/03) (aat,) (Entered: 08/01/2003)
08/05/2003	52	NOTICE of Change of Firm Name and Address by John G Emerson Jr, Scott E Poynter. New address is: Emerson Poynter LLP, 830 Apollo Lane, Houston, TX 77058. (aat,) (Entered: 08/05/2003)
08/07/2003	53	ORDER: Oral Argument is set for 8/25/2003 at 03:00 PM before Judge David C Godbey re: motion for order to show cause. (Signed by Judge David C Godbey on 8/7/03) (aat,) (Entered: 08/07/2003)
08/12/2003	54	Application and Order for Admission Pro Hac Vice by Richard S Schiffrin for Private Asset Management (Signed by

DATE FILED	#	DOCKET TEXT
		Judge David C Godbey on 8/12/03) (aat,) (Entered: 08/13/2003)
08/12/2003	55	Application and Order for Admission Pro Hac Vice by Marc I Willner for Private Asset Management (Signed by Judge David C Godbey on 8/12/03) Copy to Willner(aat,) (Entered: 08/13/2003)
08/25/2003	56	Minute Entry for proceedings held before Judge David C Godbey : Show Cause Motion Hearing held on 8/25/03 re: 35 MOTION for Order to Show Cause filed by The Archdiocese of Milwaukee Supporting Fund, Inc. The motion is denied without prejudice. (Court Reporter Linda Robbins.) (aat,) (Entered: 08/26/2003)
08/27/2003	57	NOTICE of written objections to subpoena duces tecum to Arthur Andersen LLP by Arthur Andersen LLP (aat,) (Entered: 08/28/2003)
09/02/2003	58	TRANSCRIPT of hearing on motion to show cause held on August 25, 2003 before Judge David C. Godbey. Court Reporter: Linda Robbins. (Not imaged) (USC) (aat,) (Entered: 09/03/2003)

DATE FILED	#	DOCKET TEXT
10/03/2003	59	NOTICE of change of facsimile number by Theodore Carl Anderson III. New number is: 214-292-8578. (aat,) (Entered: 10/06/2003)
12/16/2003	60	MOTION to require plaintiff Archdiocese of Milwaukee Supporting Fund to produce certain information by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 12/17/2003)
12/16/2003	61	BRIEF in support re 60 motion to require plaintiff Archdiocese of Milwaukee Supporting Fund to produce certain information filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 12/17/2003)
12/16/2003	62	APPENDIX in support re 60 motion to require plaintiff Archdiocese of Milwaukee Supporting Fund to produce certain information filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (Not imaged)(aat,) (Entered: 12/17/2003)

DATE FILED	#	DOCKET TEXT
01/08/2004	63	RESPONSE in opposition re 60 motion to require production of certain information filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Exhibits not imaged) (USC) (aat,) (Entered: 01/09/2004)
01/26/2004	64	REPLY BRIEF to response to motion re 60 motion to require plaintiff Archdiocese of Milwaukee Supporting Fund to produce certain information filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 01/27/2004)
01/28/2004	65	ORDER granting 32 motion to amend consolidated amended class action complaint, denying 38 amended motion to amend consolidated amended class action complaint, and denying [] request for temporary stay and oral argument. (Signed by Judge David C Godbey on 1/28/04) (aat,) (Entered: 01/29/2004)
01/30/2004	66	MOTION to stay actions pending settlement hearing by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 02/03/2004)

DATE FILED	#	DOCKET TEXT
01/30/2004	67	BRIEF in support re 66 motion to stay actions pending settlement hearing filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 02/03/2004)
01/30/2004	68	APPENDIX in support re 66 motion to stay actions pending settlement hearing filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (Not imaged) (aat,) (Entered: 02/03/2004)
02/24/2004	69	AGREED MOTION to extend time to respond to defendants' motion to stay actions by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 02/24/2004)
02/27/2004	70	RESPONSE in opposition re 66 motion to stay actions pending settlement hearing filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 03/01/2004)
03/01/2004	71	ORDER granting 69 agreed motion to extend time to respond to defendants' motion to stay actions until 2/27/04. (Signed by Judge David C Godbey on 3/1/4) (aat,) (Entered: 03/02/2004)

DATE FILED	#	DOCKET TEXT
03/16/2004	72	NOTICE of attorney appearance by David L Horan, Wes Loegering, Robert Edwin Davis on behalf of Douglas L Foshee, R Charles Muchmore Jr (aat,) (Entered: 03/17/2004)
03/16/2004	73	REPLY BRIEF to response to motion re 66 motion to stay actions pending settlement hearing filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 03/17/2004)
03/18/2004	74	NOTICE of attorney appearance by Jason L Cagle, Timothy R McCormick on behalf of Gary V Morris. (aat,) (Entered: 03/18/2004)
03/30/2004	75	ORDER CONSOLIDATING ACTIONS. Civil Action No. 3:03CV1965-N is consolidated into this action. All pleadings are to be filed in this action. (Signed by Judge David C Godbey on 3/30/04) (aat,) (Entered: 03/31/2004)
04/08/2004	76	AGREED MOTION to establish briefing schedule by Douglas L Foshee, Halliburton Company, John Kimble, David J Lesar, Gary V Morris, R Charles

DATE FILED	#	DOCKET TEXT
		Muchmore Jr (aat,) (Entered: 04/09/2004)
04/09/2004	77	ORDER granting 76 agreed motion to establish briefing schedule. Defendants will file an answer or motion to dismiss or other responsive pleading to the amended complaint by 5/10/04. Plaintiff shall file a response to defendants' motion to dismiss, of one is filed, by 6/18/04. Defendants shall file a reply by 7/9/04 if a response is filed. (Signed by Judge David C Godbey on 4/9/04) (aat,) (Entered: 04/12/2004)
04/19/2004	78	MOTION seeking clarification of 3/30/04 consolidation order and relieving defendants of the need to respond to the amended complaint filed in an action recently consolidated with Moore et al v. Halliburton, et al and REQUEST for expedited ruling by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 04/20/2004)
04/19/2004	79	BRIEF in support re 78 motion seeking clarification of 3/30/04 consolidation order and relieving defendants of the need to

DATE FILED	#	DOCKET TEXT
		respond to the amended complaint filed in an action recently consolidated with Moore et al v. Halliburton, et al and request for expedited ruling filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 04/20/2004)
04/29/2004	80	AGREED MOTION regarding response to second amended consolidated class action complaint by Douglas L Foshee, Halliburton Company, David J Lesar, Richard Moore, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 04/30/2004)
04/29/2004	81	UNOPPOSED MOTION to extend page limitations relating to motion to dismiss by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 04/30/2004)
05/03/2004	82	ORDER granting 81 unopposed motion to extend page limitations relating to motion to dismiss filed by defendants. (Signed by Judge David C Godbey on 4/30/04) (aat,) (Entered: 05/04/2004)
05/03/2004	83	ORDER granting 80 agreed motion regarding response to

DATE FILED	#	DOCKET TEXT
		second amended consolidated class action complaint. No answer, motion to dismiss, or other response by defendants shall be due to the second amended consolidated class action complaint pending the Court's ruling at the preliminary fairness hearing. (Signed by Judge David C Godbey on 4/30/04) (aat,) (Entered: 05/04/2004)
05/10/2004	84	MOTION to dismiss amended class action complaint of John Kimble by R Charles Muchmore Jr (aat,) (Entered: 05/11/2004)
05/10/2004	85	MOTION to dismiss amended class action complaint of John Kimble by Douglas L Foshee (aat,) (Entered: 05/11/2004)
05/10/2004	86	BRIEF in support re 85 motion to dismiss amended class action complaint of John Kimble filed by Douglas L Foshee. (aat,) (Entered: 05/11/2004)
05/10/2004	87	RESPONSE in opposition re 78 motion seeking clarification of 3/30/04 consolidation order filed by John Kimble. (aat,) (Entered: 05/11/2004)
05/10/2004	88	BRIEF in support re 84 motion to dismiss amended class action

DATE FILED	#	DOCKET TEXT
		complaint of John Kimble filed by R Charles Muchmore Jr. (aat,) (Entered: 05/11/2004)
05/10/2004	89	MOTION to dismiss by David J Lesar with brief in support. (aat,) (Entered: 05/11/2004)
05/10/2004	90	JOINT MOTION to dismiss amended class action complaint of John Kimble by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr (aat,) (Entered: 05/11/2004)
05/10/2004	91	BRIEF in support re 90 joint motion to dismiss amended class action complaint of John Kimble filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (aat,) (Entered: 05/11/2004)
05/10/2004	92	APPENDIX in support re 90 joint motion to dismiss amended class action complaint of John Kimble filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (Exhibits not imaged) (aat,) (Entered: 05/11/2004)
05/10/2004	93	MOTION for preliminary approval of settlement by Paul J

DATE FILED	#	DOCKET TEXT
		Benec, Gabriel T Forrest, Private Asset Management with memorandum. (aat,) (Entered: 05/11/2004)
05/10/2004	94	STIPULATION and agreement of settlement by Paul J Benec, Gabriel T Forrest, Douglas L Foshee, David J Lesar, Gary V Morris, R Charles Muchmore Jr, Private Asset Management. (aat,) (Entered: 05/11/2004)
05/20/2004	95	Minute Entry for proceedings held before Judge David C Godbey : Settlement hearing held on 5/20/04. Defendants' motion to stay and the motion seeking clarification of 3/30/04 consolidation order are withdrawn. (Court Reporter Linda Robbins.) (aat,) (Entered: 05/21/2004)
05/24/2004	96	RESPONSE in opposition re 93 motion for preliminary approval of settlement filed by The Archdiocese of Milwaukee Supporting Fund, Inc. and John Kimble. (aat,) (Entered: 05/25/2004)
06/01/2004	97	Application and Order for Admission Pro Hac Vice by Arthur L Shingler for John Kimble and The Archdiocese of

DATE FILED	#	DOCKET TEXT
		Milwaukee Supporting Fund, Inc. (Signed by Judge David C Godbey on 5/28/04) (klm,) (Entered: 06/02/2004)
06/01/2004	98	REVISED STIPULATION and Agreement of Settlement by Paul J Benec, Gabriel T Forrest, Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr, Private Asset Management . (nap,) Modified on 6/3/2004 (nap,) (Entered: 06/02/2004)
06/07/2004	99	ORDER granting 93 motion for preliminary approval order in connection with settlement proceedings. A settlement fairness hearing is set for 8/26/04 at 2:00PM. See order for further specifics. (Signed by Judge David C Godbey on 6/7/04) (aat,) (Entered: 06/09/2004)
06/07/2004		Set/Reset Hearings: Fairness Hearing set for 8/26/2004 at 02:00 PM before Judge David C Godbey. (aat,) (Entered: 06/09/2004)
06/08/2004	100	UNOPPOSED MOTION to extend page limitations relating to plaintiff John Kimble's opposition to motion to dismiss

DATE FILED	#	DOCKET TEXT
		by John Kimble (aat,) (Entered: 06/09/2004)
06/17/2004	101	ORDER granting 100 unopposed motion to extend page limitation relating to plaintiff John Kimble's opposition to motion to dismiss. (Signed by Judge David C Godbey on 6/17/04) (aat,) (Entered: 06/18/2004)
06/24/2004	102	TRANSCRIPT of Proceedings held on May 20, 2004 before Judge Godbey. Court Reporter: Linda Robbins. (USC, Not Imaged) (kdc,) (Entered: 06/25/2004)
07/02/2004	103	NOTICE of change of firm name and address by Eric J Belfi. New address is: Murray, Frank & Sailer LLP, 275 Madison Avenue, Suite 801, New York, NY 10016. (aat,) (Entered: 07/06/2004)
07/16/2004	104	ORDER denying as moot 60 motion to produce certain information. (Signed by Judge David C Godbey on 7/16/04) (aat,) (Entered: 07/19/2004)
08/03/2004	105	MOTION for leave to file complaint, for order continuing class member opt-out deadline and for permission to litigate

DATE FILED	#	DOCKET TEXT
		class action by Ben Alan Murphey, John Kimble, The Archdiocese of Milwaukee Supporting Fund, Inc. (aat,) (Entered: 08/04/2004)
08/03/2004	106	DECLARATION in support of 105 motion for leave to file complaint, for order continuing class member opt-out deadline and for permission to litigate class action by John Kimble, Ben Alan Murphey, The Archdiocese of Milwaukee Supporting Fund, Inc.. (aat,) (Entered: 08/04/2004)
08/09/2004	107	Court Request for Recusal: Judge David C Godbey recused. Case reassigned to Judge Barbara M. G. Lynn for all further proceedings. (svc,) (Entered: 08/10/2004)
08/10/2004	108	ORDER: The judge to whom this case initially assigned having recused himself, it is ordered that this case be assigned to the docket of the Honorable Barbara M.G. Lynn and should reflect the following case no. 3:02-CV-1152M (Signed by Judge A. Joe Fish on 8/10/04) (klm,) (Entered: 08/10/2004)
08/12/2004	109	NOTICE of Pendency of Class Action, Derivative Action

DATE FILED	#	DOCKET TEXT
		Hearing on Proposed Settlement, and Attorneys' Fee Petition and Right to Share in Settlement Fund by Plaintiffs. (nap,) (Entered: 08/13/2004)
08/13/2004	110	Memorandum in Objection and Opposition to the Fairness of the Proposed Class Settlement, Opposition to the Proposed Murphey Complaint and Request for Leave for Sixty Day Extension to Seek a Negotiated Fair Settlement and Resolution of this Class Action filed by Patricia A Magruder. (nap,) (Entered: 08/16/2004)
08/13/2004	111	AFFIDAVIT of Craig M. Walker in Opposition to the Proposed Class Settlement and in Opposition to the Filing of the Propsed Murphey Complaint by Patricia A Magruder. (nap,) (Entered: 08/16/2004)
08/13/2004	112	MOTION for Sanctions by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 08/16/2004)
08/13/2004	113	Opposition to 105 Motion for leave to file complaint, for order continuing class member opt-out deadline and for permission to

DATE FILED	#	DOCKET TEXT
		litigate class action and Memorandum in Support of 112 MOTION for Sanctions filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 08/16/2004)
08/13/2004	114	Appendix in Support of 113 Opposition to Motion for leave to file complaint, for order continuing class member opt-out deadline and for permission to litigate class action, filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 08/16/2004)
08/18/2004	115	MOTION for Reconsideration of Preliminary Settlement Approval Due to Judge Godbey's Recusal by John Kimble, The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) Additional attachment(s) added on 8/19/2004 (nap,). (Entered: 08/19/2004)
08/18/2004	116	Objection to Proposed Halliburton Securities Fraud Litigation Settlement filed by John Kimble, Ben Alan Murphey, The Archdiocese of Milwaukee Supporting Fund, Inc. (Exhibits not imaged/100+

DATE FILED	#	DOCKET TEXT
		pages) (nap,) (Entered: 08/19/2004)
08/18/2004	117	NOTICE of Intention to Appear at the Hearing on the Proposed Class Settlement and Designation of Additional Facts and Documents in Opposition to the Settlement by Patricia A Magruder. (nap,) (Entered: 08/19/2004)
08/18/2004	118	Objections to Class Action Settlement filed by William A Hoffman IV. (nap,) (Entered: 08/19/2004)
08/18/2004	119	NOTICE of Intention to Appear by William A Hoffman IV. (nap,) (Entered: 08/19/2004)
08/19/2004		NOTICE of Document Modification by Deputy Clerk regarding MOTION for Reconsideration 115. (nap,) (Entered: 08/19/2004)
08/19/2004	120	MOTION for Attorney Fees and for Reimbursement of Expenses with Memorandum of Law in Support by Paul J Benec, Gabriel T Forrest, Private Asset Management. (nap,) Modified on 8/23/2004 (nap,). (Entered: 08/20/2004)
08/19/2004	121	MOTION with Memorandum of Law in Support for Final

DATE FILED	#	DOCKET TEXT
		Approval of Class Action Settlement and Plan of Allocation by Paul J Benec, Gabriel T Forrest, Private Asset Management . (nap,) (Entered: 08/23/2004)
08/19/2004	122	Declaration of Marc I. Willner in Support of 121 MOTION for Final Approval of Class Action Settlement and Plan of Allocation, and 120 MOTION for Attorney Fees and for Reimbursement of Expenses, by Paul J Benec, Gabriel T Forrest, Private Asset Management. (USC/100+ pages exhibits not imaged) (nap,) (Entered: 08/23/2004)
08/20/2004	123	MOTION to Continue Final Settlement Approval Evidentiary Hearing by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 08/23/2004)
08/23/2004	124	ORDER denying 123 Motion to Continue Final Settlement Approval Evidentiary Hearing. (Signed by Judge Barbara M. G. Lynn on 8/23/04) (nap,) (Entered: 08/23/2004)
08/23/2004	125	RESPONSE in Opposition to 123 MOTION to Continue Final

DATE FILED	#	DOCKET TEXT
		Settlement Approval Evidentiary Hearing filed by Settling Lead Plaintiffs Paul J Benec, Gabriel T Forrest, Private Asset Management. (nap,) (Entered: 08/25/2004)
08/23/2004	126	CERTIFICATE OF SERVICE by Paul J Benec, Gabriel T Forrest, Private Asset Management re 125 Response in Opposition. (nap,) (Entered: 08/25/2004)
08/23/2004	127	RESPONSE in Opposition to 123 MOTION to Continue Final Settlement Approval Evidentiary Hearing filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 08/25/2004)
08/26/2004	130	Minute Entry for proceedings held before Judge Barbara M. G. Lynn : Settlement Fairness Hearing held on 8/26/04. The Court heard from Counsel & Objections to the proposed settlement. The Court has taken the matter under advisement and an Order will follow. (Court Reporter Sue Engledow.) (nap,) (Entered: 09/02/2004)
08/30/2004	128	ORDER. The Court is in receipt of 2 separate documents from

DATE FILED	#	DOCKET TEXT
		Neil D. Espinet...directed to this Court and styled "Espinet v. Halliburton." The Court is returning these documents to Mr. Espinet and puts him on notice that these documents do not appear to be related to this case, but appear to reflect a desire to commence litigation. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 8/30/04) (nap,) (Entered: 08/31/2004)
08/30/2004	129	REPLY in Support of 105 MOTION for leave to file complaint, for order continuing class member opt-out deadline and for permission to litigate class action filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 08/31/2004)
08/31/2004	131	ORDER. The Court today received another document from Neil D. Espinet,...directed to this Court and styled Espinet v. Halliburton. The Court is again returning this document to Mr. Espinet and puts him on notice that this document does not appear to be related to this case, but appears to reflect a desire to commence litigation. See order

DATE FILED	#	DOCKET TEXT
		for specifics. (Signed by Judge Barbara M. G. Lynn on 8/31/04) (nap,) (Entered: 09/02/2004)
09/07/2004	132	NOTICE of change of address by Thomas E Bilek. New address is: Hoeffner & Bilek, LLP, 1000 Louisiana St., Suite 1302, Houston, TX 77002. (aat,) (Entered: 09/08/2004)
09/09/2004	133	Memorandum Opinion and Order denying 121 Motion for Final Approval of Class Action Settlement and Plan of Allocation filed by Private Asset Management, Gabriel T Forrest, Paul J Benec. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 9/9/04) (nap,) (Entered: 09/10/2004)
09/09/2004	135	TRANSCRIPT of Proceeding held on August 26, 2004 Fairness Hearing before Judge Lynn. Court Reporter: Sue Engledow. (jmr) (Entered: 09/14/2004)
09/13/2004	134	NOTICE of Appearance of Additional Counsel by Rod Phelan, Robb L Voyles on behalf of Halliburton Company. (nap,) (Entered: 09/13/2004)
09/15/2004	136	EXPEDITED MOTION to Stay the Court's 133 Memorandum

DATE FILED	#	DOCKET TEXT
		Opinion and Order, with Brief in Support by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 09/16/2004)
09/15/2004	137	MOTION to Vacate the Court's 133 Memorandum Opinion and Order, with Brief in Support by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (nap,) (Entered: 09/16/2004)
09/15/2004	138	Appendix in Support of 137 MOTION to Vacate 133 Memorandum Opinion and Order, filed by Douglas L Foshee, Halliburton Company, David J Lesar, Gary V Morris, R Charles Muchmore Jr. (Not imaged)(nap,) (Entered: 09/16/2004)
09/21/2004	139	ORDER. Before the Court are Dfts' 136 Expedited Motion to Stay and 137 Motion to Vacate, both filed on 9/15/04. Responses due by 9/27/2004. No Reply will be permitted. To enable careful consideration of the Motions, the deadlines listed in paragraphs one, two, and three of the Court's Memorandum Opinion and Order, dated 9/9/04 are

DATE FILED	#	DOCKET TEXT
		extended by fourteen days. (Signed by Judge Barbara M. G. Lynn on 9/21/04) (nap,) (Entered: 09/21/2004)
09/23/2004	140	ORDER. It appears to the Court that the appointment of a guardian ad litem is necessary to represent the preliminary certified class members in this cause. Judge Lawrence J. Irving is appointed to represent the preliminary certified class at a mediation to be held in this case. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 9/23/04) (nap,) (Entered: 09/23/2004)
09/27/2004	141	ORDER. Given that a proposed settlement has not been approved as of this date, the requirement in paragraphs 57 and 58 of the Notice, that all class members who wish to receive any distribution from the Settlement Fund deliver a completed and signed Proof of Claim and Release by 9/27/04, is extended indefinitely, as provided for in paragraph 60 of the Notice. If appropriate, the Court will set a new deadline at a later date. See order for specifics. (Signed by Judge

DATE FILED	#	DOCKET TEXT
		Barbara M. G. Lynn on 9/27/04) (nap,) (Entered: 09/27/2004)
09/27/2004	142	RESPONSE in Opposition to 137 MOTION to Vacate 133 Memorandum Opinion and Order, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 09/29/2004)
09/27/2004	143	Memorandum of Law in Opposition filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 09/29/2004)
09/28/2004	144	ORDER. Pursuant to the Court's 9/23/04 order, Judge Lawrence J. Irving was appointed by the Court to serve as guardian ad litem. The Court feels it appropriate to further delineate Judge Irving's duties and responsibilities as guardian ad litem. Judge Irving is to "review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interests will be adequately protected." See order for specifics. (Signed by Judge Barbara M. G. Lynn on 9/28/04) (nap,) (Entered: 09/30/2004)

DATE FILED	#	DOCKET TEXT
09/28/2004	145	NOTICE of Intention to Participate in all Aspects of the Settlement Negotiations and Mediation Process and Demand for Production and Service of Documents by Patricia A Magruder. (lmr,) (Entered: 09/30/2004)
10/01/2004	146	MOTION to Modify 133 Memorandum Opinion and Order dated September 9, 2004 by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 10/05/2004)
10/01/2004	147	Memorandum in Support re 146 MOTION to Modify Memorandum Opinion and Order dated September 9, 2004 filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 10/05/2004)
10/04/2004	148	ORDER denying 136 EXPEDITED MOTION to Stay, granting in part and denying in part 137 MOTION to Vacate. Dfts' Motion to Vacate is denied as to all portions of this Court's 9/9/04 Order except for paragraph 1. As to paragraph 1, the Motion to Vacate is granted, in light of the terms of a Confidentiality Agreement signed by the Settling Parties.

DATE FILED	#	DOCKET TEXT
		Mediation of this case is to take place as previously ordered by this Court. The Court accepts the parties' recommendation and appoints Mr. Gary V. McGowan as mediator. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 10/4/04) (nap,) (Entered: 10/05/2004)
10/07/2004	149	ORDER. The Court's 9/9/04 Memorandum Opinion and Order is modified to reflect the fact that Kilgore & Kilgore, P.L.L.C., is local counsel for Lead Plt Archdiocese of Milwaukee Supporting Fund, Inc. Kilgore & Kilgore is permitted to be present and participate in any and all activities in which Scott + Scott is allowed to participate. In addition, all parties shall note that the civil action number of this case is 3:02-cv-1152-M, not 3:02-cv-1152-N. All future filings shall reflect the correct civil action number. (Signed by Judge Barbara M. G. Lynn on 10/7/04) (nap,) (Entered: 10/08/2004)
10/08/2004	150	MOTION with Brief in Support for Clarification of 148 10/4/04

DATE FILED	#	DOCKET TEXT
		Order by Halliburton Company, David J. Lesar, Gary V. Morris, Robert Charles Muchmore, Jr., and Douglas L. Foshee . (nap,) Modified on 10/12/2004 (nap,). (Entered: 10/12/2004)
10/12/2004	151	ORDER. The Claims Administrator, The Garden City Group, Inc., is directed to place the following message on the toll-free telephone number that was provided in the Notice to the Class Members: "The Court has ordered that the requirement that all class members who wish to receive a distribution from the Settlement Fund deliver a completed and signed Proof of Claim and Release by 9/27/04, be extended indefinitely, as provided for in paragraph 60 in the Notice. The Court Order also stated that if appropriate, the Court will set a new deadline at a later date. Due to this Order, we are not processing any claims forms at this time." Further, Lead Counsel may authorize payment of the $150,000 Notice and Administration Fund to The Garden City Group, Inc., in payment for a portion of the Notice and Administration costs it incurred in the administration

DATE FILED	#	DOCKET TEXT
		of this matter. (Signed by Judge Barbara M. G. Lynn on 10/12/04) (nap,) (Entered: 10/13/2004)
10/14/2004	152	ORDER granting 150 Motion for Clarification of 10/4/04 Order. As stated in the Court's 9/9/04 Order, all activities in the case are stayed through 12/3/04, except the specific activities authorized by the Court. The Court has not authorized the filing of motions to dismiss; therefore, no motion to dismiss may be filed during the pendency of the stay. (Signed by Judge Barbara M. G. Lynn on 10/14/04) (nap,) (Entered: 10/18/2004)
10/15/2004		Mail Returned as Undeliverable. 148 Order on Motion to Stay and Motion to Vacate received back from Craig M. Walker as not deliverable as addressed. (nap,) (Entered: 10/19/2004)
10/18/2004		Mail Returned as Undeliverable. 149 Order received back from Craig M. Walker as not deliverable as addressed. (nap,) (Entered: 10/19/2004)
10/26/2004	153	AGREED MOTION to Extend Time for Halliburton Co., AMS

DATE FILED	#	DOCKET TEXT
		Fund, Inc., and Patricia Magruder's Respective Counsel to Meet Pursuant to 9/9/04 Memorandum Opinion and Order by Halliburton Company, Patricia A Magruder, The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 10/28/2004)
10/28/2004	154	ORDER granting 153 AGREED MOTION to Extend Time for Halliburton Co., AMS Fund, Inc., and Patricia Magruder's Respective Counsel to Meet Pursuant to 9/9/04 Memorandum Opinion and Order. Counsel for parties have until and including 10/28/04, to meet pursuant to the Court's 9/9/04 and 9/21/04. (Signed by Judge Barbara M. G. Lynn on 10/28/04) (nap,) (Entered: 10/29/2004)
11/04/2004	155	ORDER. This case is stayed until 3/7/05 for all activities but those previously authorized by the Court's 9/9/04 Order as modified by the Court's 10/4/04 Order. The mediation deadline stated in paragraph 3 of the 9/9/04 order is now 1/28/05, and the mediation before the court appointed mediator, Gary

DATE FILED	#	DOCKET TEXT
		McGowan, is ordered to take place on January 27-28, 2005. The deadline...to notify the Court as to whether a new proposed settlement has been reached is now 2/28/05. The date when the Court will consider modifying appointment of Lead Plaintiffs and Lead Counsel...is now 3/7/05. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 11/4/04) (nap,) (Entered: 11/05/2004)
01/24/2005	156	Notice of Motion and MOTION for Leave to File Motion to Intervene by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund (nap,) (Entered: 01/27/2005)
01/31/2005	157	NOTICE of Change of Address by Stuart L Berman, Darren J Check, Richard S Schiffrin, Marc I Willner, counsel for Gabriel T Forrest, Paul J Benec. New address is: 280 King of Prussia Road; Radnor, PA 19087. (cxb,) (Entered: 02/02/2005)
02/07/2005	158	Alternative Dispute Resolution Summary filed by Gary

DATE FILED	#	DOCKET TEXT
		McGowan. Attorneys in Attendance: Arthur L Shingler, III, Theodore Carl Anderson, III, Richard S Schiffrin, Hon. J. Lawerence Irving, Ronald Stevens, Timothy R McCormick, Robert Edwin Davis, Marcos G Ronquillo, Craig M Walker, Robb L Voyles, Rod Phelan, William S Lerach. Pry Fee: $15,000. Disposition: Parties were unable to reach a settlement. (nap,) (Entered: 02/08/2005)
02/09/2005	159	Application and Order for Admission Pro Hac Vice by Andrew J Brown for Plumbers and Pipefitters National Pension Fund; City of Dearborn Heights Act 345 Police & Fire Retirement System and Laborers National Pension Fund (Signed by Judge Barbara M. G. Lynn on 2/9/05) (nap,) (Entered: 02/10/2005)
02/10/2005	160	UNOPPOSED MOTION Seeking Court Authority for Private Asset Management to Withdraw as Lead Plt and Schiffrin & Barroway, LLP to Withdraw as Lead Counsel by Private Asset Management (nap,) (Entered: 02/11/2005)

DATE FILED	#	DOCKET TEXT
02/10/2005	161	Appendix in Support re 160 UNOPPOSED MOTION Seeking Court Authority for Private Asset Management to Withdraw as Lead Pit and Schiffrin & Barroway, LLP to Withdraw as Lead Counsel filed by Private Asset Management. (nap,) (Entered: 02/11/2005)
02/14/2005	162	RESPONSE and Brief in Opposition to 156 MOTION for Leave to File Motion to Intervene filed by R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee. (nap,) Modified on 3/4/2005 (nap,). (Entered: 02/15/2005)
02/18/2005	163	ORDER Setting Hearing as to 160 UNOPPOSED MOTION Seeking Court Authority for Private Asset Management to Withdraw as Lead Plt and Schiffrin & Barroway, LLP to Withdraw as Lead Counsel. Motion Hearing set for 4/29/2005 09:00 AM before Judge Barbara M. G. Lynn. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 2/18/05) (nap,) (Entered: 02/18/2005)

DATE FILED	#	DOCKET TEXT
02/25/2005	164	STATUS REPORT by Gabriel T Forrest. (nap,) (Entered: 02/28/2005)
02/25/2005	165	Application and Order for Admission Pro Hac Vice by William S Lerach for Plumbers and Pipefitters National Pension Fund; City of Dearborn Heights Act 345 Police & Fire Retirement System and Laborers National Pension Fund (Signed by Judge Barbara M. G. Lynn on 2/25/05) (nap,) (Entered: 03/01/2005)
02/28/2005	166	MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 03/02/2005)
02/28/2005	167	DECLARATION of Arthur L. Shingler re 166 MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit)(nap,) (Entered: 03/02/2005)
03/04/2005	168	UNOPPOSED MOTION to Withdraw as Lead Plaintiff by Paul J Benec, and MOTION to Withdraw as Executive

DATE FILED	#	DOCKET TEXT
		Committee Member by counsel Wolf Haldenstein Alder Freeman & Herz LLP. (nap,) (Entered: 03/08/2005)
03/04/2005	169	DECLARATION of Gregory M. Nespole, Esq. in Support of 168 UNOPPOSED MOTION to Withdraw as Lead Plaintiff by Paul J Benec, and MOTION to Withdraw as Executive Committee Member by counsel Wolf Haldenstein Alder Freeman & Herz LLP. (nap,) (Entered: 03/08/2005)
03/04/2005	170	REQUEST/MOTION for Leave to File Reply in Support of Motion for Leave to File Motion to Intervene by Laborers National Pension Fund (nap,) (Entered: 03/08/2005)
03/08/2005	171	ORDER granting 156 Motion for Leave to File Motion to Intervene. (Signed by Judge Barbara M. G. Lynn on 3/8/05) (nap,) (Entered: 03/09/2005)
03/08/2005	172	Notice of Motion and for Leave to File Motion to Intervene by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund (nap,) (Entered: 03/09/2005)

DATE FILED	#	DOCKET TEXT
03/08/2005	173	Memorandum in Support re 172 MOTION to Intervene filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund. (nap,) (Entered: 03/09/2005)
03/08/2005	174	Appendix in Support re 172 MOTION to Intervene filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit)(nap,) (Entered: 03/09/2005)
03/09/2005	175	ORDER granting in part and denying in part 105 Motion for leave to file complaint, for order continuing class member opt-out deadline and for permission to litigate class action, granting l 70 REQUEST/MOTION for Leave to File Reply in Support of Motion for Leave to File Motion to Intervene, granting 172 Motion to Intervene. All previously filed Motions to Dismiss 84 85 89 90 are dismissed as moot. The Court grants 168 Motion to Withdraw as Lead Plaintiff and to Withdraw Paul T. Benec's

DATE FILED	#	DOCKET TEXT
		Counsel as an Executive Committee Member. Those parties wishing to do so should be prepared to present arguments on AMSF's Motion 166 at the hearing. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 3/9/05) (nap,) Modified on 3/10/2005 (nap,). (Entered: 03/10/2005)
03/09/2005		NOTICE of Docket Text Modification by Deputy Clerk regarding 175 Order on Motions. Docket text was accepted with errors, and has now been corrected. (nap,) (Entered: 03/10/2005)
03/09/2005	176	REPLY to Response to Motion re 172 MOTION to Intervene filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund. (nap,) (Entered: 03/10/2005)
03/09/2005	177	INTERVENOR COMPLAINT against R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee, filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and

DATE FILED	#	DOCKET TEXT
		Pipefitters National Pension Fund. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit)(nap,) (Entered: 03/10/2005)
03/09/2005		NOTICE of Docket Text/ Document Modification by Deputy Clerk regarding Order 175. The 166 Motion for Modification of Lead Plaintiff and Lead Counsel Appointment has not been ruled on by the Court. The motion is still pending, and the docket entry has been corrected. (nap,) (Entered: 03/10/2005)
03/09/2005	178	COMPLAINT against Robert R Harl, R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee, filed by Ben Alan Murphey. (Attachments: # 1 Exhibit)(nap,) Modified on 3/24/2005 (nap,). (Entered: 03/10/2005)
03/10/2005	179	JOINDER in 166 MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National

DATE FILED	#	DOCKET TEXT
		Pension Fund. (nap,) (Entered: 03/14/2005)
03/18/2005	180	NOTICE of Change of Law Firm Address by Adam J Levitt, on behalf of counsel for Ernest Hack, Polar Investment Club, The Benec Group. New address for Wolf Haldenstein Adler Freeman & Herz is: 55 West Monroe Street, Suite 1111, Chicago, Illinois, 60603. (nap,) (Entered: 03/21/2005)
03/18/2005	181	Memorandum of Law in Opposition re 166 MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment filed by Gabriel T Forrest. (nap,) (Entered: 03/21/2005)
03/18/2005	182	DECLARATION of Patrick Slyne in Opposition re 166 MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment by Gabriel T Forrest. (nap,) (Entered: 03/21/2005)
03/18/2005	183	DECLARATION of Lead Plt Gabriel T. Forrest in Opposition re 166 MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment by Gabriel T Forrest. (nap,) (Entered: 03/21/2005)

DATE FILED	#	DOCKET TEXT
03/22/2005	184	NOTICE of Substitution of Counsel by Paul W Denney on behalf of R Charles Muchmore, Jr, Douglas L Foshee. (nap,) (Entered: 03/23/2005)
03/24/2005	185	ORDER denying 120 Motion for Attorney Fees and for Reimburse-ment of Expenses. (Signed by Judge Barbara M. G. Lynn on 3/23/05) (nap,) (Entered: 03/24/2005)
03/24/2005	186	Notice of Motion and MOTION for Leave to File Motion to Intervene by Patricia A Magruder (nap,) (Entered: 03/25/2005)
04/01/2005	187	Application and Order for Admission Pro Hac Vice by Craig M Walker for Patricia A Magruder (Signed by Judge Barbara M. G. Lynn on 4/1/05) (nap,) (Entered: 04/01/2005)
04/04/2005	188	RESPONSE to 181 Memorandum of Law in Opposition to MOTION for Modification of Lead Plaintiff and Lead Counsel Appointment filed by Laborers National Pension Fund. (nap,) (Entered: 04/05/2005)
04/04/2005	189	REPLY Memorandum in Support of 166 MOTION for

DATE FILED	#	DOCKET TEXT
		Modification of Lead Plaintiff and Lead Counsel Appointment filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 04/05/2005)
04/13/2005	190	RESPONSE in Opposition re 186 MOTION for Leave to File Motion to Intervene filed by R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee. (nap,) (Entered: 04/14/2005)
04/15/2005	191	RESPONSE in Opposition re 186 MOTION for Leave to File Motion to Intervene and File Complaint filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (kdc,) (Entered: 04/18/2005)
04/15/2005	192	RESPONSE in Opposition re 186 MOTION for Leave to File Motion to Intervene and File Complaint filed by City of Dearborn Heights Act 345 Police & Fire Retirement System. (kdc,) (Entered: 04/18/2005)
04/26/2005	193	REPLY to Response to Motion re 186 MOTION for Leave to File Motion to Intervene filed by

DATE FILED	#	DOCKET TEXT
		Patricia A Magruder. (nap,) (Entered: 04/27/2005)
04/26/2005	194	REPLY to Intervenor's and AMS Fund's Response to Motion re 186 MOTION for Leave to File Motion to Intervene filed by Patricia A Magruder. (nap,) (Entered: 04/27/2005)
04/29/2005	196	Minute Entry for proceedings held before Judge Barbara M. G. Lynn : Motion Hearing held on 4/29/05. The parties presented argument on the Unopposed Motion to Withdraw (#160), AMS Fund's Motion for Modification of Lead Plt and Lead Counsel Appointments (#166), and Patricia Magruder's Motion for Leave to Intervene (#186). Order to enter. (Court Reporter Sue Engledow.) (nap,) (Entered: 05/05/2005)
05/03/2005	195	ORDER granting 160 UNOPPOSED MOTION Seeking Court Authority for Private Asset Management to Withdraw as Lead Plt and Schiffrin & Barroway, LLP to Withdraw as Lead Counsel, granting 166 Motion for Modification of Lead Plaintiff and Lead Counsel Appointment, denying 186 Notice of Motion and MOTION

DATE FILED	#	DOCKET TEXT
		for Leave to File Motion to Intervene. Lead Plt may file a Third Amended Class Complaint by 5/9/2005. The Complaint shall be styled with the name of the Lead Plt and the caption of this case shall be modified accordingly by the Clerk. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 5/3/05) (nap,) (Entered: 05/04/2005)
05/03/2005		NOTICE of Docket Text/ Document Modification by Deputy Clerk regarding Order 195. The order was docketed with an incorrect attachment but has been redocketed and noticed with the correct order attached. (nap,) (Entered: 05/04/2005)
05/09/2005	197	TRANSCRIPT (SEALED) of Motion Hearing Proceedings held on 4/29/05 before Judge Barbara M. G. Lynn. Court Reporter: Sue Engledow. (Document Not Imaged/Under Separate Cover) (nap,) Modified on 7/2/2009 (jmr). (Entered: 05/10/2005)
05/09/2005	198	CLASS ACTION COMPLAINT for Violations of Federal Securities Laws filed by Patricia A

DATE FILED	#	DOCKET TEXT
		Magruder against R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee . (Attachments: # 1)(nap,) (Entered: 05/10/2005)
05/09/2005	199	THIRD CONSOLIDATED AMENDED COMPLAINT for violation of the Securities Exchange Act of 1934 filed by The Archdiocese of Milwaukee Supporting Fund, Inc against R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee. (Attachments: # 1 # 2 # 3 # 4 # 5)(nap,) (Entered: 05/10/2005)
05/12/2005	200	Application and Order for Admission Pro Hac Vice by Thomas G Wilhelm for Plumbers and Pipefitters National Pension Fund; City of Dearborn Heights Act 345 Police & Fire Retirement System and Laborers National Pension Fund (Signed by Judge Barbara M. G. Lynn on 5/12/05) (nap,) (Entered: 05/13/2005)
05/17/2005	201	ORDER. As allowed by this Court's May 3, 2005 Order, Patricia Magruder filed a Class Action Complaint on May 9,

DATE FILED	#	DOCKET TEXT
		2005. The Court is considering whether to sever the Magruder Complaint or to conduct a separate trial on the issues raised in the Magruder Complaint. The Court invites all interested parties to file, by June 1, 2005, a three page statement suggesting that party's position as to those alternatives. (Signed by Judge Barbara M. G. Lynn on 5/17/05) (nap,) (Entered: 05/17/2005)
05/18/2005	202	JOINT STIPULATION AND PRETRIAL ORDER No. 2. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 5/18/05) (nap,) (Entered: 05/19/2005)
05/20/2005	203	ORDER. In the event that a motion to dismiss is filed in this case, oral argument for such a motion is hereby set for Tuesday, August 2, 2005, at 9:00 a.m. before Judge Barbara M. G. Lynn. (Signed by Judge Barbara M. G. Lynn on 5/20/05) (nap,) (Entered: 05/20/2005)
06/01/2005	204	Statement in Support of Severance of the Magruder Complaint /RESPONSE to 201 Order, filed by The Archdiocese of Milwau-

DATE FILED	#	DOCKET TEXT
		kee Supporting Fund, Inc. (nap,) (Entered: 06/02/2005)
06/01/2005	205	RESPONSE to 201 Order, filed by Patricia Magruder (nap,) Modified on 6/2/2005 (nap,). (Entered: 06/02/2005)
06/01/2005		NOTICE of Docket Text/ Document Modification by Deputy Clerk regarding Response to Order 205. The filer of this document has been corrected. (nap,) (Entered: 06/02/2005)
06/01/2005	206	Statement of Position Regarding Severance of Claims of Patricia Magruder/RESPONSE to 201 Order, filed by R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee. (nap,) (Entered: 06/02/2005)
06/03/2005	207	ORDER. After considering the parties' filings and the applicable law, the Court ORDERS that the Complaint filed by Patricia A. Magruder on May 9, 2005, be SEVERED from the rest of this action. The Clerk is directed to assign this matter a new case number and to assign this case to the docket of Judge Barbara M.G. Lynn. This new case shall

DATE FILED	#	DOCKET TEXT
		be captioned Magruder et al v. Halliburton et al. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 6/3/05) (nap,) (Entered: 06/06/2005)
06/08/2005	208	MOTION to Dismiss *Plaintiffs' Third Consolidated Class Action Complaint* by Gary V Morris (Cagle, Jason) (Entered: 06/08/2005)
06/08/2005	209	Memorandum in Support re 208 MOTION to Dismiss *Plaintiffs' Third Consolidated Class Action Complaint* filed by Gary V Morris. (Cagle, Jason) (Entered: 06/08/2005)
06/08/2005	210	MOTION to Dismiss Third Consolidated Amended Complaint by Halliburton Company (nap,) (Entered: 06/09/2005)
06/08/2005	211	Memorandum in Support re 210 MOTION to Dismiss Third Consolidated Amended Complaint filed by Halliburton Company. (nap,) (Entered: 06/09/2005)
06/08/2005	212	Appendix in Support re 210 MOTION to Dismiss filed by Halliburton Company. (Attachments: # 1 # 2 # 3 # 4)(nap,) (Entered: 06/09/2005)

DATE FILED	#	DOCKET TEXT
06/08/2005	213	MOTION to Dismiss Third Consolidated Amended Complaint by R Charles Muchmore, Jr, Douglas L Foshee (nap,) (Entered: 06/09/2005)
06/08/2005	214	Memorandum in Support re 213 MOTION to Dismiss Third Consolidated Amended Complaint filed by R Charles Muchmore, Jr, Douglas L Foshee. (nap,) (Entered: 06/09/2005)
06/08/2005	215	MOTION to Dismiss Third Consolidated Amended Complaint by David J Lesar (nap,) (Entered: 06/09/2005)
06/08/2005	216	Memorandum in Support re 215 MOTION to Dismiss Third Consolidated Amended Complaint filed by David J Lesar. (nap,) (Entered: 06/09/2005)
06/28/2005	217	RESPONSE in Opposition re 210 MOTION to Dismiss Third Consolidated Amended Complaint filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 06/30/2005)
06/28/2005	218	CONSOLIDATED RESPONSE in Opposition to the Individual Dfts' 208 MOTION to Dismiss Third Consolidated Amended

DATE FILED	#	DOCKET TEXT
		Complaint, 215 MOTION to Dismiss Third Consolidated Amended Complaint, 213 MOTION to Dismiss Third Consolidated Amended Complaint filed by The Archdiocese of Milwaukee Supporting Fund, Inc.(nap,) (Entered: 06/30/2005)
06/28/2005	219	Appendix in Support re 218 Response in Opposition, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 # 2) (nap,) (Entered: 06/30/2005)
06/28/2005	223	Letter to Judge Lynn filed by Garden City Group. (Attachments: # 1) (nap,) (Entered: 07/13/2005)
07/01/2005	220	ORDER. Telephone Conference set for 7/6/2005 02:00 PM before Judge Barbara M. G. Lynn. The parties shall be prepared to discuss Garden City Group, Inc.'s June 27, 2005 letter. (Signed by Judge Barbara M. G. Lynn on 7/1/05) (nap,) (Entered: 07/01/2005)
07/06/2005	231	Minute Entry for proceedings held before Judge Barbara M. G. Lynn : Telephone Conference. (Law Clerk conducts phone conference) The parties discussed

DATE FILED	#	DOCKET TEXT
		the Garden City Group's 6/27/05 letter. (Court Reporter Sue Engledow.) (nap,) (Entered: 07/22/2005)
07/08/2005	221	ORDER: A telephone conference is set in this case for Wednesday, 7/13/2005 at 02:00 PM before Judge Barbara M. G. Lynn. Any party who wishes to do so may by July 12, 2005, file a brief on no longer than seven pages outlining that party's position on this matter. (Signed by Judge Barbara M. G. Lynn on 7/8/2005) (kdc,) (Entered: 07/08/2005)
07/12/2005	222	Memorandum in Support re 221 Order,, Set Hearings, *Of The Garden City Group's Request for Payment of Fees* filed by Garden City Group. (Attachments: # 1 Exhibit A-Memo of Understanding) (Federman, William) (Entered: 07/12/2005)
07/12/2005	224	RESPONSE/Statement Concerning 223 Letter to Judge Lynn filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 07/13/2005)
07/12/2005	225	RESPONSE/Brief re 223 Letter to Judge Lynn filed by

DATE FILED	#	DOCKET TEXT
		Halliburton Company. (nap,) (Entered: 07/13/2005)
07/12/2005	226	TRANSCRIPT of Telephone Conference Proceedings held on July 6, 2005 before Judge Barbara M. G. Lynn. Court Reporter: Sue Engledow. (Document Not Imaged/Under Separate Cover)(nap,) (Entered: 07/14/2005)
07/13/2005	227	REPLY to Response to Motion re 213 MOTION to Dismiss Third Consolidated Amended Complaint filed by R Charles Muchmore, Jr, Douglas L Foshee. (nap,) (Entered: 07/15/2005)
07/13/2005	228	REPLY to Response to Motion re 215 MOTION to Dismiss Third Consolidated Amended Complaint filed by David J Lesar. (nap,) (Entered: 07/15/2005)
07/13/2005	229	REPLY to Response to Motion re 210 MOTION to Dismiss Third Consolidated Amended Complaint filed by Halliburton Company. (nap,) (Entered: 07/15/2005)
07/13/2005	230	REPLY to Response to Motion re 208 MOTION to Dismiss Plaintiffs' Third Consolidated Class Action Complaint filed by

DATE FILED	#	DOCKET TEXT
		Gary V Morris. (nap,) (Entered: 07/15/2005)
07/13/2005	232	Minute Entry for proceedings held before Judge Barbara M. G. Lynn : Telephone Conference. The parties informed the Court that an agreement had been reached with the Garden City Group. (Court Reporter Sue Engledow.) (nap,) (Entered: 07/22/2005)
08/02/2005	233	Minute Entry for proceedings held before Judge Barbara M. G. Lynn : Motion Hearing held on 8/2/05 re 208 Motion to Dismiss filed by Gary V Morris, 215 Motion to Dismiss filed by David J Lesar, 213 Motion to Dismiss filed by R Charles Muchmore, Jr, Douglas L Foshee, 210 Motion to Dismiss filed by Halliburton Company. Order to follow. (Court Reporter Sue Engledow.) (nap,) (Entered: 08/05/2005)
08/04/2005	234	TRANSCRIPT of Motion Hearing Proceedings held on August 2, 2005 before Judge Barbara M. G. Lynn. Court Reporter: Sue Engledow. (Document Not Imaged/Under Separate Cover) (nap,) (Entered: 08/05/2005)

DATE FILED	#	DOCKET TEXT
08/08/2005	235	Lead Plt's Submissions Following the 8/2/05 Hearing re Motions to Dismiss, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (nap,) (Entered: 08/09/2005)
08/08/2005	236	Supplemental Memorandum in Support re 210 MOTION to Dismiss Third Amended Consolidated Complaint filed by Halliburton Company. (Attachments: # 1 # 2)(nap,) (Entered: 08/09/2005)
09/19/2005	237	NOTICE of Change of Firm Address by William S Lerach, counsel for Manisha Patel, Leslie Turbowitz, Alan Gampel, Francisco Vasquez, Betty P Thibodeau, Alida S Coelho, John A Coelho, Richard Moore, Kevin A Stanley, Salomea J Goldberg-Blum, Lori A Russo, Ernest Hack, Robert W Davis, Charles G Nemeth, Diana L Parkes, The Archdiocese of Milwaukee Supporting Fund, Inc., David Jaroslawicz, Polar Investment Club, Gabriel T Forrest, John Kimble, Private Asset Management, Gary McAdams, Meyer Meyer Abramowitz, On Behalf of Himself and All Others Similarly Situated, David

DATE FILED	#	DOCKET TEXT
		Garden. New address of the San Diego office of this firm is: Lerach Coughlin Stoia Geller Rudman & Robbins LLP, 655 West Broadway, Suite 1900, San Diego, CA, 92101. Telephone: 619-231-1058. (nap,) (Entered: 09/21/2005)
11/15/2005	238	NOTICE of Change of Firm Address by Neil Rothstein, David R Scott, Arthur L Shingler, III, counsel for Manisha Patel, Leslie Turbowitz, Alan Gampel, Francisco Vasquez, Betty P Thibodeau, Alida S Coelho, John A Coelho, Richard Moore, Kevin A Stanley, Salomea J Goldberg-Blum, Lori A Russo, Ernest Hack, Robert W Davis, Charles G Nemeth, Diana L Parkes, The Archdiocese of Milwaukee Supporting Fund, Inc., David Jaroslawicz, Polar Investment Club, Gabriel T Forrest, Paul J Benec, John Kimble, Private Asset Management, Gary McAdams, Meyer Meyer Abramowitz, On Behalf of Himself and All Others Similarly Situated, David Garden. New address of the San Diego office of this firm is: Scott + Scott, LLC, 600 B Street, Suite

DATE FILED	#	DOCKET TEXT
		1500, San Diego, CA 82101. Tel: 619-233-4565; Fax: 619-233-0508. (nap,) (Entered: 11/17/2005)
03/14/2006	239	ORDER granting in part and denying in part 208 Motion to Dismiss, 210 Motion to Dismiss, 213 Motion to Dismiss, 215 Motion to Dismiss. Plts shall amend the Third Amended Complaint, as ordered herein, by 4/4/06.... Any Motion to Dismiss the Fourth Amended Complaint must be filed by 5/9/06. Responses are due by 6/13/06. Any Reply is due by 7/3/06. The Court schedules oral argument on 7/28/06 at 9:00 a.m. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 3/14/06) (nap,) Modified on 3/21/2006 (nap,). (Entered: 03/14/2006)
03/14/2006		NOTICE of Docket Text/ Document Modification by Deputy Clerk regarding Order on Motion to Dismiss, 239. Docket text has been correct to reflect the following deadline in the Order: Any Reply is due by 7/3/06. (nap,) (Entered: 03/21/2006)
03/24/2006	240	Mail Returned as Undeliverable. 239 Order on Motions to

DATE FILED	#	DOCKET TEXT
		Dismiss, received back from Robert Schachter as not deliverable as addressed; unable to forward. Attorney terminated from noticing due to invalid mailing address and no email address in system. (nap,) (Entered: 03/27/2006)
03/24/2006	241	Mail Returned as Undeliverable. 239 Order on Motion to Dismiss, received back from Paul J Geller as undeliverable as addressed. Notified attorney admissions to add "One Boca Place" to mailing label. Attorney terminated from noticing due to no email address in system. (nap,) (Entered: 03/27/2006)
03/28/2006	242	Mail Returned as Undeliverable. 239 Order on Motion to Dismiss, received back from Brian Murray as Not the 34th Fl. (kdc,) (Entered: 03/28/2006)
04/04/2006	246	FOURTH CONSOLIDATED AMENDED COMPLAINT for Violation of the Securities Exchange Act of 1934 against Arthur Andersen LLP, Halliburton Company, Robert R Harl filed by Manisha Patel, Leslie Turbowitz, Alan Gampel, Francisco Vasquez, Betty P Thibodeau, Alida S Coelho, John

DATE FILED	#	DOCKET TEXT
		A Coelho, Richard Moore, Kevin A Stanley, Salomea J Goldberg-Blum, Lori A Russo, Ernest Hack, Robert W Davis, Charles G Nemeth, Diana L Parkes, The Archdiocese of Milwaukee Supporting Fund, Inc., David Jaroslawicz, Polar Investment Club, Gabriel T Forrest, Paul J Benec, John Kimble, City of Dearborn Heights Act 345 Police & Fire Retirement System, Private Asset Management, Gary McAdams, Meyer Meyer Abramowitz, On Behalf of Himself and All Others Similarly Situated, David Garden. (Attachments: # 1 # 2 # 3 # 4# 5 Redlined Original# 6 redlined original# 7 Redlined original# 8 redlined original# 9 redlined original)(jyg,) Additional attachment(s) added on 4/7/2006 (jyg,). (Entered: 04/05/2006)
04/05/2006	243	Notice of MOTION for Entry of an Order Preserving the Right of Open Proceedings and Precluding the Filing of Documents Under Seal or Production of Documents Subject to Confidentiality Restrictions filed by The Archdiocese of Milwaukee Supporting Fund, Inc., John Kimble, Ben Alan Murphey,

DATE FILED	#	DOCKET TEXT
		City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund. (jrb,) (Entered: 04/05/2006)
04/05/2006	244	Memroandum of Law in Support of 243 MOTION filed by The Archdiocese of Milwaukee Supporting Fund, Inc., John Kimble, Ben Alan Murphey, City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund. (jrb,) (Entered: 04/05/2006)
04/05/2006	245	Appendix in Support of 243 MOTION filed by The Archdiocese of Milwaukee Supporting Fund, Inc., John Kimble, Ben Alan Murphey, City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund. (jrb,) (Entered: 04/05/2006)
04/07/2006		NOTICE of Docket Text/ Document Modification by Deputy Clerk regarding Fourth

DATE FILED	#	DOCKET TEXT
		Consolidated Amended Complaint 246. Inserted missing pages. (jyg,) (Entered: 04/07/2006)
04/07/2006	247	MOTION Seeking Certification of the Court's March 14, 2006 Order for Interlocutory Appeal re 239 Order on Motion to Dismiss by R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Halliburton Company, Douglas L Foshee with Brief in Support. (jyg,) (Entered: 04/10/2006)
04/18/2006	248	Rule 26(f) Case Management Statement and Discovery Plan by Plaintiffs. (jyg,) Modified on 4/19/2006 (jyg,). (Entered: 04/18/2006)
04/25/2006	249	Brief in Opposition re 243 Plaintiffs' MOTION for Entry of an Order Preserving the Right of Open Proceedings filed by Halliburton Company. (klm,) (Entered: 04/26/2006)
04/25/2006	250	Appendix in Support re 249 Brief in Opposition to Plaintiffs' Motion for Entry of an Order Preserving the Right of Open Proceedings filed by Halliburton Company. (klm,) (Entered: 04/26/2006)

DATE FILED	#	DOCKET TEXT
04/27/2006	251	RESPONSE in Opposition filed by Richard Moore, The Archdiocese of Milwaukee Supporting Fund, Inc., Gabriel T Forrest, Paul J Benec, Private Asset Management re 247 MOTION Seeking Certification of the Court's March 14, 2006 Order for Interlocutory Appeal re 239 Order on Motion to Dismiss. (kdc,) (Entered: 04/27/2006)
05/08/2006	252	REPLY in Support filed by Manisha Patel, Leslie Turbowitz, Alan Gampel, Francisco Vasquez, Betty P Thibodeau, Alida S Coelho, John A Coelho, Richard Moore, Kevin A Stanley, Salomea J Goldberg-Blum, Lori A Russo, Ernest Hack, Robert W Davis, Charles G Nemeth, Diana L Parkes, The Archdiocese of Milwaukee Supporting Fund, Inc., David Jaroslawicz, Polar Investment Club, Gabriel T Forrest, Paul J Benec, John Kimble, Private Asset Management, Gary McAdams, Meyer Meyer Abramowitz, On Behalf of Himself and All Others Similarly Situated, David Garden re 243 Notice of MOTION for Entry of an Order

DATE FILED	#	DOCKET TEXT
		Preserving the Right of Open Proceedings and Precluding the Filing of Documents Under Seal or Production of Documents Subject to Confidentiality Restrictions (jyg,) (Entered: 05/09/2006)
05/09/2006	253	MOTION to Dismiss *Plaintiffs' Fourth Consolidated Amended Class Action Complaint* by R Charles Muchmore, Jr, Douglas L Foshee (Loegering, Wes) (Entered: 05/09/2006)
05/09/2006	254	Brief/Memorandum in Support filed by R Charles Muchmore, Jr, Douglas L Foshee re 253 MOTION to Dismiss *Plaintiffs' Fourth Consolidated Amended Class Action Complaint* (Attachments: # 1 Exhibit A)(Loegering, Wes) (Entered: 05/09/2006)
05/09/2006	255	MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint by David J Lesar (jyg,) (Entered: 05/10/2006)
05/09/2006	256	Brief in Support filed by David J Lesar re 255 Individual MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint (jyg,) (Entered: 05/10/2006)

DATE FILED	#	DOCKET TEXT
05/09/2006	257	MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint by Gary V Morris (jyg,) (Entered: 05/10/2006)
05/09/2006	258	Brief in Support filed by Gary V Morris re 257 MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint (jyg,) (Entered: 05/10/2006)
05/09/2006	259	MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint by Halliburton Company (jyg,) (Entered: 05/10/2006)
05/09/2006	260	Brief in Support filed by Halliburton Company re 259 MOTION to Dismiss Plaintiffs Fourth Consolidated Class Action Complaint (jyg,) (Entered: 05/10/2006)
05/09/2006	261	Appendix in Support filed by Halliburton Company re 259 MOTION to Dismiss Plaintiffs Fourth Consolidated Class Action Complaint (Attachments: # 1)(jyg,) (Entered: 05/10/2006)
05/12/2006	262	REPLY in Support filed by Halliburton Company re 247 MOTION Seeking Certification of the Court's March 14, 2006 Order for Interlocutory Appeal

DATE FILED	#	DOCKET TEXT
		re 239 Order on Motion to Dismiss (jyg,) (Entered: 05/15/2006)
06/12/2006	263	Agreed MOTION for Leave to File a Consolidated Opposition to Defendants' Motions to Dismiss by R Charles Muchmore, Jr, Gary V Morris, David J Lesar, Richard Moore, The Archdiocese of Milwaukee Supporting Fund, Inc., Halliburton Company, Gabriel T Forrest, Paul J Benec, Private Asset Management, Douglas L Foshee (jyg,) (Entered: 06/13/2006)
06/13/2006	264	ORDER denying 247 Motion Seeking Certification of the Court's March 14, 2006 Order for Interlocutory Appeal re 239 Order on Motion to Dismiss. See order for specifics. (Signed by Judge Barbara M. G. Lynn on June 13, 2006) (jyg,) (Entered: 06/14/2006)
06/13/2006	265	CONSOLIDATED OPPOSITION filed by Manisha Patel, Leslie Turbowitz, Alan Gampel, Francisco Vasquez, Betty P Thibodeau, Alida S Coelho, John A Coelho, Richard Moore, Kevin A Stanley, Salomea J Goldberg-Blum, Lori A Russo, Ernest

DATE FILED	#	DOCKET TEXT
		Hack, Robert W Davis, Charles G Nemeth, Diana L Parkes, The Archdiocese of Milwaukee Supporting Fund, Inc., David Jaroslawicz, Polar Investment Club, Gabriel T Forrest, Paul J Benec, John Kimble, Private Asset Management, Gary McAdams, Meyer Meyer Abramowitz, On Behalf of Himself and All Others Similarly Situated, David Garden re 255 MOTION to Dismiss, 259 MOTION to Dismiss, 253 MOTION to Dismiss *Plaintiffs' Fourth Consolidated Amended Class Action Complaint*, 257 MOTION to Dismiss (Attachments: # 1 # 2 # 3 # 4 # 5 # 6)(jyg,) (Entered: 06/14/2006)
06/15/2006	266	ORDER granting 263 Motion for Leave to File a Consolidated Opposition to Defendants' Motions to Dismiss. (Signed by Judge Barbara M. G. Lynn on June 15, 2006) (jyg,) (Entered: 06/15/2006)
06/21/2006	267	Letter/RESPONSE filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 266 Order on Motion for Leave to File (jyg,) (Entered: 06/22/2006)

DATE FILED	#	DOCKET TEXT
06/27/2006	268	Mail Returned as Undeliverable. 264 Order on Motion for Miscellaneous Relief, received back from Paul J Geller as undeliverable. (mfw,) (Entered: 06/27/2006)
06/27/2006	269	NOTICE of Change of Address by John G Emerson, Jr, counsel for Richard Moore. New address is: *Scott E. Poynter, EMERSON POYNTER LLP, 500 President Clinton Ave., Ste 305, Little Rock, AR 72201* (Emerson, John) (Entered: 06/27/2006)
07/03/2006	270	REPLY in Support filed by Gary V Morris re 257 MOTION to *Dismiss Plaintiff's Fourth Consolidated Amended Complaint* (jyg,) (Entered: 07/03/2006)
07/03/2006	271	Brief/Memorandum in Support filed by R Charles Muchmore, Jr, Douglas L Foshee re 253 MOTION to Dismiss *Plaintiffs' Fourth Consolidated Amended Class Action Complaint* Reply Brief in Support of Motion to Dismiss Plaintiffs' Fourth Consolidated Amended Complaint (Loegering, Wes) (Entered: 07/03/2006)

DATE FILED	#	DOCKET TEXT
07/03/2006	272	Application and Order for Admission Pro Hac Vice by Mark V Jackowski for The Archdiocese of Milwaukee Supporting Fund, Inc. (Signed by Judge Barbara M. G. Lynn on 7/3/06) (nap,) (Entered: 07/05/2006)
07/03/2006	273	REPLY filed by David J Lesar re 259 MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint (nap,) (Entered: 07/05/2006)
07/03/2006	274	REPLY filed by Halliburton Company re 259 MOTION to Dismiss Plaintiffs Fourth Consolidated Amended Complaint (nap,) (Entered: 07/05/2006)
07/03/2006	275	Appendix in Support filed by Halliburton Company re 274 Reply to Response to Motion (nap,) (Entered: 07/05/2006)
07/12/2006	276	ORDER denying 243 Motion for Entry of an Order Preserving the Right of Open Proceedings and Precluding the Filing of Documents Under Seal or Production of Documents Subject to Confidentiality Restrictions. (Signed by Judge Barbara M. G. Lynn on 7/12/06) (nap,) (Entered: 07/12/2006)

DATE FILED	#	DOCKET TEXT
07/12/2006	277	Mail Returned as Undeliverable. 272 Order for Admission Pro Hac Vice received back from Robert B. Weiser as not deliverable as addressed; unable to forward. Per conversation with attorney from Schiffrin & Barroway, Mr. Weiser is no longer with the firm. Noticing terminated. (nap,) (Entered: 07/12/2006)
07/17/2006	278	Application and Order for Admission Pro Hac Vice by Edmund W Searby for The Archdiocese of Milwaukee Supporting Fund, Inc. (Signed by Judge Barbara M. G. Lynn on 7/17/06) (nap,) (Entered: 07/18/2006)
07/21/2006		Mail Returned as Undeliverable. 276 ORDER denying Motion for Entry of an Order Preserving the Right of Open Proceedings, received back from Paul J Geller as undeliverable as addressed. Remailed at attorney's current mailing address as shown on docket sheet. (nap,) (Entered: 07/24/2006)
07/28/2006	279	Minute Entry for proceedings held before Judge Barbara M. G. Lynn: Motion Hearing held on 7/28/06 re 259 MOTION

DATE FILED	#	DOCKET TEXT
		to Dismiss Plaintiffs Fourth Consolidated Amended Complaint filed by Halliburton Company. Order to enter. (Court Reporter Sue Engledow.) (svc,) (Entered: 08/02/2006)
07/31/2006		Mail Returned as Undeliverable. 278 Order for Admission Pro Hac Vice received back from Paul J Geller as undeliverable as addressed. Remailed to attorney's updated address. (nap,) (Entered: 07/31/2006)
08/07/2006	280	ORDER. Lead counsel in all cases pending before Judge Barbara M. G. Lynn are strongly encouraged to register for electronic transmission of notice. The District Clerk's Office has discontinued fax noticing of docket activity, and notices are being sent through U.S. mail to those attorneys who have not registered for electronic noticing. For more information about how to register for electronic noticing, counsel should visit the Northern District of Texas website at http://www.txnd.uscourts.gov/records/ens.html. (Signed by Judge Barbara M. G. Lynn on 8/7/06) (jrb,) Modified

DATE FILED	#	DOCKET TEXT
		on 8/7/2006 (jrb,). (Entered: 08/07/2006)
08/11/2006	281	TRANSCRIPT of Proceedings (Motions to Dismiss) held on July 28, 2006 before Judge Barbara M.G. Lynn. The Official Record of the transcript is on file with the Clerk's Office. Contact the Clerk's Office at 214/753-2200 or the Court Reporter - Sue Engledow at 214/753-2325 to obtain a copy of the Official Record. (jrb,) Additional attachment(s) added on 8/14/2006 (rrj,). Modified on 8/14/2006 (rrj,). (Entered: 08/14/2006)
09/01/2006	282	Order Designating Case for ECF - see order for specifics. (Signed by Judge Barbara M. G. Lynn on 09/01/06) (axm,) (Entered: 09/01/2006)
11/20/2006	283	NOTICE of Attorney Appearance by E Lawrence Vincent on behalf of Richard Moore, The Archdiocese of Milwaukee Supporting Fund, Inc., Gabriel T Forrest, Paul J Benec, Private Asset Management (jrb,) (Entered: 11/20/2006)
11/22/2006	284	MOTION for Substitution of Lead Counsel. Added attorney

DATE FILED	#	DOCKET TEXT
		David Boies for The Archdiocese of Milwaukee Supporting Fund, Inc.. Motion Filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (jrb,) (Entered: 11/27/2006)
12/12/2006	285	RESPONSE filed by Halliburton Company re 284 MOTION to Substitute Attorney. Added attorney David Boies for The Archdiocese of Milwaukee Supporting Fund, Inc.. Motion Filed (Pulliam, Jessica) (Entered: 12/12/2006)
12/12/2006	286	RESPONSE in Opposition filed by Plumbers and Pipefitters National Pension Fund *Co-Lead Class Counsel's and the Institutional Investor Class Representatives' Opposition to AMSF's Motion Seeking Court Permission to Replace Co-Lead Class Counsel* (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	287	AFFIDAVIT re 286 Response in Opposition, *Declaration of William S. Lerach in Support of Co-Lead Class Counsel's and the Institututional Investor Class Representatives' Opposition to AMSF's Motion Seeking Court Permission to Replace Co-Lead Counsel* by Plumbers and

DATE FILED	#	DOCKET TEXT
		Pipefitters National Pension Fund. (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	288	AFFIDAVIT re 286 Response in Opposition, *Declaration of Joe Kendall in Opposition to Archdiocese of Milwaukee Supporting Fund, Inc.'s Motion for Substitution of Lead Counsel* by Plumbers and Pipefitters National Pension Fund. (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	289	AFFIDAVIT re 286 Response in Opposition, *Declaration of David R. Scott in Support of Co-Lead Class Counsel's and the Institututional Investor Class Representatives' Opposition to AMSF's Motion Seeking Court Permission to Replace Co-Lead Counsel* by Plumbers and Pipefitters National Pension Fund. (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	290	AFFIDAVIT re 286 Response in Opposition, *to the Archdiocese of Milwaukee Supporting Fund, Inc.'s Motion to Substitute Lead Counsel* by City of Dearborn Heights Act 345 Police & Fire Retirement System. (Brown, Andrew) (Entered: 12/12/2006)

DATE FILED	#	DOCKET TEXT
12/12/2006	291	AFFIDAVIT re 286 Response in Opposition, *Declaration of Andrew J. Brown in Support of Co-Lead Counsel's and the Institutional Investor Class Representatives' Opposition to AMSF's Motion Seeking Court Permission to Replace Co-Lead Class Counsel* by Plumbers and Pipefitters National Pension Fund. (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7) (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	292	AFFIDAVIT re 286 Response in Opposition, *to the Archdiocese of Milwaukee Supporting Fund, Inc.'s Motion to Substitute Lead Counsel* by Laborers National Pension Fund. (Brown, Andrew) (Entered: 12/12/2006)
12/12/2006	293	AFFIDAVIT re 286 Response in Opposition, *to the Archdiocese of Milwaukee Supporting Fund, Inc.'s Motion to Substitute Lead Counsel* by Plumbers and Pipefitters National Pension Fund. (Attachments: # 1) (Brown, Andrew) Modified on 4/16/2007 (jb). (Entered: 12/12/2006)
12/27/2006	294	REPLY Brief filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 284

DATE FILED	#	DOCKET TEXT
		MOTION to Substitute Attorney. (not imaged-see records dept) (jrb,) Modified on 12/28/2006 (jrb,). (Entered: 12/28/2006)
01/08/2007	295	CERTIFICATE of Conference by Andrew J Brown on behalf of City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund (Brown, Andrew) (Entered: 01/08/2007)
01/08/2007	296	NOTICE by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund *and Co-Lead Class Counsel's Motion to Strike or, in the Alternative, for Leave to File a Response in Opposition* (Brown, Andrew) (Entered: 01/08/2007)
01/08/2007	297	MOTION to Strike 294 REPLY Brief filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 284 MOTION to Substitute Attorney. by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension

DATE FILED	#	DOCKET TEXT
		Fund, Plumbers and Pipefitters National Pension Fund (Attachments: # 1 Exhibit A to Motion to Strike# 2 Declaration of Andrew J. Brown# 3 Exhibit A to Brown Declaration# 4 Exhibit B to Brown Declaration# 5 Exhibit C to Brown Declaration# 6 Exhibit D to Brown Declaration# 7 Exhibit E to Brown Declaration# 8 Exhibit F to Brown Declaration# 9 Exhibit G to Brown Declaration# 10 Exhibit H to Brown Declaration# 11 Exhibit Ito Brown Declaration# 12 Exhibit J to Brown Declaration# 13 Exhibit K to Brown Declaration# 14 Exhibit L to Brown Declaration# 15 Exhibit M to Brown Declaration# 16 Exhibit N to Brown Declaration# 17 Exhibit 0 to Brown Declaration# 18 Exhibit P to Brown Declaration# 19 Exhibit Q to Brown Declaration# 20 Exhibit R to Brown Declaration# 21 Second Declaration of William S. Lerach# 22 Exhibit A to Lerach Declaration# 23 Declaration of Patrick J. Coughlin# 24 Declaration of Helen J. Hodges# 25 Second Declaration of David

DATE FILED	#	DOCKET TEXT
		R. Scott# 26 Exhibit A to Scott Declaration# 27 Second Declaration of Laborers National Pension Fund# 28 Second Declaration of City of Dearborn Heights# 29 Declaration of Louis P. Malone III in Support of Plumbers and Pipefitters National Pension Fund# 30 Exhibit B to Motion to Strike# 31 Exhibit C to Motion to Strike# 32 Exhibit D to Motion to Strike# 33 Exhibit E to Motion to Strike# 34 Exhibit F to Motion to Strike# 35 Text of Proposed Order Granting Motion to Strike# 36 Text of Proposed Order [Proposed Alternative] Order Granting Leave to File Opposition Brief) (Brown, Andrew) Modified on 1/9/2007 (jrb) (Entered: 01/08/2007)
01/08/2007	298	RESPONSE in Opposition filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund *Response to Letter of January 3, 2007* (Brown, Andrew) (Entered: 01/08/2007)

DATE FILED	#	DOCKET TEXT
01/09/2007	299	Notice of Errata by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund. (Kendall, Joe) Modified on 1/10/2007 (imp). (Entered: 01/09/2007)
01/09/2007	300	NOTICE of Change of Firm Name by Kirkpatrick & Lockhart Preston Gates Ellis LLP, Kirkpatrick & Lockhart Preston Gates Ellis LLP. (Medlin, Frederick) Modified on 1/10/2007 (Imp). (Entered: 01/09/2007)
01/16/2007	301	Brief/Memorandum in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 297 MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) MOTION to Strike 296 Notice

DATE FILED	#	DOCKET TEXT
		(Other), Notice (Other) MOTION to Strike 296 Notice (Other), Notice (Other) *Memorandum of Law in Support of Lead Plaintiffs Opposition to Co-Lead Counsel's Motion to Strike and For Leave to File Sur-Reply* (Attachments: # 1 Appendix Part 1# 2 Appendix Part 2) (Vincent, Emery) (Entered: 01/16/2007)
01/29/2007	302	MOTION for Order to Show Cause by The Archdiocese of Milwaukee Supporting Fund, Inc. (Vincent, E) (Entered: 01/29/2007)
01/29/2007	303	Brief/Memorandum in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. *for Order to Show Cause* (Vincent, E) (Entered: 01/29/2007)
01/29/2007	304	Appendix in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. *for Motion to Show Cause* (Vincent, E) (Entered: 01/29/2007)
02/09/2007	305	RESPONSE in Opposition filed by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and

DATE FILED	#	DOCKET TEXT
		Pipefitters National Pension Fund re 302 MOTION for Order to Show Cause (Attachments: # Exhibit A - Article) (Kendall, Joe) (Entered: 02/09/2007)
02/19/2007	306	NOTICE by David J Lesar *of Change of Firm Name* (Gonzalez, Jose) (Entered: 02/19/2007)
02/23/2007	307	ORDER denying 297 Motion to Strike. (Signed by Judge Barbara M. G. Lynn on 2/23/07) (jrb) (Entered: 02/26/2007)
02/23/2007	308	ORDER granting 284 Motion to Substitute Attorney. The Motion to Replace Lead Plaintiff is denied. (Signed by Judge Barbara M. G. Lynn on 2/23/07) (jrb) (Entered: 02/26/2007)
03/08/2007	309	NOTICE by Gary V Morris re 257 MOTION to Dismiss *of Letter to the Court* (Attachments: # *l.* Exhibit Morris's Letter to the Court# J. Exhibit Court's Opinion in SEC v. Morris) (Cagle, Jason) (Entered: 03/08/2007)
03/12/2007	310	MOTION to Withdraw as Attorney *by Michael K. Hurst and Brian N Hail on behalf of and* by David J Lesar (Hurst, Michael) (Entered: 03/12/2007)

DATE FILED	#	DOCKET TEXT
03/04/2007	311	ORDER granting 310 Motion to Withdraw as Attorney. Attorney Brian N Hail and Michael K Hurst terminated (Signed by Judge Barbara M. G. Lynn on 3/14/07) (jrb) (Entered: 03/15/2007)
03/15/2007	312	Letter requesting removal of Judge Lawrence Irving's name from all service lists. (jrb) (Entered: 03/19/2007)
03/28/2007	313	ORDER granting 253 Motion to Dismiss; denying 255 Motion to Dismiss; granting 257 Motion to Dismiss; denying 259 Motion to Dismiss. The case shall proceed as to defendants Lesar and Halliburton. They shall confer with the Lead Plaintiff and submit by May 1, 2007 a proposed Scheduling Order. (Signed by Judge Barbara M. G. Lynn on 3/28/07) (jrb) (Entered: 03/30/2007)
03/28/2007	314	Judgment. The Court having granted their Motions to Dismiss, Defendants Muchmore, Morris and Foshee are dismissed from this case with prejudice. All of the taxable court costs incurred by them are taxed to the plaintiffs. (Signed by Judge Barbara M. G. Lynn on

DATE FILED	#	DOCKET TEXT
		3/28/07) (jrb) (Entered: 03/30/2007)
04/04/2007	315	NOTICE of Attorney Appearance by Caryl L Boies on behalf of The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, Caryl) (Entered: 04/04/2007)
04/04/2007	316	CERTIFICATE OF SERVICE by The Archdiocese of Milwaukee Supporting Fund, Inc. re 315 Notice of Attorney Appearance (Boies, Caryl) (Entered: 04/04/2007)
04/05/2007	317	NOTICE by The Archdiocese of Milwaukee Supporting Fund, Inc. re 304 Appendix in Support, 303 Brief/Memorandum in Support of Motion, 302 MOTION for Order to Show Cause *Notice of Withdraw (sic) of the Order to Show Cause* (Boies, Caryl) Modified on 4/6/2007 (npk) (Entered: 04/05/2007)
04/12/2007	318	Unopposed Motion for Extension of Time to File Answer by David J Lesar, Halliburton Company (Attachments: # 1 Exhibit A) (Gonzalez, Jose) (Entered: 04/12/2007)

DATE FILED	#	DOCKET TEXT
04/16/2007	319	ORDER granting 318 Motion for Extension of Time to File Answer. David J Lesar answer due 5/13/2007; Halliburton Company answer due 5/13/2007. (Signed by Judge Barbara M. G. Lynn on 4/16/07) (jrb) (Entered: 04/16/2007)
04/20/2007	320	ORDER. The Court ORDERS Mr. David Boies to file a Notice of Appearance as Lead Counsel in this action by April 30, 2007. If Mr. Boies does not intend to appear as lead counsel, this Court will reconsider its ruling on AMSF's Motion for Substitution of Lead Counsel. (Signed by Judge Barbara M. G. Lynn on 4/20/07) (jrb) (Entered: 04/20/2007)
04/25/2007	321	NOTICE of Attorney Appearance by David Boies on behalf of The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, Caryl) Modified on 4/25/2007 (jb). (Entered: 04/25/2007)
04/27/2007	322	NOTICE of Attorney Appearance for Sashi Bach Boruchow on behalf of The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, Caryl) Modified on 4/30/2007 (npk). (Entered: 04/27/2007)

DATE FILED	#	DOCKET TEXT
04/30/2007	323	Application and Order for Admission Pro Hac Vice by David Boies on behalf of Archdiocese of Milwaukee Supporting Fund, Inc and Court Appointed Lead Counsel for Class. (Signed by Judge Barbara M. G. Lynn on 4/30/07) (jrb) (Entered: 05/01/2007)
05/01/2007	324	STATUS REPORT *Joint Status Report on Proposed Scheduling Order* by David J Lesar, The Archdiocese of Milwaukee Supporting Fund, Inc., Halliburton Company. (Boies, Caryl) (Entered: 05/01/2007)
05/01/2007	325	Application and Order for Admission Pro Hac Vice by Sashi Bach Boruchow for The Archdiocese of Milwaukee Supporting Fund, Inc. (Signed by Judge Barbara M. G. Lynn on 5/1/07) (jrb) (Entered: 05/02/2007)
05/04/2007	326	MOTION to Compel *Complete Case Files and Request for Certificate of Completion by* The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, Caryl) (Entered: 05/04/2007)
05/04/2007	327	Brief/Memorandum in Support filed by The Archdiocese of

DATE FILED	#	DOCKET TEXT
		Milwaukee Supporting Fund, Inc. re 326 MOTION to *Compel Complete Case Files and Request for Certificate of Completion* (Boies, Caryl) (Entered: 05/04/2007)
05/04/2007	328	Appendix in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 327 Brief/Memorandum in Support of Motion to *Compel Complete Case Files and Request for Certificate of Completion* (Boies, Caryl) (Entered: 05/04/2007)
05/10/2007	330	Minute Entry for proceedings held before Judge Barbara M. G. Lynn: Telephone Conference. The Court ordered former lead counsel to certify in public filings that they have turned over all case files for which they are not asserting privilege within 2 weeks. The record of the telephone conference will be sealed. (Court Reporter Sue Engledow.) Time in Court: 5 minutes. (jrb) Modified on 5/22/2007 (jb). (Entered: 05/15/2007)
05/14/2007	329	*Original* ANSWER to Amended Complaint (*Fourth Consolidated*) by David J Lesar, Halliburton Company

DATE FILED	#	DOCKET TEXT
		(Attachments: # 1 Supplement Pages 41 - 80# 2 Supplement Pages 81 - 102) (Pulliam, Jessica) (Entered: 05/14/2007)
05/24/2007	331	Certification of Service on behalf of City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund (Brown, Andrew) Modified on 6/8/2007 (Gardner, Jo). (Entered: 05/24/2007)
05/24/2007	332	NOTICE by Scott+Scott LLP *Certification* (Shingler, Arthur) (Entered: 05/24/2007)
06/14/2007	333	Order: The Court Orders the parties to resubmit a Joint Report on Proposed Scheduling Order, with new proposed deadlines consistent with the Court's intended trial date by 6/28/2007. (Signed by Judge Barbara M. G. Lynn on 6/14/2007) (skt) (Entered: 06/14/2007)
06/27/2007	334	Supplement to Joint Report on Proposed Scheduling Order by David J Lesar, The Archdiocese of Milwaukee Supporting Fund, Inc., Halliburton Company. (Boies, Caryl) Modified on

DATE FILED	#	DOCKET TEXT
		6/28/2007 (cxb). (Entered: 06/27/2007)
06/29/2007	335	ORDER granting Defendant's request. Defendant may file for reconsideration, no later than 07/09/2007. (see order for specifics) (Signed by Judge Barbara M. G. Lynn on 06/29/2007) (axm) (Entered: 07/02/2007)
07/09/2007	336	MOTION for Reconsideration re 255 MOTION to Dismiss by David J Lesar with Brief in Support. (Attachments: # 1 Appendix in Support) (Gonzalez, Jose) (Entered: 07/09/2007)
07/19/2007	337	RESPONSE in Opposition filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 336 MOTION for Reconsideration re 255 MOTION to Dismiss (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/19/2007)
08/06/2007	338	SCHEDULING ORDER: This case is set for jury trial on this Court's three-week docket beginning Monday, July 6, 2009, at 9:00 a.m. Factual Discovery due by 8/18/2008. Expert Discovery due by 1/15/09.

DATE FILED	#	DOCKET TEXT
		Pretrial Conference set for 7/2/2009 09:00 AM before Judge Barbara M. G. Lynn. Dispositive Motions due by 3/16/2009. Proposed Pretrial Order due by 6/15/2009. Pretrial Materials due by 6/15/2009. Settlement Status Report due by 1/6/2009. (see order for specifics) (Signed by Judge Barbara M. G. Lynn on 8/6/07) (klm) (Entered: 08/06/2007)
08/07/2007	339	ORDER AMENDING DATE FOR PRETRIAL CONFERENCE. Pretrial Conference set for 7/2/2009 09:00 AM before Judge Barbara M. G. Lynn.(see order for specifics) (Signed by Judge Barbara M. G. Lynn on 08/07/07) (imp) (Entered: 08/07/2007)
09/11/2007	340	NOTICE by City of Dearborn Heights Act 345 Police & Fire Retirement System, Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund *Notice of Firm Name Change* (Brown, Andrew) (Entered: 09/11/2007)
09/17/2007	341	MOTION to Certify Class *and Incorporated memorandum of Points and Authorities in Support Thereof* by The

DATE FILED	#	DOCKET TEXT
		Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Appendix Part 1# 2 Appendix Part 2# 3 Appendix Part 3# 4 Appendix Part 4# 5 Appendix Part 5# 6 Appendix Part 6# 7 Appendix Part 7) (Boies, Caryl) (Entered: 09/17/2007)
10/22/2007	342	Joint MOTION to Extend Briefing Schedule on Plaintiffs Motion for Class Certification by Halliburton Company, The Archdiocese of Milwaukee Supporting Fund Inc, David Lesar. (Pulliam, Jessica) Modified on 10/23/2007 (npk) (Entered: 10/22/2007)
10/23/2007	343	Agreed ORDER granting 342 Motion to Extend Briefing Schedule on Plaintiffs Motion for Class Certification Time. Replies due by 12/14/2007. Responses due by 11/15/2007. (Signed by Judge Barbara M. G. Lynn on October 23, 2007) (jyg) (Entered: 10/23/2007)
10/29/2007	344	Mail Returned as Undeliverable. 343 Order on Motion to Extend Time received back from Gary McGowan as Return to Sender. (Imp) (Entered: 10/30/2007)

DATE FILED	#	DOCKET TEXT
11/16/2007	345	Joint MOTION to Strike the Report of Jane Nettesheim by David J Lesar, Halliburton Company re 341 MOTION to Certify Class and Incorporated Memorandum of Points and Authorities in Support Thereof. (Attachments: # 1 Appendix to Motion to Strike) (Pulliam, Jessica) Modified on 12/26/2007 (axm). Modified on 1/7/2008 (axm). (Entered: 11/16/2007)
11/16/2007	346	RESPONSE in Opposition filed by David J Lesar, Halliburton Company re 341 MOTION to Certify Class *and Incorporated memorandum of Points and Authorities in Support Thereof* (Attachments: # 1 Appendix to Response# 2 Exhibit 1# 3 Exhibit 2# 4 Exhibit 3# 5 Exhibit 4# 6 Exhibit 5# 7 Exhibit 5# 8 Exhibit 7# 9 Exhibit 8# 10 Exhibit 9# 11 Exhibit 10# 12 Exhibit 11# 13 Exhibit 12# 14 Exhibit 13# 15 Exhibit 14# 16 Exhibit 15# 17 Exhibit 16# 18 Exhibit 17# 19 Exhibit 18# 20 Exhibit 19# 21 Exhibit 20# 22 Exhibit 21# 23 Exhibit 22# 24 Exhibit 23# 25 Exhibit 24# 26 Exhibit 25# 27 Exhibit 26# 28 Exhibit 27# 29 Exhibit 28A# 30 Exhibit 28B#

DATE FILED	#	DOCKET TEXT
		31 Exhibit 28C# 32 Exhibit 29) (Pulliam, Jessica) (Entered: 11/16/2007)
12/21/2007	347	REPLY filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 341 MOTION to Certify Class *and Incorporated memorandum of Points and Authorities in Sunnort Thereof* (Boles. David) (Entered: 12/21/2007)
12/21/2007	348	RESPONSE in Opposition filed by The Archdiocese of Milwaukee Supporting Fund, Inc re 345 Amended MOTION to Strike Expert Report of Jane Nettesheim. (Boies, David) Modified on 12/26/2007 (axm). (Entered: 12/21/2007)
12/21/2007	349	MOTION to Strike the Expert Report of Lucy Allen and Incorporated Memorandum of Point and Authorities by The Archdiocese of Milwaukee Supporting Fund, Inc. with Brief/Memorandum in Support. (Boies, David) Modified on 12/26/2007 (axm. (Entered: 12/21/2007)
12/21/2007	350	Appendix in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 349

DATE FILED	#	DOCKET TEXT
		MOTION to Strike the Expert Report of Lucy Allen and Incorporated Memorandum of Point and Authorities 348 Response in Opposition, 347 Reply to Response to Motion (Attachments: # 1 Appendix 001-084# 2 Appendix 085-149# 3 Appendix 150-232) (Boies, David) (Entered: 12/21/2007)
12/21/2007	351	ORDER Setting Deadlines as to 345 Motion to Strike the Report of Jane Nettesheim, 349 Motion to Strike the Expert Report of Lucy Allen. Dfts' Reply in Support of the Motion to Strike the Expert Report of Jane Nettesheim due by 1/18/08; Dfts Opposition to Lead Plas Motion to Strike the Expert Report of Lucy Allen due by 1/18/08. (Signed by Judge Barbara M. G. Lynn on 12/21/2007) (axm) Modified on 1/15/2008 (Lyon, Leigh). (Entered: 12/26/2007)
01/18/2008	352	REPLY filed by Halliburton Company, David J Lesar re 345 Joint MOTION to Strike 341 MOTION to Certify Class and Incorporated memorandum of Points and Authorities in Support Thereof. (Sterling,

DATE FILED	#	DOCKET TEXT
		David) Modified on 1/23/2008 (tin). (Entered: 01/18/2008)
01/18/2008	353	RESPONSE filed by Halliburton Company, David J Lesar re 349 MOTION to Strike the Expert Report of Lucy Allen and Incorporated Memorandum of Point and Authorities (Sterling, David) (Entered: 01/18/2008)
01/18/2008	354	Supplemental Appendix in Support filed by Halliburton Company, David J Lesar re 352 Reply to Response to Motion, 353 Response to Motion (Sterling, David) Modified on 1/23/2008 (jrb). (Entered: 01/18/2008)
01/24/2008	355	Amended Supplemental Appendix in Support filed by Halliburton Company, David J Lesar re 352 Reply to Response to Motion, 353 Response to Motion (Sterling, David) Modified on 1/25/2008 (tin). Modified on 1/25/2008 (tin). (Entered: 01/24/2008)
02/04/2008	356	REPLY filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 349 MOTION to Strike the Expert Report of Lucy Allen and Incorporated Memorandum

DATE FILED	#	DOCKET TEXT
		of Point and Authorities (Boies, David) (Entered: 02/04/2008)
03/18/2008	357	ORDER SETTING HEARING as to 341 Motion to Certify Class, 345 Motion to Strike the Report of Jane Nettesheim, and 349 MOTION to Strike the Expert Report of Lucy Allen. Motion Hearing set for 3/21/2008 03:30 PM before Judge Barbara M. G. Lynn. (Signed by Judge Barbara M. G. Lynn on 3/18/08) (svc) (Entered: 03/18/2008)
03/18/2008	358	ORDER denying 336 Motion for Reconsideration. (Signed by Judge Barbara M. G. Lynn on 3/18/2008) (axm) (Entered: 03/18/2008)
03/21/2008	359	Minute Entry for proceedings held before Judge Barbara M. G. Lynn: Motion Hearing held on 03/21/08 re 349 Motion to Strike filed by The Archdiocese of Milwaukee Supporting Fund, Inc., 345 Motion to Strike, filed by Halliburton Company, David J Lesar, 341 Motion to Certify Class, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. The Court heard arguments on the Motion to Certify Class and the Motions to Strike. The

DATE FILED	#	DOCKET TEXT
		Court denied both Motions to Strike and took the Motion to Certify Class under advisement. Attorney Appearances: Plaintiff - Counsel of Record; Defense - Counsel of Record. (Court Reporter Sue Engledow.) Time in Court: 3 hrs. (lmp) (Entered: 03/25/2008)
03/25/2008	360	ORDER Denying 345 Joint MOTION to Strike the Report of Jane Nettesheim, and 349 Motion to Strike the Expert Report of Lucy Allen. See order for specifics. (Signed by Judge Barbara M. G. Lynn on 3/25/08) (svc) (Entered: 03/25/2008)
03/28/2008	361	TRANSCRIPT of Motions Hearing Proceedings held on March 21, 2008 before Judge Barbara M.G. Lynn. Court Reporter Name/Phone Number: Sue Engledow/214-753-2325. District Clerk Phone Number: 214-753-2633. ***The Official Record of the transcript is on file with the clerk's office. Contact either the clerk's office or the court reporter at phone numbers listed above to obtain a copy of the Official Record.*** (Attachments: # 1 Transcript) (klm) (Entered: 03/31/2008)

DATE FILED	#	DOCKET TEXT
05/14/2008	362	NOTICE *of Subpoena to Arthur Andersen* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	363	NOTICE *of Subpoena to Gollatz Griffin & Ewing* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	364	NOTICE *of Subpoena to Hamilton Rabinovitz & Alschuler, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	365	NOTICE *of Subpoena to Kirkpatrick & Lockhart et alia, Dallas TX* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	366	NOTICE *of Subpoena to Kirkpatrick & Lockhart et alia, Pittsburgh PA* filed by The

DATE FILED	#	DOCKET TEXT
		Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	367	NOTICE *of Subpoena to KPMG Company* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	368	NOTICE *of Subpoena to Marsh USA, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	369	NOTICE *of Subpoena to Mendes & Mount, LLP* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	370	NOTICE *of Subpoena to Peterson Consulting/Navigant* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit

DATE FILED	#	DOCKET TEXT
		1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	371	NOTICE *of Subpoena to PricewaterhouseCoopers L. L. P.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	372	NOTICE *of Subpoena to United States Securities Exchange Commision*, Washington, D.C. filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	373	NOTICE *of Subpoena to United States Securities and Exchange Commission*, Fort Worth, Texas filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
05/14/2008	374	NOTICE *of Subpoena to Towers Perrin* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)

DATE FILED	#	DOCKET TEXT
05/14/2008	375	NOTICE *of Subpoena to Vinson & Elkins L.L.P.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 05/14/2008)
06/06/2008	376	NOTICE *of Subpoena to Towers Perrin* re: 374 Notice of Subpoena to Towers Perrin filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/06/2008)
06/06/2008	377	NOTICE *of Subpoena to Peterson Consulting/Navigant* re: 370 Notice of Subpoena to Peterson Consulting/Navigant filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/06/2008)
06/06/2008	378	NOTICE *of Subpoena to Smith Barney* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)

DATE FILED	#	DOCKET TEXT
06/06/2008	379	NOTICE *of Subpoena to Donaldson, Lufkin & Jenrette* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	380	NOTICE *of Subpoena to ABN Amro Bank N V. US.A.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	381	NOTICE *of Subpoena to Capital One Southcoast, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	382	NOTICE *of Subpoena to Brown Brothers Harriman & Co.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	383	NOTICE *of Subpoena to Argus Research Corporation* filed by The Archdiocese of Milwaukee Supporting Fund, Inc.

DATE FILED	#	DOCKET TEXT
		(Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	384	NOTICE *of Subpoena to Deutsche Banc Alex Brown* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	385	NOTICE *of Subpoena to Wachovia Securities; Re-A.G. Edwards & Sons, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/06/2008)
06/06/2008	386	NOTICE *of Subpoena to Sun Trust*; Re: Robinson-Humphrey filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/06/2008)
06/06/2008	387	NOTICE *of Subpoena to PNC Institutional Investment Service* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit

DATE FILED	#	DOCKET TEXT
		1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	388	NOTICE *of Subpoena to NatWest Market Group, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	389	NOTICE *of Subpoena to Morgan Stanley* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	390	NOTICE *of Subpoena to Johnson, Rice & Co. LLC* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	391	NOTICE *of Subpoena to ING Financial Markets LLC* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	392	NOTICE *of Subpoena to Highlands Insurance Company* filed by The Archdiocese of

DATE FILED	#	DOCKET TEXT
		Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	393	NOTICE *of Subpoena to DaM Rauscher Wessels* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	394	NOTICE *of Subpoena to CIBC World Markets* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	395	NOTICE *of Subpoena to UBS Warburg re: Painewebber* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/06/2008)
06/06/2008	396	NOTICE *of Subpoena to Wachovia Securities* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1)

DATE FILED	#	DOCKET TEXT
		(Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	397	NOTICE *of Subpoena to UBS Warburg* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	398	NOTICE *of Subpoena to Stephens, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	399	NOTICE *of Subpoena to Sanford C. Bernstein & Co.*, Inc. filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	400	NOTICE *of Subpoena to Citigroup Re: Salomon Smith Barney* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	401	NOTICE *of Subpoena to RBC Capital Markets* filed by The

DATE FILED	#	DOCKET TEXT
		Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	402	NOTICE *of Subpoena to Prudential Securities* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	403	NOTICE *of Subpoena to Bear, Stearns & Co.*, Inc. filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	404	NOTICE *of Subpoena to Merrill Lynch* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)
06/06/2008	405	NOTICE *of Subpoena to Jeffries & Company*, Inc. filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 06/06/2008)

DATE FILED	#	DOCKET TEXT
06/09/2008	406	*Corrected* NOTICE *of Subpoena to Towers Perrin* re: 376 Notice of Subpoena to Towers Perrin filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) Modified on 6/9/2008 (axm). (Entered: 06/09/2008)
06/09/2008	407	*Corrected* NOTICE *of Subpoena to Peterson Consulting/ Navigant* re: 377 Notice of Subpoena to Peterson Consulting/Navigant filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 11 (Floies_ Caryl) Modified on 6/9/200g (axml. (Entered: 06/09/200g1
06/17/2008	408	NOTICE *of Deposition of Phillip Vogler* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) (Entered: 06/17/2008)
06/17/2008	409	NOTICE *of Deposition of Andrea Ban Tecce* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) (Entered: 06/17/2008)

DATE FILED	#	DOCKET TEXT
06/17/2008	410	NOTICE *of Deposition of Dr. Francine Rabinowitz* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) (Entered: 06/17/2008)
06/17/2008	411	NOTICE *of Deposition of Linda Nabors* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) (Entered: 06/17/2008)
06/23/2008	412	MOTION to Quash Subpoena filed by Highlands Insurance Company (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order Proposed Order) (Martin, Brian) Modified on 6/24/2008 (jyg). (Entered: 06/23/2008)
06/26/2008	413	ORDER REFERRING 412 Motion to Quash filed by Highlands Insurance Company. Motion(s) referred to Magistrate Judge Jeff Kaplan. (Signed by Judge Barbara M. G. Lynn on 6/26/2008) (axm) (Entered: 06/26/2008)
06/26/2008	414	Standing Order for Electronic Filings Related to Matters Referred to the United States

DATE FILED	#	DOCKET TEXT
		Magistrate Judge - see order for specifics. (Signed by Magistrate Judge Jeff Kaplan on 6/26/2008) (axm) (Entered: 06/26/2008)
06/27/2008	415	ORDER denying 412 Highland's Motion to Quash Subpoena for want of jurisdiction. (see order for specifics) (Signed by Magistrate Judge Jeff Kaplan on 6/27/08) (tin) (Entered: 06/27/2008)
07/11/2008	416	Agreed NOTICE of Modification of Discovery Schedule filed by Halliburton Company, David J Lesar, The Archdiocese of Milwaukee Supporting Fund, Inc. (Sterling, David) Modified on 7/14/2008 (tin). (Entered: 07/11/2008)
07/11/2008	417	NOTICE *of Subpoena to ACE USA* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	418	NOTICE *of Subpoena to Adams and Reese LLP* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)

DATE FILED	#	DOCKET TEXT
07/11/2008	419	NOTICE *of Subpoena to American International Group; Re: National Union Fire Insurance Company* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	420	NOTICE *of Subpoena to Alan Gray & Associates* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	421	NOTICE *of Subpoena to Munich Reinsurance America, Inc.; Re: American Reinsurance Company* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	422	NOTICE *of Subpoena to ANH Refractories Headquarters; Re: Harbison Walker* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)

DATE FILED	#	DOCKET TEXT
07/11/2008	423	NOTICE *of Subpoena to Christie, Pabarue, Mortensen & Young* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	424	NOTICE *of Subpoena to Employers Reinsurance Corporation* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	425	NOTICE *of Subpoena to Jackson & Campbell, P.C.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	426	NOTICE *of Subpoena to Lynn Luker & Associates, LLC* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008	427	NOTICE *of Subpoena to Meckler Bulger & Tilson LLP* filed by The Archdiocese of Milwaukee

DATE FILED	#	DOCKET TEXT
		Supporting Fund, Inc. (Attachments: # 1 Exhibit 1) (Boies, Caryl) (Entered: 07/11/2008)
07/11/2008		Set/Reset Deadlines per doc. 416: Discovery due by 12/9/2008. (tin) (Entered: 07/14/2008)
07/18/2008	428	MOTION to Compel *for Declaration That Privilege Has Been Waived By Halliburton's Refusal to Provide An Adequate Privilege Log and to Compel Production of Withheld Documents* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, David) (Entered: 07/18/2008)
07/18/2008	429	Appendix in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 428 MOTION to Compel *for Declaration That Privilege Has Been Waived By Halliburton's Refusal to Provide An Adequate Privilege Log and to Compel Production of Withheld Documents* (Attachments: # 1 Appendix Part 1 of 5, # 2 Appendix Part 2 of 5, # 3 Appendix Part 3 of 5, # 4 Appendix Part 4 of 5, # 5 Appendix Part 5 of 5) (Boies, David) (Entered: 07/18/2008)

DATE FILED	#	DOCKET TEXT
07/22/2008	430	ORDER REFERRING 428 Plaintiffs' Motion to Compel Declaration that Privilege has been Waived By Halliburton's Refusal to Provide Adequate Privilege Log and to Compel Production of Withheld Documents. Motion referred to Magistrate Judge Jeff Kaplan. (Signed by Judge Barbara M. G. Lynn on 7/22/2008) (axm) Modified on 7/31/2008 (caw). (Entered: 07/22/2008)
07/23/2008	431	ORDER denying 428 Plaintiffs' Motion to Compel Declaration that Privilege has been Waived by Halliburton's Refusal to Provide an Adequate Privilege Log and to Compel Production of Withheld Documents. Defendant shall produce a fourth privilege log to counsel for Lead Plaintiff by 08/13/2008. (see order) (Signed by Magistrate Judge Jeff Kaplan on 7/23/2008) (axm) Modified on 7/31/2008 (caw). (Entered: 07/24/2008)
08/06/2008	432	NOTICE *of Deposition of Hamilton, Rabinovitz & Associates, Inc.* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit 1)

DATE FILED	#	DOCKET TEXT
		(Boies, Caryl) (Entered: 08/06/2008)
08/12/2008	434	Mail Returned as Undeliverable. 431 Order on Motion to Compel received back from Neil Rothstein as forward time expired-return to sender. (jrb) (Entered: 08/14/2008)
08/13/2008	433	NOTICE *of Filing Proposed Stipulation and Protective Order* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A - Proposed Stipulation and Protective Order) (Boies, Caryl) (Entered: 08/13/2008)
08/18/2008	435	STIPULATION AND PROTECTIVE ORDER. (see order for specifics) (Signed by Judge Barbara M. G. Lynn on 8/18/08) (tln) (Entered: 08/18/2008)
08/25/2008	436	NOTICE *of Videotaped Deposition of Fred Hartzke* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) Modified on 8/26/2008 (lmp). (Entered: 08/25/2008)
09/02/2008	437	NOTICE of Attorney Appearance by Jenny L Martinez on behalf of

DATE FILED	#	DOCKET TEXT
		David J Lesar. (Martinez, Jenny) (Entered: 09/02/2008)
09/02/2008	438	NOTICE of Attorney Appearance by Jenny L Martinez for R. Alan York on behalf of David J Lesar. (Martinez, Jenny) (Entered: 09/02/2008)
09/29/2008	439	NOTICE *of Videotaped Deposition of Gary Bohnsack* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Attachments: # 1 Exhibit A) (Boies, Caryl) (Entered: 09/29/2008)
09/29/2008	440	***VACATED PER ORDER FILED 10/9/08 #442***ORDER denying 341 Motion to Certify Class. The Court will issue a Memorandum Opinion elaborating on the reasons for this decision on or before November 3, 2008. (see order) (Signed by Judge Barbara M. G. Lynn on 09/29/08) (lmp) Modified on 10/9/2008 (jyg). (Entered: 09/30/2008)
10/06/2008	441	LEAD PLAINTIFFS MOTION FOR TEMPORARY STAY filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, David) Modified on

DATE FILED	#	DOCKET TEXT
		10/6/2008 (svc). (Entered: 10/06/2008)
10/09/2008	442	ORDER granting 441 Lead Plaintiffs Motion for Temporary Stay. IT IS ORDERED that the September 29, 2008 Order denying class certification is hereby VACATED. (Signed by Judge Barbara M. G. Lynn on 10/9/08) (jyg) (Entered: 10/09/2008)
10/14/2008	443	NOTICE *of Firm Name Change* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Kendall, Joe) (Entered: 10/14/2008)
11/04/2008	444	Memorandum Opinion and Order denying 341 Motion to Certify Class filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (see order for specifics) (Ordered by Judge Barbara M. G. Lynn on 11/4/08) (tln) (Entered: 11/04/2008)
12/29/2008	445	Received letter from USCA5 re court's order granting the application for leave to appeal. (imp) (Entered: 12/30/2008)
12/29/2008		NOTICE OF INTERLOCUTORY APPEAL to the Fifth Circuit as to 445 USCAS Order, by The Archdiocese of Milwaukee

DATE FILED	#	DOCKET TEXT
		Supporting Fund, Inc.. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (See Document 445 for image.) (jmr) (Entered: 02/04/2009)
01/05/2009		Receipt of payment for USCA Appeal Fee. Authorized by 445 Letter. $455.00; Receipt # DLS0027611. (jmr) (Entered: 01/05/2009)
01/05/2009	446	TRANSCRIPT REQUEST by The Archdiocese of Milwaukee Supporting Fund, Inc. (Boies, Caryl) (Entered: 01/05/2009)
02/04/2009		USCA Case Number is 08-11195 in USCA5 for Notice of Appeal, filed by The Archdiocese of Milwaukee Supporting Fund, Inc.. (jmr) (Entered: 02/04/2009)
02/04/2009		Record on Appeal Certified to US Court of Appeals, 5th Circuit re Notice of Appeal, - USCAS Number: 08-11195. 43 vol. electronic record, 5 transcripts, 1 sealed transcript, and 3 folders of unscanned documents. (jmr) Modified on 2/5/2009 (jmr). (Entered: 02/04/2009)

DATE FILED	#	DOCKET TEXT
02/04/2009		SUPPLEMENTAL Record on Appeal Certified to US Court of Appeals, 5th Circuit re Notice of Appeal, - USCA5 Number: 08-11195. 3 transcripts. (jmr) Modified on 2/17/2009 (jmr). (Entered: 02/04/2009)
02/04/2009		SUPPLEMENTAL Record on Appeal Certified to US Court of Appeals, 5th Circuit re Notice of Appeal, - USCA5 Number: 08-11195. 1 vol. each of 3:02cv1168, 3:02cv1238, 3:02cv1247, 3:02cv1248, 3:02cv1261, 3:02cv1267, 3:02cv1268, 3:02cv1368, 3:02cv1532, 3:02cv1615, 3:02cv1633, 3:02cv1634, 3:02cv2067, 3:02cv2082, 3:02cv2089, 3:02cv2129, 3:02cv2130, 3:02cv2373 and 4 vol. of 3:05cv1156. (jmr) (Entered: 02/17/2009)
02/18/2009	447	NOTICE of Transfer of the Appellate Record to Clark Dunlap re: Notice of Appeal. (jmr) (Entered: 02/18/2009)
06/09/2009	448	ORDER. This case is hereby STAYED pending the Fifth Circuit's decision on the Plaintiffs' interlocutory appeal of the Court's order denying class certification. All pretrial

DATE FILED	#	DOCKET TEXT
		deadlines which have not already expired are hereby SUSPENDED. The pretrial conference, set for July 2, 2009, at 9:00 a.m., is hereby CANCELLED. (Ordered by Judge Barbara M. G. Lynn on 06/09/09) (lmp) (Entered: 06/09/2009)
07/02/2009	449	SUPPLEMENTAL Record on Appeal Transmitted to USCA5 re Notice of Appeal, - USCA5 Number: 08-11195. 1 sealed transcript. (jmr) (Entered: 07/02/2009)
07/14/2009	450	Mail Returned as Undeliverable. 449 Appeal Record Sent received back from Edmund W Searby as Unable to forward. (Attachments: # 1 Supplement Envelope) (drh) (Entered: 07/14/2009)
07/23/2009	451	Received letter from USCA5 acknowledging receipt of supplemental record. (axm) (Entered: 07/24/2009)
03/11/2010	452	Opinion of USCA (certified copy) in accordance with USCA judgment re Notice of Appeal, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. The district court's

DATE FILED	#	DOCKET TEXT
		judgment denying the Plaintiffs motion for class certification is AFFIRMED. (tin) (Entered: 03/12/2010)
03/11/2010	453	JUDGMENT/MANDATE of USCA as to Notice of Appeal filed by The Archdiocese of Milwaukee Supporting Fund Inc. Issued as Mandate: 3/8/2010. AFFIRMED. (see judgment) (tin) (Additional attachment(s) added on 3/15/2010: # 1 Main Document) (axm). Modified pdf on 3/15/2010. (axm). (Entered: 03/12/2010)
03/12/2010	454	Appeal Record Returned: The electronic copy of the record has been recycled. (1 Sealed Transcript, 7 Transcripts, 3 Folders-Original Documents) (axm) (Entered: 03/15/2010)
03/17/2010	455	Order: Proposed Scheduling Order due by 4/2/2010. (See Order) (Ordered by Judge Barbara M. G. Lynn on 3/17/2010) (dnc) (Entered: 03/18/2010)
03/26/2010	456	Joint STATUS REPORT *and Proposed Order* filed by The Archdiocese of Milwaukee Supporting Fund, Inc..

DATE FILED	#	DOCKET TEXT
		(Attachments: # 1 Text of Proposed Order) (Boies, Caryl) (Entered: 03/26/2010)
03/29/2010	457	ORDER: It is ORDERED that this case is stayed until 5/13/2010. The parties are further ORDERED to submit a joint status report on 5/14/2010, advising the Court as to whether any such petition has been filed. (See Order) (Ordered by Judge Barbara M. G. Lynn on 3/29/2010) (mfw) (Entered: 03/30/2010)
05/14/2010	458	Joint STATUS REPORT filed by The Archdiocese of Milwaukee Supporting Fund, Inc.. (Attachments: # 1 Exhibit(s) A) (Boies, Caryl) (Entered: 05/14/2010)
02/15/2011	459	ORDER of the Supreme Court as to Notice of Appeal, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. Petition for a writ of certiorari is granted. (mcr) (Entered: 02/17/2011)
02/24/2011		Record on Appeal for USCA5 08-11195/US Supreme Court of Appeals 09-1403 Record consisting of: 1 Disk containing ECF electronic record, transmitted to US Supreme

DATE FILED	#	DOCKET TEXT
		Court of Appeals. Shipped: Federal Express 796800187377 (svc) (Entered: 02/24/2011)
03/03/2011	460	Received letter from USCA5 regarding transmittal of ROA to the Supreme Court. (Supreme Court #09-1403) (axm) (Entered: 03/04/2011)
07/25/2011	461	JUDGMENT/MANDATE of USCA as to Notice of Appeal, filed by The Archdiocese of Milwaukee Supporting Fund, Inc. The district courts judgment is reversed and the case is remanded to the district court for further proceedings or decision. REVERSED and REMANDED. (svc) (Entered: 07/27/2011)
08/04/2011	462	Application for Admission Pro Hac Vice with Cert. of Good Standing for Attorney Justin D Fitzdam (Filing fee $25; Receipt number 51671) filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (axm) (Entered: 08/05/2011)
08/04/2011	463	Application for Admission Pro Hac Vice with Cert. of Good Standing for Attorney Carl E. Goldfarb (Filing fee $25; Receipt number 51671) filed by The

DATE FILED	#	DOCKET TEXT
		Archdiocese of Milwaukee Supporting Fund, Inc. (axm) (Entered: 08/05/2011)
08/08/2011	464	ORDER granting 462 Application for Admission Pro Hac Vice of Justin D Fitzdam. Clerk shall deposit application fee to the Non-Appropriated Fund of this Court. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Barbara M.G. Lynn on 8/8/2011) (twd) (Entered: 08/10/2011)
08/08/2011	465	ORDER granting 463 Application for Admission Pro Hac Vice of Carl E. Goldfarb. Clerk shall deposit application fee to the Non-Appropriated Fund of this Court. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Barbara M.G. Lynn on 8/8/2011) (twd) (Entered: 08/10/2011)
08/10/2011		***Clerk's Notice of delivery: (see NEF for details) Docket No:464. Wed Aug 10 12:12:39 CDT 2011 (crt) (Entered: 08/10/2011)

DATE FILED	#	DOCKET TEXT
08/10/2011		***Clerk's Notice of delivery: (see NEF for details) Docket No:465. Wed Aug 10 12:14:19 CDT 2011 (crt) (Entered: 08/10/2011)
08/17/2011	466	ORDER: The Court is prepared to rule on the issue of class certification on the papers previously submitted. Prior to ruling, the Court will allow any party to supplement its arguments by 8/31/2011. Any such filings shall not exceed five pages. The Court will not allow responses to supplements and will not receive additional evidence. (Ordered by Judge Barbara M.G. Lynn on 8/17/2011) (mfw) (Entered: 08/17/2011)
08/18/2011		***Clerk's Notice of delivery: (see NEF for details) Docket No:466. Thu Aug 18 09:19:44 CDT 2011 (crt) (Entered: 08/18/2011)
08/30/2011	467	Mail returned as undeliverable. 465 Order on Application for Admission Pro Hac Vice, 464 Order on Application for Admission Pro Hac Vice, received back from Richard J Zook as Unable to forward. No address update from last filed

DATE FILED	#	DOCKET TEXT
		document. The current document has not been re-mailed. (mfw) (Entered: 08/31/2011)
08/31/2011	468	Brief/Memorandum in Support filed by Halliburton Company re 466 Order, *Opposing Class Certification and, in the alternative, Request to Supplement the Record* (Pulliam, Jessica) (Entered: 08/31/2011)
08/31/2011	469	Brief/Memorandum in Support filed by The Archdiocese of Milwaukee Supporting Fund, Inc. re 466 Order, (Goldfarb, Carl) (Entered: 08/31/2011)
01/27/2012	470	ORDER granting 341 Plaintiffs Motion to Certify Class and denying as untimely 468 Defendants' Alternative Motion to Supplement the Record. This case will proceed as a class action. The Court appoints The Archdiocese of Milwaukee Supporting Fund Inc as Class Representative and David Boies of Boies, Schiller & Flexner LLP as Class Counsel. (Ordered by Judge Barbara M.G. Lynn on 1/27/2012) (axm) (Entered: 01/27/2012)

DATE FILED	#	DOCKET TEXT
01/27/2012		***Clerk's Notice of delivery: (see NEF for details) Docket No:470. Fri Jan 27 11:30:52 CST 2012 (crt) (Entered: 01/27/2012)
02/10/2012	471	Mail returned as undeliverable. 470 Order, received back from Richard J Zook as Return to Sender, Not Deliverable as Addressed, Unable to Forward. No address update from last filed document. The current document has not been re-mailed. (skt) (Entered: 02/10/2012)
02/22/2012	472	NOTICE *OF LEAD PLAINTIFFS NOTICE OF NAME CHANGE* filed by The Archdiocese of Milwaukee Supporting Fund, Inc. (Goldfarb, Carl) (Entered: 02/22/2012)
05/01/2012	473	Application for Admission Pro Hac Vice with Cert. of Good Standing for Attorney Kim E Miller (Filing fee $25; Receipt number 057821) filed by Erica P John Fund, Inc. (twd) (Entered: 05/02/2012)
05/02/2012	474	ORDER granting 473 Application for Admission Pro Hac Vice of Kim E Miller. If not already done, Applicant must

DATE FILED	#	DOCKET TEXT
		register as an ECF User within 14 days (LR 5.1(0). (Ordered by Judge Barbara M.G. Lynn on 5/2/2012) (axm) (Entered: 05/03/2012)
05/11/2012	475	ORDER REQUIRING SCHEDULING CONFERENCE AND REPORT FOR CONTENTS OF SCHEDULING ORDER: Joint Report due by 6/13/2012. (Ordered by Judge Barbara M.G. Lynn on 5/11/2012) (Attachments: # 1 Consent Letter, # 2 Consent Form) (skt) (Entered: 05/14/2012)
05/22/2012	480	Order received from the Fifth Circuit that Halliburton Company and David J Lesar' motion for leave to appeal has been granted under FRCvP 23(f). Appeal will proceed under USCA case no. 12-10544. (Attachments: # 1 order) (Id) (Entered: 06/05/2012)
06/01/2012		Supplemental Record on Appeal for USCA5 12-10544 Record consisting of: 1 ECF electronic record, certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to

DATE FILED	#	DOCKET TEXT
		arrange delivery. (axm) (Entered: 06/01/2012)
06/01/2012		Supplemental Record on Appeal for USCA5 12-10544 transmitted to Aaron Street with Baker Botts on disk only by mail. (axm) (Entered: 06/01/2012)
06/01/2012	476	Joint MOTION to Stay filed by Erica P John Fund, Inc, Halliburton Company (Attachments: # 1 Proposed Order) (Goldfarb, Carl) (Entered: 06/01/2012)
06/04/2012	477	NOTICE *OF FILING MISSING EXHBIT TO D.E.* 476 re: 476 Joint MOTION to Stay filed by Erica P John Fund, Inc, Halliburton Company (Attachments: # 1 Exhibit(s) A) (Goldfarb, Carl) (Entered: 06/04/2012)
06/04/2012	478	Notice of payment of filing fee for appeal no. 12-10544 by Halliburton Company, David J Lesar. Filing fee $455, receipt number 0539-4615157. (Streett, Aaron) Modified on 6/5/2012 (1r1). (Entered: 06/04/2012)
06/04/2012	479	AMENDED DOCUMENT by Halliburton Company, David J Lesar. Amendment to 478.

DATE FILED	#	DOCKET TEXT
		(Streett, Aaron) Modified on 6/5/2012 (1d). (Entered: 06/04/2012)
06/04/2012	481	ORDER GRANTING PARTIES' 476 JOINT MOTION FOR A STAY PENDING RULING ON DEFENDANTS' APPEAL. (Ordered by Judge Barbara M.G. Lynn on 6/4/2012) (twd) (Entered: 06/05/2012)
06/07/2012		Third Supplemental Record on Appeal for USCA5 12-10544: Record consisting of: 1 ECF electronic record, Original document number(s): 7, 32, 34, 44, 49, 62, 63, 92, 116, 122, 138, 294, certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to arrange delivery. (axm) Modified text on 6/14/2012 (axm). (Entered: 06/07/2012)
06/07/2012		Record on Appeal and 1st, 2nd, and 3rd Supplemental Record on Appeal for USCA5 12-10544 (related to 478 appeal): transmitted to Justin Fitzdam with Boise Schiller & Flexner LLP on disk only by mail. (axm) (Entered: 06/07/2012)

DATE FILED	#	DOCKET TEXT
06/08/2012		Record on Appeal and 1st, 2nd, and 3rd Supplemental Record on Appeal for USCA5 12-10-544 (related to 478 appeal): transmitted to Ben Geslison with Baker Botts LLP on disk only by mail. (axm) (Entered: 06/08/2012)
11/21/2012		USCA Case Number 12-10544 for 480 Notice of Appeal filed by Halliburton Company, David J Lesar. (svc) (Entered: 11/21/2012)
11/21/2012	482	Court Request for Recusal Magistrate Judge David L. Horan preliminarily assigned but enters his recusal. Magistrate Renee Toliver assigned. (gr) (Entered: 11/21/2012)
11/26/2012	483	Court Request for Recusal: Magistrate Judge Renee Harris Toliver recused. Magistrate Judge Paul D. Stickney assigned. (gr) (Entered: 11/26/2012)
11/28/2012	484	Record on Appeal and Supplemental Record on Appeal for USCA5 12-10544 (related to 480 appeal): Record consisting of: 48 Volume(s) ECF electronic record, 6 Volume(s) electronic

DATE FILED	#	DOCKET TEXT
		transcript, Original document number(s): 7, 32, 34, 44, 49, 62, 63, 92, 116, 122, 138, 294, transmitted to USCA5. Shipped: Federal Express 296232215009935, 296232215009942, 296232215009959, 296232215009966, 296232215009973 (svc) (Entered: 11/28/2012)
06/26/2013	485	NOTICE of Change of Address for Attorney Kim E Miller on behalf of Erica P John Fund, Inc. (Filer confirms contact info in ECF is current.) (Miller, Kim) (Entered: 06/26/2013)
08/06/2013	486	AMENDED SCHEDULING ORDER: This case is set for jury trial on this Court's three-week docket beginning Monday, 5/11/2015 at 09:00 AM before Judge Barbara M.G. Lynn. Dispositive Motions due by 11/21/2014. Factual Discovery due by 6/20/2014. Expert Discovery due by 10/13/2014. Joint Settlement Status Report due by 9/15/2014. Pretrial Materials due by 4/20/2015. Pretrial Order due by 4/20/2015. Pretrial Conference set for 5/6/2015 at 09:00 AM before

DATE FILED	#	DOCKET TEXT
		Judge Barbara M.G. Lynn. (Ordered by Judge Barbara M.G. Lynn on 8/6/2013) (Attachments: # 1 Juror Questionnaire) (twd) (Entered: 08/06/2013)
08/07/2013	487	Opinion of USCA (certified copy) in accordance with USCA judgment re 480 Notice of Appeal filed by Halliburton Company, David J Lesar. (svc) (Entered: 08/07/2013)
08/07/2013	488	JUDGMENT/MANDATE of USCA as to 480 Notice of Appeal filed by Halliburton Company, David J Lesar. Judgment of the District Court is affirmed. Issued as Mandate: 6/19/13. (svc) (Entered: 08/07/2013)
08/07/2013		Appeal Record Returned consisting of original documents 7,32,34,37,38,44,49,62,63,68,92, 116,122,138,294, and 6 original transcripts. Placed back on shelf. (Entered: 08/08/2013)
08/21/2013	489	NOTICE *of Lead Plaintiffs Name Change* filed by Erica P John Fund, Inc (Goldfarb, Carl) (Entered: 08/21/2013)
08/30/2013	490	Appeal Record Not Returned. Electronic copy of the record has

DATE FILED	#	DOCKET TEXT
		been recycled. (svc) (Entered: 09/03/2013)
10/04/2013	491	Unopposed MOTION to Withdraw as Attorney filed by Halliburton Company (Attachments: # 1 Proposed Order on Halliburton Company's Unopposed Motion for Withdrawal of Counsel) (Sterling, David) (Entered: 10/04/2013)
10/04/2013	492	Unopposed MOTION to Withdraw as Attorney *and Substitution of Counsel* filed by David J Lesar (Attachments: # 1 Proposed Order on Lesar's Unopposed Motion for Withdrawal and Substitution of Counsel) (Sterling, David) (Entered: 10/04/2013)
10/04/2013	493	NOTICE of Attorney Appearance by David D Sterling on behalf of Halliburton Company. (Filer confirms contact info in ECF is current.) (Sterling, David) (Entered: 10/04/2013)
10/08/2013	494	ORDER granting 491 Motion to Withdraw as Attorney. Attorney Jeffrey James McNabb; Frederick Linton Medlin; Rod Phelan; Scott Daniel Powers;

DATE FILED	#	DOCKET TEXT
		Michael J Quinn; Rebecca Robertson; Ronald W Stevens; Robb L Voyles; Donald E Godwin and Jose L Gonzalez Withdrawn. (Ordered by Judge Barbara M.G. Lynn on 10/8/2013) (cea) (Entered: 10/09/2013)
10/08/2013	495	ORDER granting 492 Unopposed Motion to Withdraw as Attorney and Substitution of Counsel. Attorney James E Johanns; Jenny L Martinez; Marcos G Ronquillo; R Alan York; Donald E Godwin and Jose L Gonzalez Withdrawn. The Following Counsel are Substituted as Counsel for Mr. Lesar: David D Sterling; Jessica B Pulliam; Thomas E O'Brien and John B Lawrence. (Ordered by Judge Barbara M.G. Lynn on 10/8/2013) (cea) (Entered: 10/09/2013)
10/22/2013	496	(Document Restricted) Lead Plaintiffs Motion to Compel the Production of Documents from Defendants Halliburton Company and David J. Lesar (Sealed pursuant to order dated 8/18/2008) filed by Erica P John Fund, Inc (Goldfarb, Carl) (Entered: 10/22/2013)

DATE FILED	#	DOCKET TEXT
10/22/2013	497	(Document Restricted) Sealed Appendix in Support re: 496 Sealed and/or Ex Parte Motion (Sealed pursuant to order dated 8/18/2008) filed by Erica P John Fund. Inc (Goldfarb. Carl) (Entered: 10/22/2013)
11/01/2013	498	MOTION to Compel *Production of Documents* filed by Erica P John Fund, Inc with Brief/Memorandum in Support. (Miller, Kim) (Entered: 11/01/2013)
11/01/2013	499	Appendix in Support filed by Erica P John Fund, Inc re 498 MOTION to Compel *Production of Documents* (Miller, Kim) (Entered: 11/01/2013)
11/05/2013	500	ORDER ON PLAINTIFF'S MOTIONS TO COMPEL: Before the Court are Plaintiffs Motions to Compel ("Motions") 496 and 498. Defendants shall file their responses to Plaintiffs Motions by 11/18/2013. Any reply by Plaintiff in support of its Motions shall be filed by 11/25/2013. The Court will hear argument on Plaintiffs Motions on 12/3/2013 at 09:30 AM before Judge Barbara M.G. Lynn. (Ordered by Judge Barbara

DATE FILED	#	DOCKET TEXT
		M.G. Lynn on 11/5/2013) (cea) (Entered: 11/06/2013)
11/18/2013	501	RESPONSE filed by Halliburton Company, David J Lesar re: 496 (Document Restricted) Lead Plaintiffs Motion to Compel the Production of Documents from Defendants Halliburton Company and David J. Lesar (Sealed pursuant to order dated 8/18/2008) (Sterling, David) (Entered: 11/18/2013)
11/18/2013	502	Appendix in Support filed by Halliburton Company, David J Lesar re 501 Response/Objection, (Sterling, David) (Entered: 11/18/2013)
11/18/2013	503	RESPONSE filed by Halliburton Company re: 498 MOTION to Compel *Production of Documents* (Sterling, David) (Entered: 11/18/2013)
11/18/2013	504	Appendix in Support filed by Halliburton Company re 503 Response/Objection (Attachments: # 1 Additional Page(s)) (Sterling, David) (Entered: 11/18/2013)
11/20/2013	505	Received letter from USCA5 Re: Supreme Court granting certiorari (svc) Modified on 11/25/2013 (svc). (Entered: 11/25/2013)

DATE FILED	#	DOCKET TEXT
11/25/2013	506	(Document Restricted) Sealed Reply re: 496 Sealed and/or Ex Parte Motion (Sealed pursuant to order dated 8/18/2008) filed by Erica P John Fund, Inc (Miller, Kim) (Entered: 11/25/2013)
11/25/2013	507	(Document Restricted) Sealed Appendix in Support re: 506 Sealed and/or Ex Parte Reply/Sur-reply (Sealed pursuant to order dated 8/18/2008) filed by Erica P John Fund, Inc (Miller, Kim) (Entered: 11/25/2013)
11/25/2013	508	REPLY filed by Erica P John Fund, Inc re: 498 MOTION to Compel *Production of Documents* (Miller, Kim) (Entered: 11/25/2013)
11/25/2013	509	Appendix in Support filed by Erica P John Fund, Inc re 508 Reply (Miller, Kim) (Entered: 11/25/2013)
12/03/2013	510	Minute Entry for proceedings held before Judge Barbara M.G. Lynn: Motion Hearing held on 12/3/2013 granting 496 Sealed and/or Ex Parte Motion filed by Erica P John Fund, Inc, denying as moot 498 Motion to Compel filed by Erica P John Fund, Inc. Attorney Appearances: Plaintiff

DATE FILED	#	DOCKET TEXT
		- Carl Goldfarb, Kim Miller; Defense - David Sterling, Jessica Pulliam, Tom O'Brien. (Court Reporter: Sue Engledow) (No exhibits) Time in Court - 1:05. (jrr) (Entered: 12/05/2013)
12/26/2013	511	Notice of Filing of Official Electronic Transcript of Motions Proceedings held on December 3, 2013 before Judge Barbara M.G. Lynn. Court Reporter/Transcriber P. Sue Engledow, Telephone number 972.978.2368. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (39 pages) Redaction Request due 1/16/2014.

DATE FILED	#	DOCKET TEXT
		Redacted Transcript Deadline set for 1/27/2014. Release of Transcript Restriction set for 3/26/2014. (pse) (Entered: 12/26/2013)

LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION FILED SEPTEMBER 17, 2007

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Master Docket No. 3:02-CV-1152-M

CLASS ACTION

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of itself and All Others Similarly Situated,
Lead Plaintiff,

vs.

HALLIBURTON COMPANY, et al.,
Defendants.

This Document Relates to:

ALL ACTIONS.

LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATIONAND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[TABLES INTENTIONALLY OMITTED]

INTRODUCTION

This is a securities class action brought on behalf of persons who purchased the common stock of Halliburton Company ("Halliburton" or the "Company") between June 3, 1999, through and including December 7, 2001, (the "Class Period"), against Halliburton and David J. Lesar, (collectively, "Defendants" or "Halliburton"). Lead Plaintiff, the Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS Fund") seeks an order under Fed. R. Civ. P. 23(a) and 23(b)(3) certifying a plaintiff class of all persons and entities who purchased or otherwise acquired Halliburton's common stock during the Class Period. The Lead Plaintiff AMS Fund requests that it be appointed a Class Representative and that another injured party, Lt. Col. Ben Alan Murphey, who filed a complaint and timely objected to a previous settlement that was found to be inadequate, also be named as a Class Representative. While the AMS Fund is adequate to serve as the sole Class Representative, it believes that the Class will benefit from Mr. Murphey serving as well. Finally, Lead Plaintiff requests that current Lead Counsel, Boies, Schiller & Flexner LLP, ("Boies Schiller" or "Lead Counsel") be designated as Class Counsel.

The Fourth Consolidated Amended Complaint for violation of the federal securities laws (the "FCAC") alleges that during the Class Period, Defendants violated §§10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, by deliberately falsifying Halliburton's financial results and deliberately. and/or recklessly misleading the public about the financial condition and success of Halliburton's business, including its construction operations, the benefits of its acquisition of Dresser, Inc., its exposure

to asbestos liability and its future business and financial prospects. ¶¶ 2, 4-44[1]. Such securities fraud class actions are routinely certified by the courts of the Fifth Circuit. *In re Electronic Data Sys. Corp. Sec. Litig.*, 226 F.R.D. 559 (E.D. Tex. 2005); *In re Reliant Sec. Litig.*, No. H-02-1810, 2005 U.S. Dist. LEXIS 9716 (S.D. Tex. Feb. 18, 2005).[2] As is the case here, each of the foregoing certified cases involved false and misleading statements and/or omissions of material facts which caused investors to purchase stock at inflated prices during the Class Period. In those cases, as it should be here, a Class was certified despite the fact that investors purchased different amounts of stock on different days during the Class Period.

The primary issue for class certification in a securities case like this is whether there is a basis for a claim of loss causation. *Oscar Private Equity Investment v. Allegiance*, 487 F.3d 261 (5th Cir. 2007). In this case, the facts alleged, along with the Report of Jane D. Nettesheim, Appendix at 001 - 557 ("Nettesheim" and the "Report"), establish, among other things:

- On October 24, 2000, the Company announced that it would be restructuring its construction units. As alleged in the FCAC, the restructuring was necessitated due to the problems with the Dresser integration. FCAC ¶ 144. This partial disclosure

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[1] Unless otherwise indicated, all paragraph ("¶") references are to the FCAC.

[2] *See also In re Dynegy, Inc. Sec. Litig.*, 226 F.R.D. 263 (S.D. Tex. 2004); *Lehocky v. Tidel Techs., Inc.*, 220 F.R.D. 491 (S.D. Tex. 2004); *In re Firstplus Fin. Group, Inc. Sec. Litig.*, Civ. Action No. 3:98-CV-2551-M, 2002 U.S. Dist. LEXIS 20446 (N.D. Tex. Oct. 23, 2002).

caused Halliburton's stock price to decline from $41.63 to $37.06, a statistically significant decline. Report at ¶ 93.

- On December 21, 2000, Halliburton pre-announced its fourth quarter earnings and announced that it would be taking $120 million after tax charge, $95 million of which was required to write-off previously undisclosed losses on fixed price construction contracts. FCAC ¶ 150. This partial disclosure caused Halliburton's stock price to decline from $37.00 to $36.00, a statistically significant decline. Report at ¶ 106.

- On June 28, 2001, Halliburton disclosed, for the first time, that Harbison, a former Dresser subsidiary, had asked for financial assistance for asbestos claims. FCAC ¶ 170-171. This partial disclosure regarding Halliburton's potential asbestos liability caused Halliburton's stock price to decline from $37.17 to $35.60, a statistically significant decline. Report at ¶ 115-116.

- On December 4-7, 2001, Halliburton disclosed information regarding recent adverse asbestos verdicts, making clear that the Company's existing $125 million in asbestos reserves were not, as previously represented, adequate. FCAC ¶ 191. This disclosure caused the price of Halliburton stock to decline, on December 7, 2001 alone, from $20.85 to $12.00, a statistically significant decline. Report at ¶ 133.

SUMMARY OF CLAIMS

The key facts are set forth in the FCAC. Briefly summarized below, the FCAC alleges a series of false and misleading statements relating, among other

things, to Halliburton's accounting practices with respect to 1) its improper booking of unapproved claims as revenue; 2) its knowingly inadequate reserves for asbestos liability; and, 3) its severe but undisclosed problems associated with the acquisition and integration of Dresser.

Accounting for Unapproved Claims

Prior to mid-1997, the business unit Brown Root Energy Services ("BRES") and the reporting segment Engineering and Construction ("E&C") principally entered into cost-plus or segmented fix fee contracts. In the 1997 Annual Report, Halliburton stated that "the keys to increasing revenue and improving profit margins . . . will be . . . acceptance of more . . . fixed price contracts." ¶ 68. Far from leading to improved revenue and profit margins, the fixed-price contracts accepted by the Company resulted in cost overruns and delays, and customers' refusal to pay millions in unapproved claims. ¶ 10.

Prior to the second fiscal quarter of 1998, as disclosed in public statements and filings with the Securities and Exchange Commission ("SEC"), Halliburton did not report unapproved claims as revenue until the claim was resolved. ¶ 69. However, in second quarter 1998 the Company began to record unapproved claims as revenue even if customers had not agreed to pay and were not legally obligated to do so. ¶ 11. Under the new, undisclosed accounting policy, Halliburton's losses on these contracts appeared as revenue and falsely inflated Halliburton's reported operating incomes and margins and overall financial health. ¶¶ 11-14, 204-236. FCAC ¶¶ 11-72, 210-219.

Knowing the change in accounting for unapproved claims falsely represented the Company's revenue,

profit and financial health, Halliburton nevertheless continued to claim success on these large fixed-price contracts. On July 22, 1998, Halliburton reported that the "Engineering and Construction Group business segments second quarter, 1998, operating income increased 66 percent . . . operating margin for the segment improved to 6.5 percent compared to last year's 3.9 percent . . . ." ¶ 80. Similar claims of financial success were made when Halliburton issued a release reporting its third quarter, 1998 results on October 29, 1998, stating that "[d]espite weaker market conditions, the . . . construction activities of Brown & Root Energy Services registered higher revenues for the quarter." ¶ 86. In fact, the higher revenues were not due to improved operations, but were the result of the change in accounting for unapproved claims.

Despite Halliburton's claims of success, in connection with its year-end 1998 results, Halliburton was forced to take a $60 million charge for unapproved claims. While announcing the charge, the Company assured analyst that the charge was not necessitated by the premature booking of unapproved claims as revenue, but rather was required because of customers' change of attitude about paying unapproved claims. ¶ 90. The Company further reiterated that it would not accept or perform change orders unless the customer agreed in advance to pay for the extra work, thereby indicating that it would continue its practice of not booking revenue on unapproved claims until the claim was resolved. This statement was false and misleading because Halliburton had in fact changed its accounting practice, and further, the statement indicated the problem resulting in the $60 million charge, had been addressed, and therefore, there would be no such future charges.

Thereafter, on June 9, 1999, Richard B. Cheney ("Cheney") and Gary V. Morris ("Morris") made a joint presentation at the 12th Annual Paine Webber Energy Conference. On behalf of the Company, Cheney and Morris explained that "Hal has adjusted to the change in customer philosophy" and requires that customers provide "assurance of payment . . . along the way . . ."; and, restated management's "confidence in downstream margins going forward." ¶ 91. These statements were relied upon and repeated in subsequent analyst reports. ¶¶ 92-93.

By including the unapproved claims in the Company's reported revenue, profit and margins were more favorable than they would have been if the accounting policy had not been changed. The Company invoked these overstated numbers to perpetuate the perception of success, and boasted the year-over-year improvements in revenue but failed to disclose that the improved financials were the result of the accounting change, not of improved operations.

It was not until March, 2000, in Halliburton's 1999 Annual Report, that the Company slipped a sentence into the notes to its financial statements that it was now recognizing revenue on unapproved claims when it deemed collection "probable." ¶ 124. However, this belated disclosure was still misleading because it did not disclose that the Company had already, over the prior six quarters, secretly and improperly recognized at least tens of millions in unapproved claims as revenue, even though they were unlikely to be collected and could not be accurately estimated, two strict requirements under Generally Accepted Accounting Principles ("GAAP") for recognizing Unapproved Claims as revenue. ¶¶ 13-14, 204-209. Moreover, Halliburton continued the practice of

comparing the inflated post-change financial results to the pre-change financial results, without disclosing the inflating effects of the new accounting method.

In public statements and filings with the SEC subsequent to its 1999 Annual Report, Halliburton repeated that its accounting practice was not to book revenue on unapproved claims until it deemed collection was probable. Each of these statements however was false and misleading because Halliburton continued to improperly record millions in uncollectible and inestimable Unapproved Claims as revenue every quarter. ¶¶ 11-14, 204-209, 234-236.

Asbestos Liability

Halliburton also repeatedly assured investors that the resolution of Dresser's legacy of asbestos suits would not have a material impact on Halliburton's finances. Halliburton's 1998 Annual Report assured investors that the $12 million then reserved was adequate, and "that the pending asbestos claims will be resolved without a material effect on Halliburton's financial position or results of operations." ¶ 101. While over time the Company made slight increases to the actual amount of reserves, Halliburton continued throughout the Class Period to falsely represent that it had adequately reserved for potential asbestos liability. For example, on November 15, 1999, Halliburton filed its third quarter, 1999 10Q, which stated that reserves had been increased to $13 million, and assured investors that $13 million asbestos reserves were adequate.

Similarly, on May 15, 2000, Halliburton filed its first quarter, 2000 10Q. Regarding Halliburton's potential asbestos litigation, the Company announced that it had accrued $25 million, and that management

believed that pending asbestos claims would be resolved without material effect on Halliburton's financial position. As detailed in the FCAC, such unequivocal assurances were repeated in every SEC filing through May, 2001[3]. ¶¶ 88, 101, 113, 126, 130, 148, 160, 166. In fact, as the Company knew, or was severely reckless in not knowing, Halliburton had potential liability of hundreds of millions of dollars, and was in litigation with various insurance carriers who were denying coverage.

Integration of Dresser Operations

In early 1998, Halliburton announced the $7 billion Dresser acquisition, assuring investors it was a "win," which would strengthen Halliburton's balance sheet and boost its "bottom-line" because Halliburton and Dresser were "an outstanding business and cultural fit." ¶ 8. Halliburton told investors the merger would result in the "strengthening [of Halliburton's] balance sheet," "lower costs" and "very significant savings . . . in excess of $1/4 billion" per year, *i.e.*, the "combination will be especially effective." ¶ 15. Thereafter, on September 13, 1999, Lesar told analysts and money managers at an energy conference that the Dresser merger would bring a $500 million annual benefit to the Company, up from the $250 million annual benefit the Company had previously stated would result from the acquisition. ¶ 115.

Halliburton continued to represent that the integration had been successful and would confer

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[3] Halliburton increased its accrual for asbestos by just $2 million in 3rd Q 00, $3 million in 4th Q 00 and $1 million in lst Q 01, resulting in accrued liabilities at March 31, 2001 of only $30 million while assuring analysts that Halliburton had "fully accrued" for all asbestos liabilities. ¶ 35.

substantial benefits to Halliburton's home line. For example, Halliburton's 1999 Annual Report assured investors that "[t]he merger with Dresser Industries is now behind us. Integrating the operations of the two companies . . . [has] been an important part of our transition to the future . . . . The potential rewards to our shareholders are vast." ¶ 21, 122. According to Cheney, Halliburton's stock was "one of the best investment opportunities." ¶¶ 21-22.

These positive but false statements inflated Halliburton's stock price to $52 by the Spring of 2000. *Id.* In fact, however, throughout the Class Period, there were ongoing and persistent problems with the integration of Dresser, costing the Company at least tens if not hundreds of millions of dollars.

PROPOSED CLASS REPRESENTATIVES

Lead Plaintiff AMS Fund proposes that it, along with Ben Alan Murphey, serve as Class Representatives. During the Class Period, Lead Plaintiff and proposed Class Representative AMS Fund purchased shares of Halliburton stock and, as of the end of the Class Period, suffered damages of approximately $71,000 as a result of Defendants' material misrepresentations and omissions. ¶ 54(a). AMS Fund, a charitable institution, has already expended substantial time and effort, and amply demonstrated its commitment to vigorously prosecute this litigation on behalf of the proposed Class. The AMS Fund has ably represented the Class by overseeing and communicating with appointed Lead Counsel, and keeping apprised of the ongoing developments in the case. Lead Plaintiff has undertaken an extensive investigation into Defendants' fraudulent schemes, and when former lead counsel sought approval of an inadequate settlement, AMS Fund, joined by

proposed Class Representative Ben Alan Murphey, objected to, and defeated that settlement.

During the Class Period, proposed Class Representative Ben Alan Murphey purchased shares of Halliburton stock, and, as of the end of the Class Period, suffered damages of approximately $11,000 as a result of Defendants' material misrepresentations and omissions. ¶ 54(f). Mr. Murphey filed his class action complaint in this action on March 9, 2005. Mr. Murphey has actively monitored this action through his communications with Special Counsel Neil Rothstein, and when former lead counsel sought approval of the inadequate settlement, Mr. Murphey joined in the AMS Fund in objecting to that settlement.

Mr. Murphey and AMS Fund stand ready, willing and able to perform the duties of a Class Representative, including testifying at depositions and responding to discovery requests.

ARGUMENT

A. Legal Standards for Class Certification Pursuant to Fed. R. Civ. Proc. 23

The party seeking certification bears the burden of proof and must demonstrate that the proposed class and its representative(s) satisfy the requirements of Rule 23(a) and one of the requirements of Rule 23(b). *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001), *clarified on rehearing en banc*, 279 F.3d 313 (5th Cir. 2002). Here Lead Plaintiff moves for certification under Rule 23(b)(3), in that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and

efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

On a motion for class certification "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2153 (1974); *accord Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311 (5th Cir. 2005) *citing Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("the strength of a plaintiff's claim should not affect the certification decision."). While the Fifth Circuit's recent opinion in *Oscar Private Equity Investment v. Allegiance*, 487 F.3d 261 (5th Cir. 2007) requires a showing of loss causation in order for a Lead Plaintiff to avail upon a fraud-on-the-market presumption of reliance, under *Allegiance* the inquiry is whether Plaintiff had offered "some empirically-based showing that the corrective disclosure was more than just present at the scene." *Id.* at 271.

A class action affords a single forum in which to litigate the same or similar claims, and affords an indispensable mechanism to conserve judicial resources. The Supreme Court, as well as courts throughout the country, have endorsed class actions in securities fraud claims. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("most of the plaintiffs would have no realistic day in court if a class action were not available."). A district court has great discretion in deciding whether certification is proper. *Vizena v. Union Pacific R. R. Co.*, 360 F.3d 496, 502 (5th Cir. 2004).

This case has all the elements of a certifiable, securities class action. The proposed Class is defined

as all purchasers of Halliburton common stock during the Class Period, excluding defendants, officers and directors of the Company, as well as their families.[4] The Class consists of tens, if not hundreds of thousands of investors who acquired Halliburton's stock over a 31-month period and were damaged by the same fraudulent schemes and false and misleading statements and omissions of material facts. Accordingly, as demonstrated below, certification is appropriate.

B. The Proposed Class Satisfies the Requirements of Rule 23(a)

Rule 23(a) sets forth four prerequisites for class certification: (1) The Class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Class; (3) the

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[4] In accordance with Local Rule 23.2, counsel provides the following additional information: Plaintiffs' counsel has agreed to advance the money to fund this action. Counsel anticipates providing notice to all class members for whom they are able to obtain a valid address by U.S. mail, and supplementing that notice with publication notice in a national newspaper such as the Wall Street Journal. As part of the Stipulation and Agreement of Settlement, filed on May 10, 2004, initial Lead Counsel estimated that the cost of such a notice program would be $150,000. Lead counsel believes that figure is a rough approximation of the cost of a notice program, and is in the process of trying to gather the information needed for a more precise estimate. Plaintiffs' counsel has been retained in this action on a contingency basis and should plaintiffs prevail in this action, counsel is entitled both to payment of attorneys fees and to reimbursement of advanced costs. Plaintiffs do not believe any discovery is necessary for the class certification hearing other than deposition of expert witnesses unless defendants raise factual defenses to class certification. Counsel believes the depositions can be conducted within a few weeks of service of all relevant expert reports.

claims or defenses of the representative parties are typical of the claims or defenses of the Class; and, (4) the representative parties will fairly and adequately protect the interests of the Class. Fed. R. Civ. P. 23(a). The requirements of Fed. R. Civ. P. 23(a) are commonly referred to as the "numerosity," "commonality," "typicality," and "adequacy", respectively. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

1. Numerosity

Numerosity is satisfied when a potential Class is so numerous that joinder of all members is impracticable. *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992). Because a reasonable estimate of the number of purported members satisfies the numerosity requirement, a precise numeration is not required. *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000) (Harmon, J.). In the Fifth Circuit, "the prerequisite expressed in Rule 23(a)(1) is generally assumed to have been met in class action suits involving nationally traded securities." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1039 (5th Cir. 1981).

The Class consists of those who purchased Halliburton's publicly traded securities during the Class Period. At the start of the Class Period, Halliburton had approximately 440.6 million shares outstanding, with members of the Class scattered throughout the United States. *See* Report ¶ 22. While the exact number of class members is presently unknown, and can be ascertained only through discovery, based on the Company's reported shares outstanding and trading volume during the Class Period, Lead Plaintiff estimates there are tens, if not hundreds of thousands of class members nationwide.

2. Commonality

To satisfy the commonality requirement, Lead Plaintiff must show that there are questions of law or fact common to the class. The "commonality" requirement is satisfied "when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997). Rule 23(a)(2) does not require perfect harmony throughout the class and the presence of some factual variations among class members' experiences will not defeat class certification. *In re Reliant,* 2005 U.S. Dist. LEXIS 9716, at *20. That some plaintiffs have different claims or claims that require some individualized analysis does not defeat commonality. *James v. City of Dallas*, 254 F.3d. 551, 570 (5th Cir. 2001).

This proposed Class satisfies the "commonality" requirement. At least the following issues of law and fact are common to the proposed Class Representatives and the Class:

(i) whether Defendants violated federal securities laws;

(ii) whether Defendants' undisclosed schemes, false statements and omissions of material facts misrepresented the business, financial and operational results and future performance of the Company;

(iii) whether Defendants acted willfully, knowingly, or recklessly in concealing their schemes and misrepresenting and omitting material facts;

(iv) whether the market price of the Company's common stock was artificially inflated during the Class Period due to Defendants' schemes, material

misrepresentations, deceptions and nondisclosures; and

(v) whether class members sustained economic loss causally connected to Defendants' misconduct, and if so, the proper measure of such damages.

In addition, all Class members were damaged by Defendants' "standardized conduct" during the Class Period. *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998). Defendants' fraudulent accounting schemes, and false and misleading statements and omissions to the market inflated the Company's stock price and injured class members in a uniform manner. ¶¶ 18-126. The proposed Class Representatives, like all members of the Class, purchased Halliburton shares based on the integrity of the market when defendants' misconduct inflated Halliburton's stock price. This common nucleus of facts and law unite all class members, irrespective of when and how many shares they purchased. Nothing more is required to show commonality under Rule 23(a)(2). *In re Reliant,* 2005 U.S. Dist. LEXIS 9716, at *20.

3. Typicality

"The test for typicality, like the test for commonality, is not demanding." *Lightbourn,* 118 F.3d at 426. "The court focuses on the legal and remedial theories of the named plaintiffs and the class members they seek to represent." *Henry,* 199 F.R.D. at 569. Typicality does not require that all claims must be identical. *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review,* 637 F.2d 1014, 1024 (5th Cir. 1981). "The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class

members have been injured by the same course of conduct." *Longden v. Sunderman,* 123 F.R.D. 547, 556 (N.D. Tex. 1988).

The claims of the proposed Class Representatives are typical of those of the class members. Defendants' common schemes and "standardized" course of wrongful conduct caused damage to class members who purchased shares at artificially inflated prices during the Class Period. The proposed Class Representatives, like all other class members, suffered economic losses from their transactions in Halliburton's stock when the artificial inflation was removed from the stock price through, *inter alia,* partial disclosures of adverse facts concerning the true financial state of the Company. ¶ 3. Simply put, the proposed Class Representatives' claims are typical under Rule 23(a)(3) because "the claims of named and unnamed plaintiffs have a common source and rest upon the same legal and remedial theories." *In re Reliant,* 2005 U.S. Dist. LEXIS 9716, at *22 (*citing Lehocky,* 220 F.R.D. at 500).

4. Adequacy

"The Court must find that class representatives, their counsel, and the relationship between the two are adequate to protect the interests of absent class members." *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). The adequacy requirement has three elements: (1) the chosen Class Representative cannot have antagonistic or conflicting claims with other members of the class; (2) the named representative must have sufficient interest in the outcome to ensure vigorous advocacy; and (3) designated counsel must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously. *Berger v. Compaq Computer Corp.*, 257

F.3d at 479-80. The proposed Class Representatives satisfy the "adequacy" requirements of Rule 23(a)(4).

There are no conflicts of interest between the proposed Class Representatives and the other members of the Class. The proposed Class Representatives will have to prove the same legal theory and standardized conduct as the absent class members to establish Defendants' liability. Further, there are no defenses unique to the proposed Class Representatives. Differences between the Class Representatives and the class members do not defeat adequacy unless these differences create conflicts between the representatives and the class members. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001). Here there is no such conflict.

An adequate representative must be willing to take an active role in and exercise ultimate control of the litigation in order to protect the interests of the absent class members. *Berger v Compaq Comp. Corp.*, 257 F.3d at 479. The proposed Class Representatives have demonstrated their interest and vigor by actively prosecuting this case. When the initial lead counsel proposed an inadequate settlement, the proposed Class Representatives joined in objecting to, and ultimately defeating, the settlement. Mr. Murphey has continued to monitor the case through consultation with Special Counsel Neil Rothstein.

Finally, the proposed Class Representatives have retained attorneys with considerable experience in complex litigation and securities class actions. The proposed Class is represented by Boies, Schiller & Flexner LLP, whose attorneys have been appointed as Class Counsel in numerous class actions, including

securities class actions.[5] The firm resume of Boies, Schiller & Flexner LLP evidences its ability to vigorously prosecute this action with the guidance and assistance of the proposed Class Representatives. *See App.* at 558 - 586.

C. This Action Satisfies Rule 23(b)(3)

In addition to satisfying the requirements of Rule 23(a), the proposed Class Representatives must also meet the requirements of Rule 23(b)(2) or (3). Lead Plaintiff seeks certification under Rule 23(b)(3), which states that an action may be maintained as a class action if:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id. The proposed Class satisfies both the predominance and superiority requirements.

1. Common Questions of Law or Fact Predominate

To satisfy the predominance requirement, Lead Plaintiff must establish that issues that are subject to generalized proof, and thus applicable to the Class as a whole, predominate over issues that are subject only to individualized proof. *See Alison v. Ciigo Petroleum Corp.*, 151 F.3d 402, 419-420, 425 (5th Cir.

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[5] On February 23, 2007, this Court approved Lead Plaintiff's selection of Boies, Schiller & Flexner LLP ("Boies Schiller") as Lead Counsel.

1998). Rule 23(b)(3)'s predominance requirement is "more stringent" than the commonality requirement of Rule 23(a) but, in analyzing predominance, courts generally focus on liability, therefore "predominance is a test readily met in certain cases alleging consumer or securities fraud or antitrust violations." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Common issues, including those identified in section B.2. above, predominate in this action. Defendants' liability arises from their fraudulent accounting schemes and dissemination of materially false and misleading statements and omissions during the Class Period. *See In re Bank One Sec. Litig.*, No. 00 CV 0767, 2002 U.S. Dist. LEXIS 8709, at *22 (N.D. Ill. May 9, 2002) ("The issues of law and fact that flow from Defendants' alleged misstatements and omissions predominate over any individual issue."). Each member of the Class purchased Halliburton stock at prices artificially inflated as a result of Defendants dissemination of false and misleading statements and, because the same set of operative facts and the same issues of proximate cause apply to each class member, common questions of law and fact predominate and a class action is appropriate. *Durrett v. John Deere Co.*, 150 F.R.D. 555, 560 (N.D. Tex. 1993). Indeed, the only possible individual issues in this case are reliance and damages, the latter of which courts uniformly hold, absent a conflict that is imminent and "at the very heart of the suit", will not defeat class certification in securities cases. *Kalodner v. Michaels Stores, Inc.*, 172 F.R. D. 200 (N.D. Tex. 2007) (internal citations omitted).

2. The Issue of Reliance Will Not Defeat Certification

Lead Plaintiff relies on the fraud-on-the-market theory recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) for of a class-wide presumption of reliance. The fraud-on-the-market presumption provides that:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. at 247.

Under the Fifth Circuit's recent interpretation of *Basic*, in order to avail upon the fraud-on-the-market presumption, plaintiffs must show that Halliburton stock traded on an efficient market and that the corrective disclosure affected the stock price. *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261. The *Allegiance* court made clear however, that plaintiffs need not quantify damages, or prove that some percentage of the drop was attributable to the corrective disclosure, but need only offer some empirically based showing that "the corrective disclosure was more than just present on the scene." *Id.* at 271. Once the proposed Class establishes entitlement to the fraud-on-the-market presumption of reliance, Defendants can rebut that presumption only "by showing that the nondisclosures did not" affect the Halliburton's stock price. *Fine v Am. Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990).

a. Halliburton's Common Stock Traded in an Efficient Market

The court in *Unger v Amedisys*, 401 F.3d 316 (5th Cir. 2005), expanding upon the five factors recognized by *Cammer v. Bloom*, 711 F. Supp. 1276 (D.N.J. 1989), identified eight factors for determining market efficiency: (1) average weekly trading volume expressed as a percentage of total outstanding shares; (2) number of securities analysts following and reporting on the stock; (3) extent to which market makers and arbitrageurs trade in the stock; (4) Company's eligibility to file SEC registration Form S-3 (as opposed to Form S- or S-2); (5) existence of empirical facts "showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price;" (6) Company's market capitalization; (7) bid-ask spread for stock sales; and (8) float, the stock's trading volume without counting insider-owned stock. *See also*, *Bell*, 422 F.3d at 313. Under each of these factors it is clear that the market for Halliburton stock was efficient. Report, ¶¶ 9-24.

Factor 1: Trading Volume

Halliburton's stock traded at an average weekly volume of over 16,796,502 shares during the Class Period. Report, ¶ 22. Weekly trading volume for Halliburton was on average, 3.8% of the outstanding shares, significantly more than the 2% volume courts have found sufficient to raise a "strong presumption" of market efficiency for stocks traded on the NASDAQ, and more than the 1% volume courts have deemed sufficient for stocks traded on the NYSE. Report, ¶ 21, fn.16.

Factor 2: Analyst Coverage

Securities analysts from several firms covered and reported on Halliburton during the Class Period.[6] Such expansive analyst coverage is an indicator of market efficiency. Report, ¶ 27.

Factor 3: Opportunity for Arbitrage

For stocks traded on the NYSE, the function of market makers – that is, to ensure the competitive, orderly and efficient market for securities, is performed by a single specialist. Report, ¶ 28. Specialists achieve this function by performing four critical roles: (1) as an auctioneer, continually showing the best bids and offers, and maintaining order in the crowd; (2) as an agent for SuperDot orders (direct electronic routing system to and from the trading floor) as well as for brokers; (3) as a catalyst for order flow by informing interested parties of items available in the market; and (4) as a principal, where the specialist has an obligation to enter into a transaction using its own capital if there is a willing buyer or seller with no counterparty in the marketplace. Specialists thus facilitate continuous trading during market hours. Report, ¶ 29. As with the market makers, the role of the specialist assures the existence of arbitrage opportunities. Report, ¶ 31. As evidenced by the level

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[6] Halliburton was covered by at least ABN Amro Bank N.V. U.S.A; A.G. Edwards & Sons, Inc.; Argus Research Corporation; Bear, Stearns & Co., Inc.; Brown Brothers Harriman & Co.; Capital One Southcoast, Inc; CIBC World Markets Corp.; Deutsche Bank Securities Inc.; ING Financial Markets USA; Jefferies & Company, Inc.; Johnson, Rice & Co.; Painewebber Inc.; PNC Institutional Investment Service; Prudential Equity Group, Inc.; RBC Capital Markets; Sanford C. Bernstein & Co., Inc.; Smith Barney Citigroup; Southwest Securities; Stephens Inc.; SunTrust Robinson Humphrey Capital Markets; UBS (US); and Wachovia Securities.

of short interest, the short-selling of Halliburton's stock was not constrained during the Class Period, and arbitrage opportunities could be exploited, which is evidence in support of market efficiency. Report, ¶¶ 32-37.

Factor 4: Form S-3 Eligibility

The Company was eligible to file an SEC registration Form S-3 during the Class Period. Indeed, Halliburton filed an amended Form S-3 before the Class Period, on September 25, 1998, and during the Class Period, filed a Form S-3 on December 3, 2001. Thus, this factor supports a finding of market efficiency. Report, ¶¶ 38-39.

Factor 5: Cause and Effect Relationship

The cause and effect relationship between unexpected information released to the market and movement of the stock price is the essence of an efficient market and the foundation for the fraud-on-the-market theory. *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 508 (1st Cir. 2005) (stating that the cause and effect relationship between pricing and new information is implicit in an efficient market). The movement of Halliburton's stock price during the Class Period when unexpected news was disseminated shows that Halliburton's stock traded in an efficient market. Report, ¶¶ 40-46.

Factor 6: Market Capitalization

During the Class Period, the market capitalization for Halliburton stock ranged from $5.1 billion, on the last day of the Class Period, to a Class Period high of $24 billion. Report, ¶ 47. Even at the lower end of this range, Halliburton's market capitalization supports a finding that the market for Halliburton stock was efficient. Report, ¶ 48.

Factor 7: Bid/Ask Spread

Bid/ask spreads are a measure of transaction costs; low transactions costs indicate that arbitrage opportunities can be exploited readily. Report, ¶ 49. During the Class Period, the average bid/ask spread as a percentage of the mean bid/ask price for Halliburton was 0.22%; the average for Halliburton's competitors was 0.36%. Such a low bid/ask spread indicates that arbitrage opportunities could be exploited, which is evidence of market efficiency. Report, ¶ 50.

Factor 8: Public Float

Courts have held that a large float percentage (percentage of shares held by the public) can be an indicator of market efficiency. *Unger*, 401 F.3d at 323; *Bell*, 422 F.3d 307 and 313, n.10. During the Class Period, there were between 429.0 million and 445.5 million shares of Halliburton stock outstanding, of which approximately 99% were held by the public. This large public float indicates an efficient market. Report, ¶ 51.

Each of the *Unger* factors supports the conclusion that Halliburton stock traded in an efficient market. In addition, Halliburton's listing on a national exchange; the presence of sophisticated investors; and, the coverage of Halliburton by wire services, financial press, and general media also support a finding of market efficiency. Report, 11 52-64.

b. Loss Causation

The Fifth Circuit, in *Oscar Private Equity Investment v. Allegiance*, recently held that to avail itself of the benefits of the fraud-on-the-market presumption of reliance at the class certification stage, the Lead

Plaintiff must show loss causation. *Id.* at 269. More specifically, the *Allegiance* court found that, where there are multiple negatives, not all of which are alleged to be culpable, the Lead Plaintiff has the burden of showing that it was the culpable statement(s) that caused a significant amount of the decline in the stock price:

> when unrelated negative statements are announced contemporaneous of a corrective disclosure, the plaintiff must prove " that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline.

Id. at 270. In clarifying this burden, *Allegiance* affirmed that, at this stage, the Lead Plaintiff need not quantify damages:

> While counsel is correct that *quantification* of damages is presently unnecessary—*i.e.* proof that some percentage of the drop was attributable to the corrective disclosure—the plaintiffs must, in order to establish loss causation at this stage, offer some empirically-based showing that the corrective disclosure was more than just present at the scene.

Id. at 271. (Emphasis original).

In addressing the dissent's concerns that *Allegiance* does not provide adequate guidance as to "what form such proof might take[]", the court reiterated that such proof could come in the form of an events study and leaves open the possibility of other "options, subject to scrutiny in the first instance by opposing experts and the district courts." *Id.* at 265, n.22. *Allegiance* further suggests that such

an event study could be based on "public data and public filings." *Id.* at 267. *Allegiance* confirms that analysts' opinions may be evidence of the cause of a stock decline, but will not be sufficient to carry Lead Plaintiff's burden "without reference to any post-mortem data they have reviewed or conducted." *Id.* at 271. In some circumstances, it is sufficiently evident that the stock was driven down by the culpable disclosure that no empirical analysis is necessary to disaggregate the effect of the culpable and the non-culpable disclosures. *See Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004) (disclosure that revenue would be 66% below estimates sufficient to establish loss causation notwithstanding simultaneous release of non-culpable news).

Lead Plaintiff here has satisfied the *Allegiance* burden through the submission of the Nettesheim expert report. In preparation of the Report, Nettesheim reviewed all publicly available, relevant information for the Class Period, and determined that there were 24 instances of statistically significant declines in the company-specific return on Halliburton stock during the Class Period. Of those instances, eleven days corresponded to the release of culpable news, and only one of those days, January 5, 2000, involved multiple pieces of news, some culpable and some not.

As discussed in the Nettesheim Report, there are six instances (October 5, 1999, June 29, 2001, August 9, 2001, October 31, 2001, December 4, 2001 and December 7, 2001) in which there was but one piece of news that caused a statistically significant decline in the company-specific return on Halliburton stock during the Class Period. Report, ¶¶ 84, 115, 119, 125. As explained in the Report, the company-specific

return nets out the change in the price attributable to changes in the relevant index and the market as a whole. Report, ¶ 81. As there is no other news or information that can explain the company-specific stock price decline on these days, as Nettesheim concluded, the decline in the price of Halliburton stock could only have been caused by the partial disclosure of the single piece of culpable news, and as to these instances, Lead Plaintiff has satisfied its burden of establishing loss causation. Report, ¶ 87, 118, 121, 133. *See Allegiance*, 487 F.3d. at 267 (a greater showing of loss causation is warranted in the instance of simultaneous disclosure of multiple pieces of negative news).

In addition, there are two instances (October 25, 2000 and December 22, 2000) in which there is more than one negative piece of news, all alleged to be culpable. Report, ¶¶ 93, 106. It is Lead Plaintiff's burden to attribute the cause of a decline among culpable and non-culpable negative statements. *Allegiance* does not require a Lead Plaintiff to attribute the cause of a decline among multiple culpable negative statements. *See Allegiance*, 487 F.3d at 265 ("we address here only the simultaneous disclosure of multiple negatives, not all of which are alleged culpable."). Accordingly, even without more, Lead Plaintiff has carried its burden of showing loss causation as to these instances.

And even though doing so is not required by *Allegiance,* Nettesheim has opined on the significance of each piece of news associated with this statistically significant decline in the price of Halliburton stock for these instances, utilizing the event study, and an empirical analysis of all of the information surrounding the news, including the analyst reports

and the information utilized by those analysts. For example, after the market closed on Thursday, December 21, 2000, Halliburton pre-announced fourth-quarter earnings, formally unveiling the restructuring of its engineering and construction units and stated that it planned to take a charge of $120 million in the fourth quarter. Report ¶ 106. Of the $120 million special charge, $95 million (or 79%) was related directly to the cost overruns alleged by Lead Plaintiff, with the remaining $25 million related to the restructuring necessitated by the ongoing problems with the Dresser integration. Both of these "negatives" are culpable under the allegations of the FCAC.

This disclosure, and the analyst reports that disseminated the information, caused a statistically significant decline in Halliburton's share price. On December 22, 2000, Halliburton's stock price declined 2.7%, to close at $36.00. The company-specific return that day was negative 3.9%. Although the industry was down that day, the overall market was up more than 3.0%. While not required under *Allegiance,* Nettsheim opines that the significant cause of this decline was due to the "surprise" charge of $95 million to cover cost over runs. Report ¶¶ 106-111.

Finally, there is one instance (January 5, 2000), in which there is a mix of culpable and non-culpable negatives on a day in which there was a statistically significant decline in the company-specific return on Halliburton stock. Report ¶ 88. For this day, Nettesheim performed a rigorous empirical analysis whereby she 1) used econometric analysis to determine how much of the day's stock return is attributed to company-specific news and events, and how much of the day's stock return can be attributed to market

and industry news and events; (2) examined all of the news surrounding the day on which the alleged disclosure was made to determine what the company said and what market participants said; 3) reviewed all of the analyst reports surrounding the day on which the alleged disclosure was made to determine how the company's statements or communications impacted market participants' assessments of the company's value; 4) conducted an empirical analysis of the information on and surrounding the disclosure date to determine what specific news items were important on the day of the alleged disclosure; and 5) conducted an empirical analysis to determine the relative importance of different pieces of news with respect to impact on stock valuation.

On January 5, 2000, Halliburton's stock price declined 4.38%, from $38.50 to $36.81. The company-specific return that day was negative 4.3%. Report ¶ 88. Nettesheim opines that a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger. Report ¶ 92.

3. The Class Action is Superior to Other Available Methods For the Fair and Efficient Adjudication of This Action

The matters pertinent to finding superiority include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4)

the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. Pro. 23(b) (3). Applying each of these four factors shows that class certification in this case is both useful and necessary.

First, with the possible exception of the Laborers National Pension Fund, Plumbers and Pipefitters National Pension Fund, and City of Dearborn Heights Act 345 Police & Fire Retirement System, who sought to be appointed as Lead Plaintiffs, there has been no indication that any other Class Members would prefer to try his or her own case. Second, other than the consolidated cases, there are no known cases concerning this controversy. Third, it "is desirable that securities fraud cases involving a large number of plaintiffs with small individual claims proceed as class actions." *Keasler v. Natural Gas Pipeline Co.,* 84 F.R.D. 364, 368 (E.D. Tex. 1979); *Longden,* 123 F.R.D. at 551. Finally, Lead Counsel knows of no exceptional difficulties regarding trying this case as a class action. There will be no difficulties in managing the class because liability will be determined by common evidence and misstatements and omissions, and loss causation will be determined through common effect of disclosures on the stock price.

In such circumstances, class representation is the only way to afford relief to those plaintiffs whose claims are too small to permit them to bring individual suits, and is superior to other available methods for the fair and efficient adjudication of this controversy *Henry,* 199 F.R.D. at 573; *see also Levitan v. McCoy,* No. 00 C 5096, 2003 U.S. Dist. LEXIS 5078, at *6 (N.D. Ill. Mar. 28, 2003) ("securities fraud cases are uniquely situated to class action treatment since the claims of individual investors are often too small to merit separate lawsuits.").

CONCLUSION

For the reasons set forth herein, an Order should be entered (i) certifying this action as a class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure; (ii) appointing AMS Fund and Ben Alan Murphey as Class Representatives; and (iii) appointing Lead Counsel, Boies, Schiller & Flexner LLP as Class Counsel.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURTNORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Master Docket No. 3:02-CV-1152-M

CLASS ACTION

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY, et al.,

Defendants.

This Document Relates to: ALL ACTIONS.

APPENDIX IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

TABLE OF CONTENTS

[TABLES INTENTIONALLY OMITTED]

REPORT OF JANE D. NETTESHEIM
September 17, 2007

I, JANE D. NETTESHEIM, declare:

I. Background and Qualifications

1. I am a financial economist and vice president of Stanford Consulting Group, Inc. ("SCG"), which provides research, consulting, and expert services in financial economics and related areas to clients, including government agencies, corporations, and law firms. I have a B.A. in biology from the University of Colorado and an M.B.A. from the University of Hawaii, and I completed the coursework in the Ph.D. program in finance at the London Business School, University of London. My curriculum vitae and the list of the expert testimony I have provided by deposition or at trial are attached as Exhibit 1. The fees charged for this project are the standard hourly rates of employees of SCG. My current hourly rate is $475.

2. I have served as a consultant and expert in the areas of market efficiency, materiality, loss causation and the calculation of damages in many securities class actions. I have examined the relationship between stock price movements and changes in market and industry indices for a number of stocks in a variety of industries. I also have examined the relationship between information releases and changes in stock prices for a number of companies in a variety of industries. I have analyzed various data sources for information about shareholdings and trading activity for different types of market participants.

II. Scope of Engagement

3. Counsel for Lead Plaintiff has asked me to examine and opine on the efficiency of the market for the common stock of Halliburton Company, Inc.

("Halliburton" or the "Company")[1] during the period June 3, 1999, through December 7, 2001, inclusive (the "Class Period").[2] I have also been asked to conduct an analysis of materiality and loss causation pertaining to the alleged misrepresentations and omissions in this matter, and to address the causes of the decline in Halliburton's stock price during the Class Period.[3]

4. The opinions offered in this Report are subject to refinement or revision based on continuing analysis of the documents and materials listed below, as well as new or additional information which may be provided to or obtained by me in the course of this matter. I expect to review additional information and documents, including information and documents that may become available through discovery and the reports and depositions of other expert witnesses.

III. Bases for Opinions

5. My opinions expressed in this Report are based upon my professional knowledge and experience, as well as on a review of documents and information relevant to this matter. Exhibit 2 lists the materials I have obtained from Counsel or other identified sources. The materials I have relied upon in forming my opinions in this Report are identified in this Report and its Exhibits. Such documents and information are

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[1] Herein, "Halliburton's stock" refers to the common stock of Halliburton.

[2] During the Class Period, Halliburton's common stock traded on the New York Stock Exchange ("NYSE") under the ticker "HAL."

[3] Because discovery is just beginning in this action, this analysis is preliminary and based on the public information available to me at this time. I assume that the allegations outlined in the Complaint are true.

typically relied upon by financial experts in securities class actions or by financial economists in their research. I reserve the right to modify or supplement my opinions expressed herein in the event that further information becomes available to me.

IV. Summary of Opinions

6. Based on my review of the evidence in this matter and analysis of data specific to Halliburton and its stock, I conclude that the market for Halliburton's stock during the Class Period was open, developed, and efficient.

7. Based on my review of the evidence in this matter and analysis of data and information specific to Halliburton during the Class Period, I conclude that:

- A significant part of the decline in Halliburton's stock price during the Class Period was caused by disclosures that Halliburton's exposure to liability in asbestos litigation was far larger than previously revealed to the public. Had Halliburton disclosed reasonable estimates of its asbestos exposure—that Lead Plaintiff alleges could have been and should have been disclosed earlier—Halliburton's stock price would have traded at prices materially lower than prices at which it did trade during the Class Period.
- A significant part of the decline in Halliburton's stock price during the Class Period was caused by disclosures related to Halliburton's representations and omissions concerning the condition and success of its engineering and construction operations related to large overseas fixed-price/lump sum contracts and

the benefits resulting from its merger with Dresser Industries, Inc. ("Dresser"). Had Halliburton 1) not included unapproved claims in its reported revenues for certain quarters in 1998, 1999 and 2000—that Lead Plaintiff alleges Halliburton should not have included during the Class Period; and 2) disclosed that it was not going to realize the benefits it had originally anticipated from the Dresser merger—that Lead Plaintiff alleges could have and should have been disclosed earlier—Halliburton's operating income would have been lower for certain quarters and for the years 1998, 1999 and 2000, and Halliburton's stock price would have traded at prices materially lower than prices at which it did trade during the Class Period.

8. The misrepresentations and omissions alleged by Lead Plaintiff caused Halliburton's stock price to be inflated during the Class Period as evidenced by the partial disclosures during the Class Period. Those disclosures revealed information about Halliburton's financial condition, which Lead Plaintiff alleges was previously misrepresented and/or omitted by Defendants, that caused the prices of Halliburton's stock to decline.

V. Market Efficiency: Securities prices in efficient markets reflect the market's consensus as to fair value given all publicly available information at the time of purchase or sale

9. Over the past thirty years, the efficient capital market hypothesis ("ECMH") has risen to a prominent position in financial and economic theory. In its most commonly held form—known as "semi-strong"—the

ECMH states that the securities markets incorporate all publicly available information. This hypothesis has been empirically validated in numerous studies.[4] The ECMH also has stood up against its critics; while anomalies have occurred in financial markets, they are random and do not allow for trading strategies that would create abnormal profits.[5, 6]

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[4] *See, e.g.*, Eugene F. Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work," *Journal of Finance*; Volume 25, Issue 2; May, 1970; pp. 383-417. In this article, Fama provides an overview of a number of studies supporting the efficiency of capital markets.

[5] Fama, Eugene F., "Market Efficiency, Long-term Returns, and Behavioral Finance," *Journal of Financial Economics* Vol. 49, 283-306 (1998). As Fama states: "Consistent with the market efficiency hypothesis that the anomalies are chance results, apparent overreaction to information is about as common as underreaction, and post-event continuation of pre-event abnormal returns is about as frequent as post-event reversal. Most important, consistent with the market efficiency prediction that apparent anomalies can be due to methodology, most long-term return anomalies tend to disappear with reasonable changes in technique."

[6] Malkiel, Burton G., "The Efficient Market Hypothesis and Its Critics," *Journal of Economic Perspectives* Vol. 17, 59- 82 (Winter 2003). Malkiel writes "Before the fact, there is no way in which investors can reliably exploit any anomalies or patterns that might exist. . . . [T]hese patterns are not robust and dependable in different sample periods, and some of the patterns based on fundamental valuation measures of individual stocks may simply reflect better proxies for measuring risk. . . . Many of the predictable patterns that have been discovered may simply be the result of data mining." He further quotes Richard Roll, an eminent academic financial economist and portfolio manager, "I have personally tried to invest money, my client's money and my own, in every single anomaly and predictive device that academics have dreamed up. . . . I have attempted to exploit the so-called year-end anomalies and a whole variety of strategies supposedly documented by academic research. And I have yet to

10. The fraud-on-the-market theory relies on informational efficiency, specifically that the price of the security reflects publicly available information. For defendants' statements to have impacted stock prices, the market must be informationally efficient. Informational efficiency also has been cited recently by Courts as an appropriate measure of market efficiency in certain securities cases.[7]

11. In an efficient market, investors can rely on the market price as reflecting all publicly available information. In other words, the price at which an investor can buy or sell a security is the market's consensus as to that security's fair value given all of the publicly available information at the time of purchase or sale.

12. The seminal Rule 10b-5 case of the 1980's, *Basic Inc. v. Levinson*, clarified that because most publicly available information is reflected in the market price, an investor's reliance on any public material misrepresentations may be presumed for purposes of a Rule 10b-5 action.

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material

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make a nickel on any of these supposed market inefficiencies . . . a true market inefficiency ought to be an exploitable opportunity. If there's nothing investors can exploit in a systematic way, time in and time out, then it's very hard to say that information is not being properly incorporated into stock prices."

[7] *See In re PolyMedica Corp. Securities Litigation*, No. 05- 1220, slip op. (1st Cir. Dec. 13, 2005); *See also In re Xcelera.com Securities Litigation*, No. 05-1221, slip op. (1st Cir. Dec. 13, 2005)

> information regarding the company and its business. . . .
>
> Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.[8]

13. The fraud-on-the-market theory permits investors in an efficient market to rely on the market price, even though that price may contain the effects of misrepresentations or omissions. The *Basic* court noted:

> In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value.[9]

14. A direct empirical test of market efficiency is to examine price responsiveness to the release of new and material information. If the security price responds quickly, the response supports a conclusion that the market for the security is efficient. As an indirect test of efficiency, one can examine whether market conditions promote efficiency. Case precedent exists on such indirect indicators of market efficiency. The *Cammer* Court found that for the market for a

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[8] *Basic Inc. v. Levinson*, 485 U.S. 224 p. 241-242 (1988). Quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986).

[9] *Basic Inc. v. Levinson*, 485 U.S. 224 at 244 (1988). Quoting *Peil v. Speiser*, 806 F.2d 1154, 1161 (3d Cir. 1986).

particular security to be efficient, the following two criteria should be met:[10]

- it should trade in an open market in which anyone, or at least a large number of persons, can buy or sell;
- it should trade in a developed market which has a relatively high level of activity and frequency, and for which trading information (*e.g.*, price and volume) is widely available. It usually, but not necessarily, has continuity and liquidity (the ability to absorb a reasonable amount of trading with relatively small price changes).

15. Specifically, the *Cammer* Court identified five factors that may be considered in determining whether a market for a stock is efficient and, therefore, whether security prices respond quickly to new relevant information. These factors include both a direct empirical test, as well as indirect indicators, of the efficiency of a market for a security. The *Unger* Court and the *Bell* Court also considered these five factors in evaluating market efficiency.[11] In forming my opinion, I have considered each of the five *Cammer / Unger / Bell* Factors as applied to the market for Halliburton stock:[12]

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[10] *Cammer v. Bloom*, 711 F. Supp. 1264, 1276 n. 17 (D.N.J. 1989): "Definitions of the key terms which underlie the fraud on the market theory were offered by commentators Bromberg & Lowenfels, 4 *Securities Fraud and Commodities Fraud*, §8.6 (Aug.1988)."

[11] *Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 311 (5th Cir.2005).

[12] *Cammer*, 711 F. Supp. pp. 1285-87.

i. whether the security trades at a large weekly volume;

ii. whether analysts follow and report on the security;

iii. whether the security has market makers and whether there is a potential for arbitrage activity;

iv. whether the company is eligible to file Securities and Exchange Commission ("SEC") Form S-3; and

v. whether there are empirical facts showing a cause-and-effect relationship between unexpected corporate events or financial information releases, and an immediate response in the security's price.

16. The Cammer/Unger/Bell factors address informational efficiency, *i.e.*, whether the market conditions exist such that when material, new, unexpected information is released, the price of the company's security changes to reflect the new mix of public information.

17. I also have considered additional factors that were considered by the *Unger* and *Bell* Courts (as well as the *Krogman* Court) in evaluating market effciency:[13]

vi. the Company's market capitalization;

vii. the bid/ask spread for stock sales; and

viii. the security's float, or shares outstanding excluding insider-owned stock.

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[13] *Unger*, 401 F.3d 316 at 323, HN10, *Bell*, 422 F.3d 307 at 313, n10; *Krogman v. Sterritt* 202 F.R.D. 467 (N.D. Tex. 2001) pp. 474, 478; *See also, O'Neil v. Appel* 165 F.R.D. 479 (W.D. Michigan 1995) at 503.

18. In addition to the factors discussed above, I have considered the following factors which have been addressed in the economic literature, and/or have been considered by Courts:

ix. the principal exchange on which the security was listed and traded;

x. institutional ownership of the security; and

xi. news coverage and dissemination of information by news sources pertaining to the Company and its securities during the Class Period.

19. Consideration of the *Cammer / Unger / Bell* factors (the first five factors discussed below), the *Unger / Bell* factors (factors six through eight discussed below), and these additional factors (factors nine through eleven discussed below) supports my conclusion that the market for Halliburton stock during the Class Period was informationally efficient.[14]

VI. Application of the Cammer/Unger/Bell Factors and Additional Factors as Indicia of the Efficiency of the Market for Halliburton's Stock

A. Cammer/Unger/Bell Factor 1: Weekly Trading Volume

20. A market is liquid if investors can trade a large number of shares on demand and, absent new information, an individual investor can buy and sell

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[14] *See also, Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, — F.3d —, No. 05-10791, 2007 WL 1430225 (C.A.5 May 16, 2007), FN42. Here, Judge Higginbotham refers to the *Cammer / Unger / Bell* Factors and the *Unger / Bell* Factors as the usual indicia of market efficiency, citing *Bell*.

without affecting the price. The high level of trading activity associated with trading in Halliburton's stock during the Class Period indicates that Halliburton's stock traded in a liquid market. High trading volume generally indicates that there is sufficient interest in the company and its stock such that analysts will conduct research and report their analysis to market participants. Liquidity and high trading volume also allows investors to quickly buy and sell shares when their assessments about the value of a company's stock have changed.

21. According to one authority, "turnover measured by average weekly trading of 2% or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; 1% would justify a substantial presumption."[15, 16]

22. During the Class Period, the average weekly reported trading volume for Halliburton's stock was

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[15] *Cammer* at 1293, citing Bromberg.

[16] The *Cammer* Court examined a stock that traded on the NASDAQ; Halliburton common stock traded on the NYSE during the Class Period. On the NASDAQ, a dealer is on one side of every transaction. When an investor sells one share on the NASDAQ, it is sold to a dealer and a transaction of one share is reported; then another investor buys that same share from the same dealer, and it is reported as another transaction of one share. Only one share has changed hands between the two investors, but trading volume of two shares has been reported. All else being equal, the same share trade on the NYSE would be reported as trading volume of one share. The *Cammer* Court's benchmark of average weekly trading turnover applies to stocks trading on the NASDAQ. All else being equal, as a result of the "double-counting" on NASDAQ, a benchmark of average weekly trading turnover of 2% for a NASDAQ traded stock would be 1% for a NYSE traded stock.

16,796,502 shares. (See Exhibit 3 for the daily reported closing prices and volume of Halliburton's stock, and Exhibit 4 for a summary of weekly trading of Halliburton's stock.) Halliburton's shares issued and outstanding totaled approximately 440.6 million shares at the start of the Class Period and approximately 429.4 million shares at the end of the Class Period. (See Exhibit 5 for data on shares outstanding for Halliburton.) Weekly trading volume for Halliburton was, on average, 3.8% of shares outstanding.

23. The annualized turnover ratio is the annual reported trading volume divided by the number of shares outstanding. Total trading volume of Halliburton's stock during the Class Period was 2.187 billion shares, compared to 429.4 million shares outstanding at the end of the Class Period. This is an annualized turnover ratio (share volume during the Class Period divided by shares outstanding divided by the time period in years) of 202.7%. In 1999, 2000 and 2001, the average annualized turnover ratio for NYSE listed stock was 78%, 88% and 94 %, respectively.[17]

24. Given the volume of trading relative to the number of shares outstanding, Halliburton's stock experienced high weekly trading volumes and annualized turnover ratio. Halliburton's high trading volume indicates that the market for Halliburton's stock was efficient during the Class Period.

B. *Cammer/Unger/Bell* Factor 2: The Number of Securities Analysts Following and Reporting on Halliburton

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[17] NYSE 2001 Fact Book.

25. Securities analysts research and report to investors on the financial condition and prospects of a covered company. In conducting their research, analysts typically have greater resources available to them than do individual investors. Analysts are conduits to the market for information collected from management from on-site visits, conference calls accompanying key company announcements, and other contacts with senior management. Analysts can channel new information to the market rapidly through their published reports, online reporting services such as First Call, and alerts given to clients and other employees of the same investment firm. Analysts thus facilitate the dissemination of new information to investors and share price reaction to new information.

26. During the Class Period, securities analysts from numerous firms reported on Halliburton, including, for example: ABN Amro Bank N.V. U.S.A; A.G. Edwards & Sons, Inc.; Argus Research Corporation; Bear, Stearns & Co., Inc.; Brown Brothers Harriman & Co.; Capital One Southcoast, Inc; CIBC World Markets Corp.; Deutsche Bank Securities Inc.; ING Financial Markets USA; Jefferies & Company, Inc.; Johnson, Rice & Co.; Painewebber Inc.; PNC Institutional Investment Service; Prudential Equity Group, Inc.; RBC Capital Markets; Sanford C. Bernstein & Co., Inc.; Smith Barney Citigroup; Southwest Securities; Stephens Inc.; SunTrust Robinson Humphrey Capital Markets; UBS (US); and Wachovia Securities. Exhibit 6 contains a

list of analyst reports for Halliburton issued during the Class Period.[18]

27. The large number of analysts reporting on Halliburton and analysts' reports published about Halliburton during the Class Period supports my conclusion that there was an efficient market for Halliburton's stock during that time.

C. *Cammer/Unger/Bell* Factor 3: The Number of Market Makers in Halliburton's Stock

28. This third *Cammer / Unger / Bell* factor applies directly to stocks traded on the NASDAQ because that exchange uses market makers to facilitate market efficiency. The NYSE, where Halliburton stock was traded prior to and during the Class Period, uses specialists to facilitate an orderly and efficient market for each security. As there is but one specialist for NYSE listed stocks, rather than look at the number of market makers, I have examined the role of the specialist as well as arbitrage opportunities for Halliburton's stock. Market makers and specialists enable investors to trade promptly upon the arrival of new relevant information, and thereby new information can be rapidly reflected in securities prices.

29. The NYSE assigns one dealer, known as the specialist, to each security traded on the NYSE. These

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[18] Exhibit 6 contains a list of 397 reports that are available from Thomson Research (www.investext.com) from a search of "Halliburton CO" in the "Company" field, and from Reuters from a search of "HAL" in the Primary Ticker (Exhibit 6 excludes duplicative reports between the two sources). This is only a partial list of analyst reports on Halliburton. Several firms, *e.g.*, Merrill Lynch and Goldman Sachs, do not make their analysts' reports available through public databases.

specialists are independent companies in corporate or partnership structures whose responsibilities require them to maintain a fair, competitive, orderly and efficient market for the securities assigned to them. Specialists achieve this function by performing four critical roles: (1) as an auctioneer, continually showing the best bids and offers, and maintaining order in the crowd; (2) as an agent for SuperDot orders (direct electronic routing system to and from the trading floor) as well as for brokers; (3) as a catalyst for order flow by informing interested parties of items available in the market; and (4) as a principal, where the specialist has an obligation to enter into a transaction using its own capital if there is a willing buyer or seller with no counterparty in the marketplace. Specialists thus facilitate continuous trading during market hours.[19]

30. Halliburton's reported specialist during the Class Period was LaBranche & Co. LLC ("LaBranche"). According to their website:

> [LaBranche] is one of the largest Specialists in equity securities listed on the New York and American Stock Exchanges. As a Specialist, we play an integral role in both the NYSE and the AMEX floor-based trading auction model by acting as the exclusive broker (*i.e.*, agent) or market-maker (*i.e.*, principal) in our portfolio of listed company stocks and options. The Specialist facilitates all buying and selling of securities of the companies it represents by bringing timely

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[19] The Fifth Circuit has certified a class of purchasers of common stock traded on the NYSE. *See, e.g., In Re Enron Corporation Securities § Derivative & "ERISA" Litigation*, Civil Action Number H-01-3624 Consolidated Cases.

> information, critical expertise, and needed liquidity to the forefront of the auction market place.[20]

31. The third *Cammer/Unger/Bell* factor also addresses the existence of arbitrageurs, generally understood to be sophisticated investors who can act rapidly to take advantage of pricing discrepancies. Arbitrage has been defined as:

> . . . the process of earning riskless profits by taking advantage of differential pricing for the same physical asset or security. As a widely applied investment tactic, arbitrage typically entails the sale of a security at a relatively high price and the simultaneous purchase of the same security (or its functional equivalent) at a relatively low price.
>
> Arbitrage activity is a critical element of modern, efficient security markets. Because arbitrage profits are by definition riskless, all investors have an incentive to take advantage of them whenever they are discovered. Granted, some investors have greater resources and inclination to engage in arbitrage than others. However, it takes relatively few of these active investors to exploit arbitrage situations and, by their buying and selling actions, eliminate these profit opportunities.[21]

32. Short interest may be an indicator of arbitrage activity as arbitrageurs act to take advantage of and thereby eliminate any mispricing which may exist by simultaneously buying and selling securities, and/or

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[20] www.labranche.com/invrel.html

[21] Sharpe, William F., *et al., Investments*, (NJ: Prentice Hall) 1999, 6th ed., p. 284.

by borrowing and selling short. A short sale is the sale of a stock that an investor does not own. When an investor holds the belief that a stock price will decline, he can borrow the stock, sell the stock, and then buy the stock back later to return it to the lender. If the price drops between the time that short seller sold the stock and he buys it back, the short seller realizes a gain. Thus, short-selling can facilitate market efficiency by allowing borrowing and selling of stock when investors believe that the price could decline. I have examined the level of short interest in Halliburton's stock in order to determine if there were any impediments to short selling or arbitrage opportunities.

33. Throughout the Class Period, there were at least 429 million Halliburton shares outstanding, held by more than 800 institutions and many other investors who could have sold their shares of Halliburton. In addition, shares held by institutions are often available for borrowing by short sellers; thus the large number of institutional shareholders and their large shareholdings could facilitate market efficiency by permitting whatever short sales arbitrageurs wished to make.

34. During the Class Period there was substantial short interest in Halliburton and large changes in short interest. (See Exhibit 7.) However, the level of short interest is not large relative to Halliburton's shares outstanding. The average short interest in Halliburton's stock represented approximately 2.3% of total shares outstanding. The level of short interest during the Class Period indicates that shares should have been available to borrow for short-selling.

35. Economist Gene D'Avolio, while preparing his dissertation for his Ph.D. in Business Economics

(awarded 2004) at Harvard University, summarized the market for short-selling in the United States by examining data from April 2000 to September 2001.[22] The specific data for Halliburton's stock, or any stock, are not available from this database; however, D'Avolio examined a very large sample of data over a period of time that includes part of the Class Period.

36. D'Avolio estimated that in the second quarter of 2001, as much as one-quarter of the U.S. market capitalization was available as loan supply for short-selling and that 7% of that capacity was utilized. In the database that he examined,[23] D'Avolio found that short interest was, on average, 2.3% of shares outstanding. During 2001, Halliburton's stock was the type of stock that in D'Avolio's database had excess supply available for borrowing for short-selling, *i.e.*, companies with large market capitalization and substantial institutional ownership. D'Avolio also found that common stock issued by large companies such as Halliburton had low implied loan fees, which indicated that short-selling was not restricted and that arbitrage opportunities could be exploited. The level of short interest in Halliburton's stock relative to the public float indicates that short-selling of Halliburton's stock was not constrained during the Class Period and that arbitrage opportunities could be exploited, which is evidence in support of market efficiency.

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[22] Gene D'Avolio, "The market for borrowing stock," *Journal of Financial Economics*, November 2002, vol. 66, pp. 271-306.

[23] One of the largest security lenders in the world that accounts for significantly more than 10% of the total market short interest (and for many stocks the lender had sufficient supply to cover total short interest on its own) provided a proprietary database to D'Avolio.

37. Trading in Halliburton stock on the NYSE during the Class Period, where the market in the stock was facilitated by a specialist, indicates that the market for Halliburton stock was efficient during the Class Period, as does the possibility of arbitrage activity via short sales.

D. Cammer/Unger/Bell Factor 4: Whether Halliburton was Eligible to File SEC Form S-3

38. Form S-3 is a simplified registration form that may be used if a company has been subject to Securities Exchange Act of 1934 reporting requirements for more than one year, has filed all documents in a timely manner during the prior twelve months, and has not, since the last audited statements, failed to pay required dividends or sinking funds, nor defaulted on debts or material leases.[24] Thus, companies that have previously provided what the SEC deems to be sufficient public information may incorporate prior filings by reference into current filings, and need not repeat such information since it is already widely publicly available.

39. Halliburton filed amended Form S-3 prior to the Class Period on September 25, 1998. During the Class Period, Halliburton filed Form S-3 on December 3, 2001. That Halliburton was eligible to file Form S-3 with the SEC prior to and during the Class Period is another factor which supports my conclusion that the market for Halliburton's stock was efficient.

E. Cammer/Unger/Bell Factor 5: Empirical Facts Showing a Cause-and-Effect Relationship between Unexpected Corporate

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[24] www.sec.gov/info/edgar/forms.htm

Events or Financial Releases and an Immediate Response in the Stock Price

40. According to the ECMH, securities prices in efficient markets incorporate all available public information. A direct test of market efficiency is to conduct an event study to identify dates on which material new information was released to the market, and to examine whether the stock price responded to that information.

It is important to note that material new information is new once, i.e., once incorporated into the market mix of information with subsequent price reaction, successive announcements of the same information will have no additional effect on share price.

41. I performed an event study to examine the publicly available company-specific information contemporaneous with statistically significant common stock price returns[25]—in other words, to determine whether material news affecting Halliburton promptly caused a measurable share price reaction after accounting for general market and industry effects. A description of the regression analysis used for this event study is described in the Appendix to this Report.

42. The table below includes the days during the Class Period with statistically significant changes in Halliburton's stock price and the relevant information that was disseminated to the market. There are a total of 7 days during the Class Period that have

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[25] Herein, the stock price return on a given day is equal to: (that day's closing price plus the dividend, if any, divided by the previous trading day's closing price) minus 1.

statistically significant positive returns and 24 days during the Class Period that have statistically significant negative returns (there are a total of 31 days with statistically significant stock price returns). In general, large significant changes in Halliburton's stock price are associated with material, new and unexpected information about the Company.

43. I noted that on certain days with significant stock price returns, there was no company-specific news and the statistically significant returns occur because the Halliburton stock return is not consistent with relatively large market or industry-specific returns. This occurs on four days, specifically, February 10, 2000, October 24, 2000, December 18, 2000, and February 12, 2001. On at least one of these days, the large market or industry-specific returns reflect material news releases from another company. Therefore, it is consistent with the ECMH that Halliburton's stock return would not necessarily move with the market or industry, *i.e.*, its relatively stable stock price, although statistically correlated with the market and industry indices, is not unexpected.

44. I also noted that there are five days with significant stock price changes for which I have found little or no "new news" pertaining to Halliburton, specifically, June 18, 1999, October 15, 1999, February 25, 2000, May 19, 2000, and November 6, 2001. This is not unexpected as I do not have access to all of the information that was disclosed about the Company during the Class Period. Certain information, including oral communications, information from online reporting services such as First Call, and private investment alerts and analyst reports given to clients and other employees of the same investment firm, are not publicly available or are not maintained in

historical databases. Moreover, Halliburton's stock price may be affected by news that I did not capture in my searches, such as news pertaining to one or more of Halliburton's major clients or competitors (that does not refer specifically to Halliburton). On certain dates, the fact that I have not located news pertaining to Halliburton that explains the Company's stock price reaction does not preclude me from concluding that the market for Halliburton's stock was efficient during the Class Period.

45. Following is a summary of all days that have statistically significant stock price returns. A further discussion of the news on each day is included in the Appendix to this Report.

Date	Actual Return	Company-Specific Return	News
6/18/1999	-3.7%	-4.1%	No company-specific news on that day to explain the movement of the stock. However, on the following trading day, Monday, June 21, there was news that oil inventories were high and that this could put pressure on oil prices and, therefore, on values of oil companies and oil services companies.
10/5/1999	-13.2%	-9.0%	The Company warned that it expected its 1999 third- quarter earnings

			to be in the range of 11 to 13 cents per diluted share. The previous average analyst estimates was 19 cents per share. The Company attributeed the reduction, in large part, to the lower than expected profits of the joint ventures of its engineering construct-ion units and many of the other business units of the Dresser Equipment Group.
10/15/1999	-5.8%	-3.6%	No company-specific news on that day to explain the movement of the stock. On October 18, Schlumberger Ltd., which at that time was the world's second biggest oilfield services company (second by revenues to Halliburton), reported third quarter earnings which fell 60 percent compared with the prior year but rose four percent from the previous quarter.
10/27/1999	-3.4%	-3.5%	An analyst at Brown

			Brothers Harriman lowered her estimates for fourth quarter 1999 and for the year 2000.
1/5/2000	-4.4%	-4.3%	Analysts cut their estimates of Halliburton's earnings for 2000 and 2001 following a conversation with the company.
1/10/2000	-4.0%	-3.9%	An analyst reduced his earnings estimates for 2000.
1/12/2000	-6.8%	-3.6%	The Houston Chronicle reported that "Oil-field service companies' earnings are also expected to be a mixed bag. Weatherford International, Smith International, Halliburton and Schlumberger are all projected to earn less in the 1999 fourth quarter than they did the year before."
2/10/2000	-0.2%	-5.1%	This company-specific decline is driven by the market and the industry, which were up that day. No company-specific news on that day to explain

			the movement of the stock.
2/25/2000	-4.9%	-3.6%	There was no company specific information to explain the decline that day in the stock; however, analysts commented on the recent poor performance in the stock prices of oil service companies.
5/2/2000	7.1%	3.7%	New commentaries attributed the gain in Halliburton's stock price to OPEC's anticipated decision to not increase production quotas.
5/19/2000	2.5%	3.9%	There was no company specific information to explain the decline that day in the stock; however, analysts commented on the recent poor performance in the stock prices of oil service companies.
5/30/2000	4.7%	3.6%	On Saturday, May 27, the weekly financial newspaper Barron's issued a positive report on Halliburton, stating it expected

			Halliburton's stock price to recover over the next 18 months. On Tuesday, May 30, 2000, an analyst raised his price target for Halliburton.
6/8/2000	-1.8%	-3.5%	An analyst met with the Company on June 7. The analyst's report was issued on June 8, and based on that meeting, he lowered his estimate for second-quarter oper-ating earnings for the Company by a penny to 64 cents.
10/6/2000	-5.0%	-3.8%	On October 5, 2000, Owens-Corning filed for bankruptcy pro-tection "after it ran out of options to pay asbestos lawsuit claims that could eventually cost the company $7 billion." The October 9 edition of Barron's discussed Halliburton's asbestos litigation exposure in light of the Owens-Corning situation.
10/23/2000	-6.5%	-3.5%	Halliburton reported

			that its Brown & Root Services unit was a target of the federal grand jury investigation.
10/24/2000	-6.5%	-3.5%	This is a statistically significant increase because both the market and the industry were down that day. While there is no company-specific news on that day to explain the movement of the stock, it is likely a partial correction from the prior day's news.
10/25/2000	-11.0%	-6.6%	Halliburton announced that it intended to restructure and shrink its engineering and construction units into a single unit, which prompted certain analysts to cut earnings forecasts.
12/18/2000	4.0%	-3.8%	The company-specific return that day is a statistically significant decline because the industry was up sharply that day.
12/22/2000	-2.7%	-3.9%	On December 21, Halliburton pre-

			announced fourth-quarter earnings and formally unveiled the restructuring of its engineering and construction units and stated that it planned to take a charge of $120 million in the fourth quarter, the bulk of which was due to cost overruns at several overseas projects. On December 22, the overall market was up more than 3.0% such that this was a statistically significant decline.
2/12/2001	0.4%	4.6%	The company-specific return is a statistically significant increase because the industry was down that day. The industry move was due to a significant decline in Schlumberger stock (12%), a major Halliburton competitor, on news of a proposed cash purchase of Sema PLC, a British technology information firm.
4/26/2001	9.1%	3.7%	Halliburton released

			its first-quarter 2001 financial results, reporting earnings on the low end of analysts' estimates, but stating that the company expected 2001 earnings per share ("EPS") to be at or above $1.30, which was higher than analysts' consensus forecast of $1.20. Some analysts raised their estimates and/or rating for Halliburton.
6/29/2001	-4.2%	-4.6%	Halliburton announced that a former subsidiary of Dresser, Harbison-Walker ("Harbison"), had been requesting the Company's financial assistance with asbestos claims Harbison agreed to assume in 1992 after it was spun off from Dresser. Certain analysts expressed concern over the Company's potential exposure to asbestos liability.
7/26/2001	3.7%	3.4%	Halliburton released its second quarter financial results,

			reporting strong revenue and earnings and, as a result, several analysts raised their estimates.
8/9/2001	-4.5%	-5.2%	Halliburton filed Form 10-Q with the SEC, in which it increased its accrued net liability for known open asbestos claims to $124 million (from $30 million on March 31, 2001, and $29 million on Dec. 31, 2000). Certain analysts responded that the situation was now more complex and uncertainty was increased.
10/31/2001	-6.3%	-4.9%	A jury in Mississippi found Dresser (through Harbison) liable in two of six asbestos cases for total compensatory damages of $21.3 million. One analyst was surprised by the size of the award.
11/1/2001	-2.9%	-3.7%	While there is no company-specific news on that day to explain the movement of the stock, it may reflect further concerns

			related to the October 31, 2001 news. The market was up that day.
11/6/2001	-3.9%	-3.5%	There was no company specific news on that day consistent with the price decline.
11/9/2001	0.2%	-3.4%	Salomon Smith Barney issued a report on Halliburton in which the analyst lowered his earnings estimates for fourth quarter 2001. The industry was up that day.
12/4/2001	-0.7%	-3.7%	A Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001. The same district court also entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs in the aggregate amount of $35.7 million related to an alleged breach of a purported settlement agreement.
12/5/2001	0.5%	-3.8%	This is a statistically significant negative

			return because both the market and the industry are up that day. While there is no company-specific news on that day to explain the movement of the stock, it likely reflects further concerns related to the December 4, 2001 news.
12/7/2001	-42.4%	-42.7%	A Maryland jury had awarded a $30 million verdict against Dresser in favor of five plaintiffs in an asbestos litigation. Several analysts issued reports that day in response; some downgraded ratings and lowered price targets citing mounting asbestos liabilities.

46. The events on dates of significant Halliburton stock price movement described above clearly illustrate that large changes in Halliburton's stock price generally are associated with important new information, which supports my conclusion that the market for Halliburton's stock was efficient during the Class Period.

F. *Unger/Bell* Factor 6: Market Capitalization

47. Courts have found that a large market capitalization can be an indicator of market efficiency.[26] Halliburton's stock had substantial market capitalization (calculated as the number of shares multiplied by the prevailing share price) throughout the Class Period. The market capitalization for Halliburton ranged from $15 billion to $23 billion in 1999; from $15 billion to $24 billion in 2000; and from $5.1 billion to $21 billion in 2001. Even on the last day of the Class Period, December 7, 2001, after a decline in the value of Halliburton's market capitalization of more than 42%, its market capitalization was greater than $5.1 billion. See Exhibit 8. The average market capitalization of a NYSE stock was $5.6 billion, $6.0 billion, and $5.7 billion in 1999, 2000, and 2001, respectively.[27]

48. Halliburton's market capitalization was substantially greater than the average for a NYSE stock throughout the Class Period prior to December 7, 2001. The relatively large market capitalization of Halliburton stock supports my conclusion that the market for Halliburton's stock was efficient during the Class Period.

G. *Unger/Bell* Factor 7: Bid/Ask Spread

49. Bid/ask spreads are a measure of transaction costs and low transactions costs indicate that arbitrage opportunities can be exploited readily. Exhibit 9 contains the median and mean bid/ask

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[26] *Unger*, 401 F.3d 316 at 323, HN10; *Bell*, 422 F.3d 307 at 313, n10; *Krogman* 202 F.R.D. 467 at 478; O'Neil 165 F.R.D. 479 at 503.

[27] NYSE Factbook Online http://www.nysedata.com/ nysedata/ Default.aspx?tabid=115 (select NYSE Historical Statistics then NYSE Overview Statistics).

spread, both as a dollar amount and percentage of the mean bid/ask prices, during the Class Period for Halliburton and its competitors. The more relevant analysis is to examine the bid/ask spread quotes from the listing exchange rather than all exchanges (including the non-listing exchanges). Bid/ask spread quotes from non-listing exchanges frequently include quotes that are so large as to be obvious errors or meaningless, *i.e.*, not reflective of actual transactions.

50. During the Class Period, the average bid/ask spread as a percentage of the mean bid/ask price for Halliburton was 0.22%; the average for Halliburton's competitors was 0.36%.[28] Halliburton's bid/ask spreads are comparable to its competitors during the Class Period. That bid/ask spreads are not large indicates that arbitrage opportunities could be exploited, which is evidence in support of market efficiency.

H. Unger/Bell Factor 8: Public Float

51. Courts have held that a large float percentage (percentage of shares held by the public) can be an indicator of market efficiency.[29] During the Class Period, there were between 429.0 million and445.5 million shares of Halliburton stock outstanding. Insider holdings ranged between approximately 2.0 million and 3.6 million shares during the Class Period. The public float was approximately 99% of shares

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[28] The figures are for quotes on each company's listing exchange. In Exhibit 9, I have also provided the bid/ask spread for all quotes included in the TAQ database.

[29] *Unger*, 401 F.3d 316 at 323, HN10; Bell, 422 F.3d 307 at 313, n10; *Krogman* 202 F.R.D. 467 at 478; *O'Neil* 165 F.R.D. 479 at 503.

outstanding throughout the Class Period. See Exhibit 10.

I. Factor 9: Listing Exchange

52. A security's listing on a national exchange means that financial information about that company is readily available to investors, at a minimum, through the company's SEC filings. Listing on the NYSE, AMEX or NASDAQ, means that investors have access to trading prices and volumes throughout the trading day. Rules of the national exchanges require that investors buy at the lowest ask price and sell at the highest bid price prevailing at the time of their trade.[30] Because a national exchange brings together many thousands (or millions) of investors, trading prices reflect a consensus opinion as to securities' values. At least one authority has said the following:

> . . . at a minimum, there should be a presumption-probably conditional for class determination-that certain markets are developed and efficient for virtually all the securities traded there: the New York and American Stock Exchanges, the Chicago Board Options Exchange and the NASDAQ National Market System.[31]

In the *Cammer* decision, the Court stated:

. . . some may concur with [Defendant's] suggestion . . . that companies listed on national stock exchanges or companies entitled to issue new securities using

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[30] Market Structure and Trading Volume, Anderson & Dyl, p. 3 (March 2003), available at www.nyse.com

[31] Bromberg & Lowenfels, 4 Securities Fraud and Commodities Fraud, Section 8.6 (Aug. 1988) (quoted in *Cammer*, 711 F. Supp at 1292).

SEC Form S-3 would almost by definition involve stock trading in an "open and developed" market.[32]

53. Halliburton was traded on the NYSE and, as noted above, did file Forms S-3 with the SEC before and during the Class Period. The NYSE is a New York City-based stock exchange. During the Class Period, the NYSE was the largest equities marketplace in the world as measured by dollar volume. During 1999 to 2001, there were 2,798 to 3,025 companies listed on the NYSE. As of December 31, 2001, the combined capitalization of all NYSE listed companies was $16 trillion.

54. The NYSE is an agency auction market where most trading is conducted by brokers acting on behalf of customers, rather than by dealers trading for their own account. Competitive price discovery at the point of sale results from this broker interaction. Aided by NYSE-assigned brokers known as specialists, the NYSE marketplace provides all customer orders an equal opportunity to interact and receive the best price.[33]

55. NYSE's Letter to Our Constituents at page two of its 2002 Annual Report notes that "investors must be guaranteed a fair and level playing field." At page 21, it discusses market quality and states that "Investors enjoy fast, reliable and efficient access to unsurpassed liquidity, the narrowest spreads anywhere, and the best possible execution."[34] NYSE's Chief Regulatory Officer states in his letter to investors in NYSE's 2004 Annual Report that the

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[32] *Cammer*, 711 F. Supp. at 1276-77 (D.N.J. 1989)

[33] www.nyse.com

[34] http://www.nyse.com/pdfs/2002ar_NYSE-2002.pdf

exchange is "committed to do everything in our power to protect investors and ensure that the New York Exchange remains the fairest, most open securities market in the world."[35]

56. Available from NYSE is the Trade and Quote ("TAQ") database which provides all reported trades and quotes for all issues traded on all U.S. exchanges, e.g., NYSE, NASDAQ (OTC), and regional exchanges. The TAQ database contains over 1.3 million trades for Halliburton stock during the Class Period; the average number of trades per day was 2,086.

57. The fact that Halliburton traded on a major exchange during the Class Period, supports a conclusion that the market for the stock was efficient during that period.

J. Factor 10: Institutional Ownership and Trading

58. Institutional investors such as pension funds, mutual funds, and investment banks, typically have ready access to minute-to-minute financial news and to online bulletins from analysts such as those disseminated through First Call. They also expend resources in analyzing the value of stocks in which they invest. Thus, the fact of significant institutional ownership is a signal that knowledgeable investors are closely and rapidly scrutinizing sources of company information and forming investment opinions that affect share price accordingly.

59. There was substantial institutional ownership of Halliburton stock throughout the Class Period. According to data provided by Thomson Financial, institutional holdings of Halliburton's stock ranged

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[35] http://www.nyse.com/pdfs/2004editorial.pdf at 7.

from a low of 273.5 million shares at the end of the fourth quarter of 2001 to a high of 315 million shares at the end of the third quarter of 2000.[36] (See Exhibit 11.) During the Class Period, institutional ownership of Halliburton stock ranged between 64% and 73% of the Company's reported shares outstanding and the number of institutional investors reported holding Halliburton stock ranged from 416 to 539.

60. During the Class Period, institutional investors actively traded Halliburton stock, as indicated by data from reporting institutions' filings of Form 13F with the SEC. Changes in institutional holdings of Halliburton shares from quarter-end to quarter-end for quarters falling in whole or in part within the Class Period, are substantial. This indicates institutions were actively trading Halliburton stock. (See Exhibit 12.) Institutional investors, reporting at each quarter-end, increased their holdings of Halliburton shares during the Class Period by at least 20 million (during the quarter ended September 30, 1999) and by as much as 53 million shares (during the quarter ended December 31, 2000). Thus, a substantial number of shares changed hands among the institutional investors throughout the Class Period.

61. The presence and trading activity of institutional investors in the market for Halliburton's stock during the Class Period support a conclusion that the market for the stock was efficient during that period.

K. Factor 11: Dissemination of News

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[36] Institutions which file Form 13F with the SEC report shares held as of the end of each calendar quarter.

62. Coverage of a company by wire services, financial press, and general media ensures that investors have ready access to new information about a company's condition and prospects, and facilitates rapid share price reaction to new information about the company. There was extensive news coverage of Halliburton during the Class Period, including reports on Halliburton's financial condition, its prospects for growth, and its revenues and earnings trends.

63. Prior to, during, and after the Class Period, articles concerning Halliburton appeared in major news media in the United States, such as: *AP Online; Associated Press Newswires; Barron's; Business Week; Business Wire; Capital Markets Report; CCN Newswire; Chicago Tribune; CNBC: Business Center; Companies & Commodities; Corporate Financing Week; Daily Petroleum Report; Defense Daily International; Denver Post; Dow Jones Business News; Dow Jones Capital Markets Report; Dow Jones Energy Service; Dow Jones News Service; Factiva Press Release Service; Financial Disclosure Wire; Financial Times; Houston Chronicle; Knight Ridder Tribune Business News; Los Angeles Times; Money Magazine; Moody's Investor Service Press Release; New York Daily News; New York Post; Newsday; Oil & Gas Investor; Oil & Gas Journal; Petroleum Economist; Petroleum Finance Week; Pipeline & Gas Journal; PR Newswire; Reuters News; The Accountant; The Atlanta Constitution; The Baltimore Sun; The Boston Globe; The Christian Science Monitor; The Daily Telegraph; The Economist; The New York Times; The Oil and Gas Journal; The Philadelphia Inquirer; The San Francisco Chronicle; The Wall Street Journal; The Washington Post; and U.S. Newswire.* During the Class Period, more than 12,100 electronic and/or printed articles were published with "Halliburton"

mentioned in the article; more than 2,900 were published with "Halliburton" appearing in the headline or first paragraph.[37]

64. In addition, Halliburton held regular conference calls with members of the investment community. After each quarter's earnings announcement was released, the Company held a conference call at which management described Halliburton's financial performance and condition, answered questions from participants, and often provided guidance on expected future financial performance. During the Class Period, Halliburton management also occasionally held conference calls to discuss new business developments and other pertinent information.

65. The extensive news coverage of Halliburton within the Class Period supports my conclusion that the market for Halliburton stock was efficient during the Class Period.

VII. Summary Regarding the Market Efficiency of Halliburton's Stock

66. In summary, the following indicia of market efficiency are bases for my opinion that the market for Halliburton stock was efficient throughout the Class Period:

- the considerable trading volume in Halliburton stock during the Class Period;
- the significant number of securities analysts who reported on Halliburton;

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[37] Source: www.factiva.com (from Dow Jones)

- the fact that trading in Halliburton stock was facilitated by a specialist on the NYSE, a sophisticated and developed principal exchange;
- the Company's eligibility for and filing of SEC Form S-3 prior to and during the Class Period;
- the demonstrable relationships between company-specific news releases and prompt share price reactions;
- Halliburton's large market capitalization;
- Halliburton's bid/ask spreads comparable to other companies in its industry;
- Halliburton's sizeable public float;
- the fact that Halliburton traded on a major exchange;
- significant institutional ownership during the Class Period; and
- the extent of news coverage of Halliburton available to investors.

67. The fact of market efficiency does not preclude the information about Halliburton disseminated to the market by Defendants from being false and misleading. Rather, it means that information disseminated by Defendants about Halliburton and its prospects, whether true or false, was reflected in Halliburton's share price.

VIII. Materiality

68. Material information is any information that investors would want to know about a company that might affect their investment decisions with respect to

that company,[38] or information that can reasonably be expected to affect the value of that company's securities. Material information may concern the market as a whole, the industry in which a company operates, or specifically the company (company-specific information). Clearly, material information includes information concerning a company's current revenues, expenses, and earnings. Market participants also may rely upon expected future revenues, expenses, and earnings, information on accounting policies and procedures, reserves and estimates, in addition to demand for a firm's products and services, information concerning a firm's ability to compete and the effects of competition, information on management's effectiveness in managing the enterprise, and many other items of information which may affect market participants' evaluations of a firm's revenue and earnings prospects.

69. Share price is a function of a company's expected future economic earnings, *i.e.*, of expected future cash flow to shareholders. Cash flow to shareholders is that cash flow on which there are no other claims—not from suppliers, creditors, employees, government in the form of taxes, or from others—and hence is a return to equity investors for their investment and the risk they have borne. This cash flow can be distributed to equity investors as dividends or special distributions and/or as appreciation in share price realized at sale of the stock. In other words, a firm's share price is the present value of future economic earnings expected by its

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[38] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Indus.*, 426 U.S. at 449).

equity investors, discounted for risk and the time value of money.[39]

70. Market participants rely on statements made by company managers and representatives. Market participants also rely on the opinions of a company's independent auditors for assurance that the company's financial statements accurately and reliably report its financial performance. Unless the market has reason to believe a company's future financial performance will be significantly different from its present financial performance, the market will look to the company's periodic reports of financial performance as important indicators of its financial health and earnings prospects. For example, a company's financial reports provide the level of revenues from which market participants project future growth.

71. If market expectations for a company's future economic earnings change, the company's share price will change. If the level of earnings used in projections or the expected growth rate of future economic earnings increases, share price increases; if the level of earnings for the market's projection or expected growth rate decreases, share price decreases.

72. The statements of a company's management and of its external auditors are particularly important in shaping the market's information mix because management and auditors have special access to and control of information about earnings, prospects for growth, and conditions within the company. For example, analysts participate in conference calls, report on conversations with management, and

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[39] Richard A. Brealey and Steward C. Myers, *Principles of Corporate Finance*. 7th edition, c2003, pp. 60-61.

summarize a company's financial statements in analyst reports. The mix of information in the market about a firm is rarely, if ever, uniform, and the mix often includes some diversity in forecasts for financial performance. The market assimilates all the information available to arrive at an equilibrium price. Unless the general market recognizes notable defects in management's and auditors' credibility, their statements will weigh heavily in establishing that equilibrium price.

73. It must be noted that a statistically significant change in a company's security's price (net of market and industry effects) is an indicator that new company-specific information has dramatically changed the total mix of information about a company, but is itself not the only indicator of materiality. A security price movement of any size can be material. Statistical significance measures the relative size of the security's price adjustment to the new information, i.e., statistical significance only indicates that the price change was among the largest price changes over a period of time. Information that does not cause a very large price adjustment, i.e., one that is not statistically significant, also can be material. Price changes are caused by information; the market is not a collection of whimsical expressions of an irrational force. Price changes may appear random because new information arrives randomly, i.e., we cannot predict the future. Nevertheless, those price changes have causes. Information "important enough to affect security prices when publicly released provides compelling evidence that a reasonable

investor would consider the information important in making an investment decision."[40]

74. Stock prices reflect publicly available information and this is the economic theory underlying an event study. Certain of the case-relevant events from an event study are discussed in Sections V.E. (addressing *Cammer* factor 5) and IX. (addressing Loss Causation) of this Report. A partial disclosure is corrective with respect to alleged misrepresentations and omissions when that disclosure changes the mix of fraud-related information available to investors. Specifically, if a company makes an announcement that misrepresents some aspect of its business or omits information that should not have been omitted and later the company "corrects" the misrepresentation (or omission), even though it did not admit its earlier misrepresentation (or omission), then that is a partial disclosure. Thus, a partial disclosure can be new information regarding the true condition or prospects of a company that has the effect of correcting the prior misrepresentation (or omission) even when the company does not admit to the fraud. Though the company may portray the information as new to the company, it would be a partial disclosure if it was, in fact, information previously known to the company but misrepresented to the market.

75. An example will illustrate. A company reports overstated revenues over several quarters. Analysts and investors, relying on those overstated revenues, make assessments about the company's revenue-

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[40] Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," The Business Lawyer, 49, 545.

generating capabilities, and assess the value of the company's stock.[41] Later, the company reports revenues that are below investors' expectations (those expectations based on the prior revenue overstatements) and the stock price falls.

The fraud is not that the company reported disappointing revenues in the later quarter and the stock price fell in that quarter, the fraud is that the company hid its disappointing revenues in earlier quarters, when the stock price would have declined had the company reported its revenues accurately. If the company had earlier reported its revenues appropriately, then analysts and investors would have had correct information upon which to make their assessments regarding the value of the company's stock, which would have resulted in the stock price decline earlier rather than later. The fraud is not that the stock price declined but that the stock price declined later than it would have if correct financial information had been reported. The corrective disclosure has a direct causal link to the alleged misrepresentations even though the company had not admitted to prior misrepresentations or to fraud. Furthermore, it may be the case that the company, while reporting disappointing revenues in the later quarter, may still be overstating its revenues such

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[41] In this case, it is alleged that each time Halliburton released earnings, such earnings were overstated because they failed to disclose that the earnings included unapproved claims that Halliburton had erroneously recognized as revenues on its large fixed-price construction contracts.

that the price inflation[42] from the initial misrepresentations is reduced but it is not eliminated.

IX. Loss Causation

76. The above section of this Report titled "Materiality" explains that investors use disclosures about the financial performance and condition of a company to make assessments about future cash flows that will accrue to investors in a firm's securities, and that investors use this information in valuing those securities. This section on "Loss Causation" describes certain disclosures by the Company that Lead Plaintiff intends to prove at trial corrected false or misleading information, or that revealed information that was wrongly omitted, regarding Halliburton's financial performance, earnings prospects, and potential asbestos liability; such disclosures caused the prices of Halliburton's stock to decline.

77. Certain announcements during the Class Period, while they did not admit the alleged fraud at that time, are partial disclosures of information that changed investors' perceptions of the true value of Halliburton. Lead Plaintiff alleges that had Halliburton's financial statements not been false and misleading during the Class Period, investors would have lower and more realistic expectations regarding Halliburton's earnings and revenue generating capabilities during the Class Period. Thus, information during the Class Period that partially corrected investors' previously erroneous perceptions

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[42] Price inflation refers to that portion of the price of a share of stock in excess of its true value, *i.e.*, the difference between a reported stock price and its price had the fraud not occurred.

as to Halliburton's value are partial disclosures of the alleged fraud.

78. This analysis is ongoing. This analysis does not attempt to illustrate all of the misrepresentations or partial disclosures of the fraud through the end of the Class Period. In the future, I may consider additional and/or different dates as partial disclosures of the alleged fraud based on additional analyses, materials, further discovery, and/or the opinions of other experts in this matter.

79. This "Loss Causation" section is based on, and summarizes the results of, an event study analysis based on widely accepted statistical techniques and a review of information releases of many kinds relevant to Halliburton and issued during the Class Period. Information releases include news articles and wire service reports, reports of securities analysts, and Company press releases, conference calls, interviews and presentations, and SEC filings. The event study enables me to identify news during the Class Period—both related to Halliburton's partial disclosures concerning its potential asbestos liability, its booking of unapproved claims on fixed-price contracts and the lack of benefits from the Dresser merger, and other unrelated news—which led to a significant change in Halliburton's share price. This event study demonstrates that during the Class Period the prices of Halliburton's stock reacted to material, new, and unexpected information.

80. Regression analysis is used to show how a company's stock price moves in relation to market and industry movements and how it responds to news and information. The regression analysis I performed is able to explain 77% of the total variance in Halliburton's stock return during the control period.

This is a very high correlation for this type of regression analysis; in my experience, market and industry indices returns generally explain less than 50% of the variation in a particular company's stock returns. (See Section V.E. and the Appendix to this Report for additional information regarding the event study.)

81. Similar to the methods I commonly employ when conducting an analysis of damages in securities cases such as this, I have conducted the following analyses to determine the effect the disclosures of the alleged fraud (discussed below) had on Halliburton's stock price.

- Conducted an econometric analysis of the company's stock returns, *i.e.*, regression analysis in order to separate the portion of the return caused by company specific news and events from the portion of the return caused by market and/or industry news and events.
- Reviewed all of the news surrounding the day on which the alleged disclosure was made to determine what the company said and what market participants said.
- From the regression analysis, determined how much of the day's stock return can be attributed to company-specific news and events, and how much of the day's stock return can be attributed to market and industry news and events.
- Reviewed all of the available analyst reports surrounding the day on which the alleged disclosure was made to determine how the company's statements or communications impacted market participants' assessments of the company's value. Analyst reports provide

information on what the company said if the company's statements were made outside of a press release, *e.g.*, conference call.

- Conducted an empirical analysis of the information on and surrounding the disclosure date. Based on commentary by the company, news articles, and statements from analysts, determined what specific news items were important on the day of the alleged disclosure or on the days surrounding the day of the alleged disclosure, *e.g.*, the particular disclosure to which news articles attributed stock price movements; reasons in analyst reports for changes in estimates, ratings or target prices; commentary by the company with respect to what it noted was important.

- Conducted an empirical analysis to determine the relative importance of different pieces of news with respect to impact on stock valuation, *i.e.*, how different pieces of news impacted the stock price, examined contemporaneous assessments (both qualitative and quantitative) as to the impact on value. For example, reasons underlying the company's changes to its guidance, estimates and forecasts, and reasons underlying all or parts of analysts' changes to their valuation models, estimates, ratings, and target prices.

A. Summary of Events Related to the Misrepresentations, and the Effect on the Price of Halliburton's Stock

82. Following is a discussion of certain disclosures during the Class Period which revealed that previous alleged representations and omissions by Defendants

had been false and misleading, causing the prices of Halliburton's stock to decline. (See Exhibit 13 for a chart of Halliburton's stock price and a summary of the events related to the disclosures.)

Partial Disclosures Related to Booking of Unapproved Claims and Unrealized Benefits from the Dresser Merger:

83. The following events are examples of information disclosed during the Class Period that brought, in part, investors' perceptions of the Company's financial condition related to its booking of unapproved claims on fixed-price contracts and the benefits from the Dresser merger more in-line with its alleged true condition at that time. My analysis has identified at least four instances of partial disclosures related to these allegations; these disclosures caused a total company-specific decline in Halliburton's stock price of as much as 21.8%, or $9.42 (other non-culpable information was disclosed on one of these days, January 5, 2000, although, as discussed, below, a significant portion of the information on that day related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits from the Dresser merger).

84. *October 5, 1999*: On October 5, 1999, Halliburton's stock price dropped 13.2%, from $39.75 to $34.50. The company-specific return is -9.0%, a statistically significant negative return. After market close, on Monday, October 4, 1999, Halliburton announced that Dresser had elected to sell its interests in two joint ventures.[43] The Company also

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[43] Halliburton held an invitation-only conference call with analysts. *Dow Jones Business News*, "Halliburton Sells Stakes In Joint Ventures For $1.1 Billion," October 4, 1999, 7:43 pm.

warned that it expected its 1999 third-quarter earnings to be in the range of 11 to 13 cents per diluted share. The previous average analyst estimates was 19 cents per share. The Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group.[44] This is an instance where the Company released negative news, which concerned the lack of benefits arising from the Dresser merger.

> [Halliburton] shares could slip in Tuesday morning trading due to its earnings warning. The oil driller said that its Dresser Equipment Group business segment and its Engineering and Construction business segment are warning of lower profits. As a result, Halliburton expects a third quarter profit between 11 and 13 cents a share, while analysts currently expect a profit of 19 cents a share. Halliburton also announced that its subsidiary Dresser Industries will sell its interests in two joint ventures to Igersoll-Rand [*sic*] Co. for a total of $1.1 billion. The sales will result in a one-time fourth-quarter gain of 84 cents a share. Shares closed down 2 1/16 to 39 3/4 ahead of the news.[45]

85. News commentary and analysts attributed the decline in Halliburton's stock price that day to the

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[44] *Reuters News*, "Halliburton to Exit Two Ventures, Sees Lower Q3 EPS," October 4, 1999, 5:23 pm.; Halliburton SEC Form 8-K filed October 4, 1999.

[45] *CBS MarketWatch.com*, "Earnings Advisories," October 4, 1999, 6:11 pm.

reduction in the Company's near-term expected earnings:[46]

> Shares of Halliburton Co. plunged 13.2 percent Tuesday after the company said its Dresser Industries unit will sell its stake in two joint ventures to Ingersoll-Rand for $1.1 billion, after poor performance by the businesses hurt third quarter results.
>
> Dresser Industries decided to sell the interests amid the Dresser Equipment Group segment's poor current and projected financial performance at D-R and at IDP. D-R is expected to report an operating loss in the third-quarter while the entire business segment forecasts weaker operating results, compared to previous predictions, for the third and fourth quarters.
>
> Analysts appear to agree that Halliburton's sale of the poor-performing joint ventures was a good move and that the earnings shortfall will be temporary.
>
> In a research note, analyst James Stone of Schroders said Halliburton's move is "a better-than-expected outcome" for the company and even though "it will negatively affect earnings in the fourth quarter and for at least part of 2000, it is a much better scenario than having bought out Ingersoll-Rand."

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[46] *See, e.g.*, Dain Rauscher Wessels, "Halliburton Selling Joint-Venture Interests; Expects To Miss Previous Third-Quarter Guidance," October 5, 1999; Dow Jones Business News, "Earnings Warning Pressures Shares Of Oil-Services Firm Halliburton," October 5, 1999, 11 :26 am.

> Stone reduced his third-quarter earnings-per-share estimate to 12 cents from 21 cents, but noted that the sale's impact on the company is short-term and will ultimately be to Halliburton's advantage.
>
> Additionally, Arvind Sanger, analyst at Donaldson, Lufkin & Jenrette downgraded his third-quarter estimate to 12 cents a share from 18 cents, fourth quarter earnings-per-share estimate to 18 cents from 28 cents. However, in his research note, he maintained a "buy" rating on the company's stock, viewing the sales as "a good strategic move."[47]

86. Analysts lowered their forecasts after the Company's earnings warning. For example:

CIBC:

> We have revised our estimates for 3Q and 4Q99 to $0.12 and $0.18 from $0.18 and $0.25, respectively. We are preliminarily raising our 2000 and 2001 estimates to $1.56 and $2.15 from $1.49 and $2.08, respectively. We reiterate our Buy rating and 12- to 18-month price target of $56.
>
> The sale of the joint-venture interest comes as a major surprise to Wall Street, which assumed [Halliburton] wanted to own the compressor and pump businesses. . . . Reducing financial leverage and creating potentially accretive earnings transactions made the sale decision mandatory,

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[47] *CBS MarketWatch.com*, "Halliburton to sell interests in two joint ventures; issues third-quarter earnings warning," October 5, 1999, 8:06 pm.

from the point of view of shareholder value creation.

The company's announcement of weakness across virtually every business line in 3Q is not surprising, given the slower than anticipated oilfield industry recovery. [Halliburton] is merely the latest company to confess to this situation.

We believe a significant disconnect exists between oilfield service stock prices and improving industry fundamentals. . . .[48]

Dain Rauscher Wessels:

HAL announced that third-quarter EPS would come in $0.06-$0.07 less than expected and attributed the entire shortfall to the disappointing performance of the two joint ventures.

We are lowering our third-quarter EPS estimate to $0.12 from $0.21, our 1999 estimate to $0.66 from $0.85, and our 2000 estimate to $1.14 from $1.39. We are maintaining our Neutral rating.[49]

Jefferies & Company:

Lowering Estimates—We are lowering our 3Q99 EPS estimate to $0.12 from $0.23 to reflect the weak operational environment in HAL's Dresser Equipment Group and its downstream Engineering and Construction segment. In addition, we are lowering our 1999 EPS estimate to $0.65 from $0.85 and our 2000 EPS estimate to $1.05 from $1.50 to reflect the sale of its Dresser-Rand and

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[48] CIBC World Markets, October 5, 1999.

[49] Dain Rauscher Wessels, "Halliburton Selling Joint-Venture Interests; Expects To Miss Previous Third-Quarter Guidance," October 5, 1999.

Ingersoll-Dresser Pump divisions and the adjusted outlook for other divisions.[50]

87. I have reviewed all of the news and analysts reports from October 5, 1999, that are available to me at this time; I do not see other news or information that can explain the company-specific stock price decline on October 5 other than the reduction in the Company's near-term expected earnings. The reductions in earnings estimates are based at least in part on lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group. Lead Plaintiff alleges that during the Class Period Defendants misrepresented the integration of Dresser's construction operation, and the benefits the merger would have to Halliburton's bottom line, and the operational problems at the Company's engineering and construction units.[51] Thus, a significant portion of the stock price decline on October 5, 1999, was caused by information that partially corrected prior misstatements and omissions regarding the Dresser merger and the Company's related operational problems.

88. *January 5, 2000*: On Wednesday, January 5, 2000, Halliburton made a partial disclosure related to the Company's booking of unapproved claims on fixed price contracts and the lack of benefits realized from the Dresser merger as revealed in a conversation with analyst Carol Lau with Brown Brothers Harriman &

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[50] Jefferies & Company, Inc., "Stock Collapses On Profit Warning; Underperforming Assets To Be Sold," October 5, 1999.

[51] Fourth Consolidated Amended Complaint for Violation of the Securities Exchange Act of 1934, filed April 4, 2006 (the "Complaint"), pp. 1-2 .

Co. On this day, which included both culpable and non-culpable news, there was a statistically significant decline in Halliburton's share price. Halliburton's stock price dropped 4.38% from $38.50 to $36.81. The company-specific return was negative 4.3% that day. Following this conversation with Halliburton, Lau reduced her 2000 EPS estimates.[52] Year 2000 estimates were reduced by 20 cents (from $1.10 to $0.90), related to the following segments:

Operating Segment	Reduction to EPS:
Energy Services	$0.13
Engineering and Construction	$0.06
Dresser Equipment	$0.01
Total	$0.20

89. On the same day, Merrill Lynch analyst K. Simpson ("Simpson") cut his estimates of Halliburton's earnings for 2000 and 2001, and downgraded the Company's intermediate-term rating on the stock to "Accumulate" from "Buy," while retaining the long-term "Buy" rating. Simpson attributed the cut to "reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America and 'less powerful synergies from the Dresser merger than [h]e had envisioned.'"[53] His earnings per share estimates were cut to $0.85 from $1.15 for 2000 and to $1.50 from $1.90 for 2001. I do not have Simpson's breakout of his reduction of 2000 and 2001 earnings estimates between the segments; however, the reasons Simpson cites for cutting his rating for Halliburton are—except for his concerns about oilfield spending—related to

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[52] Brown Brothers Harriman & Co., January 5, 2000, 2:02 pm.

[53] *Reuters News*, "Research Alert—Halliburton Estimates Cut," January 5, 2000, 9:59 am.

Halliburton's alleged misstatements and omissions—specifically those concerning revenues and profitability from large fixed-price construction contracts and the benefits of the Dresser merger. The news article that reported on Simpson's change to estimates and rating noted that in the first half hour of trading the stock was down $1.4375, to $37.0625.

90. Industry-wide disclosures are captured by the industry index and are not reflected in the company-specific returns. Oilfield spending was an industry-wide concern for oil services companies that day. Thus, while the disclosure related to industry oilfield spending is non-culpable it is unlikely to be a contributing factor to the significant company-specific decline in Halliburton's stock price that day. For example, the impact of spending by major oil companies on the industry was discussed that day in a *Dow Jones Business News* article:

> . . . [I]ndustry observers say oil-services giants such as Halliburton Co. (HAL), Baker Hughes Inc. (BHI) and Schlumberger Ltd. (SLB) will report fourth-quarter results substantially below a year earlier. Oil-services, or oil-field, companies provide equipment, such as drilling rigs and services, to search for and produce oil and gas. . . .
>
> Overall, analysts said, the oil-services group should show substantial declines from fourth quarter 1998 because the most notable oil-industry trend of 1999—rising crude prices—has yet to spur major increases in production and exploration. This spending by major oil companies is the oil-services group's bread and butter. . . .

> "You're starting to see some increases in spending [by oil companies], but it's still very conservative," said Poe Fratt of A.G. Edwards & Sons Inc.[54]

91. CIBC World Markets also discussed oilfield spending that day:

> The oilfield service industry is driven by the need for oil and gas companies to develop new reserves and increase their current deliverability to satisfy the world's growing energy demand.
>
> The bottom of the industry cycle occurred in either 3Q99 or 4Q99, depending on whether a company's business is primarily North America, or internationally, oriented.
>
> We anticipate this cyclical uptrend to strengthen as 2000 unfolds. With increased oilfield activity, given the downsizing within the service companies, revenue and profit margins should experience a healthy recovery this year and into 2001, driving EPS growth. . . .
>
> Our strategy for investing in this industry recovery has been, and remains, to focus on the largest-cap service companies such as Schlumberger (SLB-$67 target price), Halliburton (HAL-$56 target price), and Baker Hughes (BHI-$41 target price), because that is where we believe investors' money will flow initially during the early stage of the upturn.[55]

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[54] *Dow Jones Business News*, "Oil-Service Firms' 4th-Quarter Results May Signal Start Of A Recovery," January 5, 2000, 9:15 am.

[55] CIBC World Markets, "Oilfield Svc & Offshore Drilling; Oilfield Services Investment Thesis," January 5, 2000.

92. I have reviewed all of the news and analysts reports from January 4-6, 2000, that are available to me at this time; I do not see other news or information that can explain the company-specific stock price decline on January 5 other than the reductions to earnings estimates made by the two analysts after, at least in the case of Lau, a conversation with Halliburton management. The reductions in earnings estimates are based at least in part on the problems with the large fixed-price contracts and the lack of benefits from the Dresser merger. Lead Plaintiff alleges that had Halliburton not included in its operating income in certain quarters of 1998, 1999 and 2000 unapproved claims revenue, in contrast to its earlier accounting policies, investors would have been on notice with respect to the unsatisfactory profitability of the certain large fixed-price contracts.[56] Thus, a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger. This is the type of information that would affect stock prices because it relates to value and is used, at least by analysts, in models to assess the value of Halliburton's stock.

93. *October 24-25, 2000*: After market close on October 24, 2000, while announcing its third quarter earnings release, the Company made a partial disclosure concerning the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger. Specifically, it disclosed that it would be restructuring its engineering and construction units, causing a

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[56] Complaint, pp. 140-141.

statistically significant decline on October 25 of 11.0% in Halliburton's stock price from $41.63 down to $37.06 (the company-specific decline was 6.6%; this was a statistically significant decline). Trading volume was 25.35 million shares that day, more than 7 times the average daily trading volume for Halliburton stock during the Class Period.[57] The price decline on October 25, 2000, was caused by revelations related to operational problems at the engineering and construction units and, to a lesser extent, some analysts' concerns regarding potential asbestos exposure. This is an instance where the Company released negative news concerning operational problems at its engineering and construction units. Analysts revised their forecasts as a result of the negative news discussed on October 24 and 25, 2000. A significant portion of the negative news, as attributed to the Company, in news reports and by analysts, was related to the problems with the engineering and construction units that Lead Plaintiff alleges could have been and should have been revealed earlier. Thus, a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged in the Complaint.

94. According to the Complaint, Halliburton's then-Chairman and chief executive David Lesar ("Lesar") leaked information regarding the Company's "serious operational problems in Halliburton's construction business . . . and that a new major restructuring/ reorganization . . . was necessary" to certain analysts

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[57] The average daily trading volume for Halliburton stock during the Class Period was 3.46 million shares.

in "early" October 2000.[58] The Complaint cites a Salomon Smith Barney report released October 25, 2000, which states:

> During the conference call, management indicated their desire to merge [Brown & Root Energy Services] with its construction peers in [Engineering and Construction] and rationalize the entire business. This confirms the message we heard from management several weeks ago during our company visit.[59]

95. The subsequent restructuring charge taken in fourth quarter (as revealed later in the December 22, 2000 partial disclosure) was predominantly due to the delays and cost overruns of Halliburton's large fixed-price construction projects. According to news reports, Lesar said on October 24 or 25, 2000, that:

> [T]he engineering and construction units have been hurt because customers have been slow to move ahead with major construction projects and that profits have been unsatisfactory.
>
> . . .Kellogg Brown & Roots profits have been adequate so far because that unit has been working through a backlog of projects.
>
> However, its profit margins will erode as it finishes projects and customers continue to delay decisions on major new construction.[60]

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[58] Complaint, p. 101.

[59] Salomon Smith Barney, "HAL: 3Q in line; E&C Outlook weak; Trimming Estimates," October 25, 2000.

[60] *Knight Ridder Tribune Business News*, "Dallas-Based Halliburton Co. to Combine Engineering, Construction Units," October 25, 2000.

Lead Plaintiff alleges that during the Class Period had Halliburton not included unapproved claims in its construction units' revenues, or disclosed that it had included unapproved claims in its financial reporting for its construction units, investors would have been on notice of those units' reduced profitability or that reported profits might not be realized if customers failed to pay the unapproved claims, with subsequent charges for cost overruns as a result.

96. The announcement by the Company on October 24 prompted certain analysts to cut earnings forecasts based on the partial disclosures related to the large fixed-price construction contracts.[61] Some analysts mention other negative news but the overwhelming consensus behind all downgrades is the problems at Halliburton's Engineering and Construction unit and the restructuring related to same.

> Shares of oil-services firm Halliburton Co. slumped Wednesday after the company announced a restructuring of its engineering and construction units. . . .
>
> ING Barings lowered its rating on the stock from "buy" to "hold," Southwest Securities downgraded from "buy" to "accumulate," and Dain Rauscher Wessels said that because of "too many uncertainties" in the non-oilfield units investors should focus on purely oil-service stocks.

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[61] The charges for cost overruns that were announced in December 2000 make clear that the problems in the engineering and construction were related to the large, fixed-price contracts and, therefore, the negative news on October 24 and 25, 2000, is a partial disclosure related to the Company's booking unapproved claims on fixed-price contracts and the lack of benefits from the Dresser merger alleged in the Complaint.

> In trading Wednesday morning, Halliburton shares were down $5.13, or more than 12 percent, to $37.06. . . .
>
> The company made the announcement while releasing its third-quarter results. Halliburton said excluding one-time items, it earned $109 million, or 24 cents per share, a penny better than expected by analysts surveyed by First Call/Thomson Financial. Revenue was $3 billion.[62]

97. Several analyst reports were released on October 25. Merrill Lynch analyst Kevin Simpson said he had cut his estimate of Halliburton's 2001 earnings per share to $1.30 from $1.50 due to problems with the Company's construction segment, but was maintaining an accumulate rating on the stock. "The engineering and construction side of the business is turning much more slowly than they had expected and than I had expected," he said.[63]

98. Also, "ING Barings analyst Stephen Gengaro lowered his rating on Halliburton's stock to hold from buy rating and his 2001 earnings estimate to $1.50 from $1.80, citing weakness in the engineering and construction business and, to a lesser extent, outstanding asbestos liability claims against the company."[64]

99. Analyst James K. Wicklund with Dain Rauscher Wessels released a report that day that

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[62] *Associated Press Newswires*, "Halliburton stock slides on news of restructuring, slowing projects," October 25, 2000, 12:24 pm.

[63] *Reuters News*, "Update 2-Halliburton stock hit by engineering slowdown," October 25, 2000, 4:26 pm.

[64] *Ibid.*

stated that Halliburton's third-quarter EPS beat expectations, but "[m]ore interestingly, the company announced a major restructuring of its Engineering and Construction Group which continues to show disappointing results."

He reduced his fourth-quarter estimates to "reflect the increasing weakness in the engineering and construction business and the slower-than-expected increase in international activity." He stated:

> We applaud the company's attempt to improve the results of the ECG [construction segment] and believe that the ESG [oilfield services segment] is well positioned to benefit from the continued oilfield services cyclical recovery with strong market positions in several products/services segments. However, we believe there are too many uncertainties regarding the recovery in the non-oilfield service businesses. We recommend investor's focus on pure-play oilfield service stocks that are more highly leveraged to the continued cyclical recovery. We continue to rate the stock Neutral.[65]

100. Analyst Allen Brooks with CIBC stated in his report that day:

We are maintaining our Buy rating but reducing our price target to $50 from $56. . . .

> The shock in the conference call was management's statement that, given the outlook for customer spending in the shallow water marine construction market and the downstream [Engineering and Construction] business, it is

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[65] Dain Rauscher Wessels, "Halliburton Reports: Announces Major Restructuring Initiative," October 25, 2000.

> not sure that Halliburton has the critical mass to generate consistent and predictable profitability and profit growth from these sectors. Management believes the stock is being punished for the lack of this predictability. Therefore, it will look to a significant restructuring of these businesses with an eye to achieving this goal during 2001.[66]

101. Analyst Fratt with A.G. Edwards & Sons, Inc. stated that Halliburton's EPS was ahead of expectations "due to strong North American drilling market," but that the "near-term outlook [was] less robust." Fratt lowered his estimates for the Company to "reflect weaker [Engineering and Construction] business," concluding that the "[r]estructuring is positive and oilfield service recovery continues." Fratt reiterated his "Accumulate/ Aggressive" rating for the Company.[67]

102. Analyst Asit K. Sen with ABN AMRO stated:

> Strong performance from the oil field services business . . . were essentially offset by weaker results from the Engineering and Construction (E&C) business. . . . The company indicated that it is embarking on a strategic restructuring program to improve results from the E&C business that we view positively. . . . We are

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[66] CIBC, "Weak E&C Outlook Prompts Restructuring; Reducing Estimates," October 25, 2000.

[67] A.G. Edwards & Sons, Inc., "North America Drives Positive Earnings Surprise—Lowering Estimates to Reflect Weaker E&C Business," October 25, 2000.

lowering our 2000 EPS estimate to $0.55 (from $0.58) and 2001 estimate to $1.35 (from $1.50).[68]

103. As clearly illustrated above, each analyst cites the problems within Halliburton's construction segment as the cause for downgrades and concerns. Indeed, most analysts discuss positive news for the Company's oilfield services segment, which would be positively reflected in the stock's returns, strengthening my opinion that the decline in the stock price was due to the partial disclosure related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger.

104. I have reviewed all of the analyst reports available to me at this time. The following table summarizes their adjustments to earnings following the Company's third quarter 2000 earnings release and conference call with management.

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[68] ABN AMRO, "HAL: Lowering 2000 and 2001 Earnings Estimates," October 25, 2000. Later that day, Sen issued another report where he lowered his 2001 EPS estimate even further to $1.15. AMRO, "HAL: Bruised But Not Broken—Sensitivity Analysis," October 25, 2000.

Analyst	Prior 2001 EPS	New 2001 EPS	Reason for Change
ABN-AMRO	$1.50	$1.15	Continued weakness in E&C business, both upstream (BRES) and downstream (KBR) services. Change in 2001 estimates for operating income from previous earnings model: Prior: / New: ES $1,029 million / $929 million E&C $207 million / $76.5 million More than 50% of the reduction is estimated operating earnings for 2001comes from E&C.
A.G. Edwards & Sons	$1.55	$1.35	More conservative operating assumptions for E&C business.
CIBC	$1.71	$1.50	Weakness in E&C business. Change in 2001 estimates for operating income from previous earnings model: Prior: / New: ES $1,046.2 million / $1,029.2 million E&C $203.5 million / $80.0 million Dresser $174.2 million / $164.8 million More than 80% of the reduction in estimated operating earnings for 2001 comes from E&C.

Analyst	Prior 2001 EPS	New 2001 EPS	Reason for Change
Dain Rauscher Wessels	$1.57	$1.42	Increasing weakness in E&C business and slower-than-expected increase in international activity. Change in 2001 estimates for operating income from previous earnings model: ES: Prior: $987.4 million; New: $1,029.2 million E&C: Prior: $189.4 million; New: $80.0 million Dresser income: Prior: -$86.4 million; New: -$98.5 million Other income is interest expense/ income. More than 80% of the reduction in estimated operating earnings for 2001 comes from E&C.
Jefferies & Co.	$1.65	$1.65	No charge
Salomon Smith Barney	$1.45	$1.10	"Largely" due to weak E&C outlook.

105. For the three analysts that provide detailed earnings models, 50% to 80% (a significant portion) of the reduction in estimates for 2001 operating income is from the engineering and construction business (E&C).[69] This is the type of information that would affect stock prices because it relates to value and is used directly by, for example, analysts in models to assess the value of Halliburton's stock. I have reviewed all of the news and reports from October 24 and 25, 2000, that are available to me at this time and find that the negative news and sentiment is predominately about the operational problems, delays and cost overruns for large construction projects.[70] Thus, a significant portion, if not all, of the significant price decline on October 25 was caused by the partial disclosures related to the operational problems at the engineering and construction units and is related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger that are alleged by Lead Plaintiff.

106. *December 21-22, 2000*: On Thursday, December 21, 2000, Halliburton pre-announced fourth-quarter earnings and formally unveiled the restructuring of its engineering and construction units. The press release stated that it planned to take a charge of $120 million in the fourth quarter, the bulk of which was due to cost

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[69] Various studies have demonstrated that earnings surprises, i.e., when earnings are lower or higher than expected, have an impact on stock prices. Thus, it has been empirically demonstrated that changes in earnings and earnings expectations can and do affect stock prices.

[70] It is my understanding that to date there has been no discovery that would identify specifically what projects were affected.

overruns at several overseas projects.[71] This is an instance where the Company released negative news, all of which appears to be related to cost overruns on the fixed-price contracts at its engineering and construction units. Lead Plaintiff alleges that information related to cost overruns on overseas projects could have been and should have been disclosed earlier.

> [Halliburton will] record[ ] approximately $120 million after tax charges in the fourth quarter related to restructuring and charges on projects of the engineering and construction businesses. Both Brown & Root Energy Services and Kellogg Brown & Root are impacted by the charges and reorganization.
>
> The portion of the charges related to reorganization costs is expected to be approximately $25 million after tax and primarily relate to severance costs associated with a reduction in the number of senior management positions and costs to exit several facilities no longer required, while the remaining charges primarily relate to project specific matters.
>
> During the quarter, several large fixed fee engineering and construction projects, including two projects where Kellogg Brown & Root participates as a member of a construction joint venture, incurred significant additional costs related to projected completion of the projects.

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[71] Aftermarket close, on January 30, 2001, Halliburton released its fourth-quarter 2000 earnings results in which the Company increased the $120 million charge announced December 21 to $193 million (of which, $157 million was attributed to project losses).

> Much of the additional costs relate to labor disturbances in Venezuela and West Africa that have significantly affected productivity on the projects. While claims will be made for a large portion of the additional costs, management does not believe that all the claims will be recovered. In addition, negotiations with customers regarding cost increases on seven other projects have not resulted in resolution of certain claims as originally anticipated.[72]

107. In general, analysts were surprised by the charges related to the cost overruns.

> Halliburton said approximately $25 million of the charge will cover costs of the restructuring, which analysts said could foreshadow spinning off the engineering and construction units into a separate company. But the bulk of the charge, about $95 million, was related to delays and cost overruns. The company blamed some on labor problems in Venezuela and West Africa and said it will make claims to recoup the money.
>
> It is also negotiating, so far unsuccessfully, to recover extra costs on seven other projects.
>
> The Dallas-based company had hinted about the restructuring two months ago, but the cost overruns caught observers off-guard.
>
> "There are nine projects (with overruns). That points more to a problem with the bidding process," said Jim Wicklund, an analyst with Dain

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[72] *PR Newswire*, "Halliburton Announces New Structure and Engineering and Construction Charges," December 21, 2000, 8:59 am.

Rauscher Wessels who rates Halliburton stock "neutral."

Allen Brooks, an analyst with CIBC World Markets Corp., attributed the overruns to doing business in places such as Nigeria.

"It was a little bit of a surprise, but I don't raise too high a flag about it," said Brooks.[73]

108. Analysts continued to express concerns on December 22:

Two investment analysts who follow Halliburton expressed some unhappiness about the write-off from cost overruns and higher expenses, which came as a surprise to them.

"I knew there would be charges," said Fred A. Mutalibov with Southwest Securities Inc. in Dallas. "But one of the problems with the big companies like Baker Hughes, Halliburton and Schlumberger within my industry is that what are called one-time or non-recurring charges keep coming again and again."

Jim Wicklund, analyst with Dain Rauscher Wessels in Dallas, said excluding the charges makes it difficult for investors to compare Halliburton's earnings from quarter to quarter. It isn't the first time Halliburton has written off cost overruns on projects, he said.

"This is $95 million in charges where they had significant cost overruns and seven projects that they had cost increases that they haven't been able to pass along. With no offense meant toward

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[73] *Associated Press*, "Halliburton to split into two divisions," December 21, 2000, 5:31 pm.

> Halliburton, that's a lack of good contingency consideration," he said.
>
> Halliburton shares, after trading off as much as $1.31, closed down 75 cents to $37 Thursday on the New York Stock Exchange.
>
> Guy Marcus, Halliburton's vice president of investor relations, declined to identify the projects or customers with which Halliburton has incurred the higher costs.
>
> Halliburton said "several large fixed-fee" projects, including two where its Kellogg Brown & Root unit is part of a construction joint venture, "incurred significant additional costs" coming up to completion.
>
> It said "labor disturbances" in Venezuela and West Africa "have significantly affected productivity on the projects."
>
> "While claims will be made for a large portion of the additional costs, management does not believe that all the claims will be recovered," Halliburton said.
>
> The company also said that on seven other projects, it has been unable to resolve claims over cost increases as it had first anticipated.[74]

109. Although the stock fell 2.0% on December 21, this was not a statistically significant return. On December 22, 2000, Halliburton's stock price declined 2.7%, down from $37.00 to close at $36.00. The company-specific return that day is negative 3.9%, a statistically significant decline (although the industry

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[74] *Texas*, "Dallas-Based Oil Services Firm Halliburton to Take $120 Million Charge," December 22, 2000.

was down that day, the overall market was up more than 3.0%). The price reactions on December 21 and 22 are consistent with the charge for cost overruns at various projects that was a surprise to the market.

110. Several analysts issued reports on December 21 and 22 in response to the Company's announcement.

A.G. Edwards & Sons:

> Although these project adjustments will undoubtedly have a positive impact on [Engineering and Construction] profitability in 2001-2, the extent of the adjustments is much wider than previously thought, in our view, and is evidence that execution problems have also had a negative impact on [Engineering and Construction] operating results. With the restructuring and project adjustments, we believe that [Halliburton's] [Engineering and Construction] business should be on track to meet its 3% margin goal in 2001 and generate closer to 5% margins in the future. We point out that the [Engineering and Construction] backlog has improved slightly since the end of 3Q2000 and additional activity should materialize as integrated oil companies increase capital spending in 2001.[75]

CIBC:

> The struggling [Engineering and Construction] division has been a drag on [Halliburton's] stock performance. Based on our 2001 EPS estimates, [Halliburton] currently trades at a 35% valuation

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[75] AG Edwards & Sons, Inc. "E&C Business Restructuring Formally Announced—4Q2000 EPS ON Track," December 21, 2000.

> discount to other major oil services companies. Although part of this discrepancy is warranted due to the weak performance of the [Engineering and Construction] business, we believe [Halliburton] can narrow the valuation gap with a successful reorganization. Additionally, the strength of the recovery in the oilfield service industry should also enhance stock price appreciation.[76]

111. Of the $120 million special charge announced by Defendants, $95 million (or 79%) is related directly to the misrepresentations of cost overruns alleged by Plaintiffs. The remaining $25 million is related to the restructuring necessitated by the severe operational problems arising from the failed Dresser merger and cost overruns for large fixed-price construction contracts, and does not appear to have been a surprise or a concern to analysts as some charge was expected after the Company announced the restructuring plan in its third quarter earnings conference call.

112. Halliburton's stock price reaction that day is consistent with the charge for cost overruns at various projects being a surprise and a concern to the market. I have reviewed all of the news and analysts reports available to me at this time from December 21 and 22, 2000, and find that the negative news and sentiment is predominately about the operational problems, delays and cost overruns for large construction projects. As there was no other negative news released that day, all of the price decline on December 22 was caused by the partial disclosures related to the operational problems at the engineering and

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[76] CIBC, "4Q Outlook In Line With Prior Guidance, Restructuring Charge Announced," December 21, 2000.

construction units and is related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged by Lead Plaintiff.

113. My conclusions with respect to the causes of significant portions of the company-specific price declines in Halliburton stock on October 5, 1999, January 5, October 25 and December 21-22, 2000, are based on statements made by the Company and by analysts (that are for the most part attributed to or based on communications from the Company). I reserve the right to revise my conclusions if, based on discovery, additional information would cause me to alter my conclusions.

Partial Disclosures Related to the Company's Exposure to Asbestos Litigation:

114. Lead Plaintiff alleges that Defendants "intentionally concealed and affirmatively misrepresented the true significance of Halliburton's exposure to asbestos liabilities in Halliburton's financial statements, [SEC] filings, press releases and communications with analysts and investors."[77] The following events are examples of information disclosed during the Class Period that corrected, in part, these misrepresentations, in that they brought investors' perceptions of the Company's exposure to asbestos liability more in-line with its alleged true exposure at that time. My analysis has identified at least four instances of partial disclosures related to these allegations; these disclosures caused a total company-specific decline in Halliburton's stock price of as much as 56%, or $16.19.

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[77] Complaint, pp. 23-24.

115. *June 29, 2001*: On June 28, after market close, Halliburton made a partial disclosure related to the asbestos claims. This is an instance where the Company released negative news, all of which concerned the asbestos claims. It announced that Harbison had requested the Company's financial assistance with asbestos claims Harbison agreed to assume in 1992 after it was spun off from Dresser. Dresser had agreed to handle asbestos claims filed prior to the split, and Harbison agreed to handle asbestos claims filed afterward. Dresser was named as a defendant in the claims, and the companies were in effect co-insured. The Company stated that:

> Based on the information it has developed to date and its own experience in managing asbestos claims, Halliburton believes that if such a decision is made it would require an additional reserve for estimated known claims at June 30, 2001, net of insurance recoveries, of approximately $50 to $60 million, after-tax.

Halliburton stated that it had "substantial interest" in resolving the claims, and that this development exposed the Company, net of insurance recoveries, to a worst case asbestos liability cost of $60 million.[78]

116. This disclosure caused a statistically significant decline in Halliburton's share price. On Friday, June 29, 2001, Halliburton's stock price declined 4.22%, down from $37.17 to close at $35.60. The company-specific return that day is negative 4.6%.

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[78] *PR Newswire*, "Harbison-Walker Asks Halliburton For Asbestos Claims," 4:45 pm, June 28, 2001.

117. Certain analysts expressed some concern over the Company's potential exposure to asbestos liability and its impact on Halliburton's stock price, which is reflected in the decline in the stock price. For example, on June 29, Goldman Sachs removed Halliburton from its list of top recommendations, citing anticipated pressure on the Company's stock price due to this asbestos related disclosure:

> Analyst Terry Darling ["Darling"] wrote in a report, "Although [Halliburton's] operating performance is improving (second quarter upside surprise likely) and it's unlikely that this event substantially increases [Halliburton's] financial risk from asbestos liabilities, we believe the incremental uncertainty created by this new development is likely to place further pressure on [Halliburton] shares.[79]

CNBC discussed the Goldman Sachs downgrade:

> [Halliburton] was downgraded today by Goldman Sachs. The bottom line from Goldman is that Goldman says the company has issues with w— asbestos [sic] liabilities. That's going to be a problem, even though the fundamentals appear to be improving for Halliburton. The firm is taking the stock off of its recon-mend list. They make it a market performer on the heels of the company, saying it may assume asbestos liabilities of Harbison Walker, which was spun off by Dresser Industries as Indresco back in 1992.[80]

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[79] *Reuters News*, "Research Alert-Goldman cuts Halliburton from recommended list," June 29, 2001, 8:04 am.

[80] *CNBC Squawk Box*, "Newscast: Squawk Box, 9:30 AM; today's business news," June 29, 2001.

The reasons cited by Darling for removing the Company from its recommendation list are related to Halliburton's misstatements—specifically the misstatements concerning the significance of Halliburton's exposure to asbestos liabilities.

118. I have reviewed all of the news and analysts reports surrounding June 29, 2001, that are available to me at this time; I do not see other news or information that can explain the company-specific stock price decline on June 29, 2001, other than the asbestos-related disclosure. The stock price decline on June 29 was caused by information that partially corrected investors' erroneous assessments Halliburton's asbestos liability. Lead Plaintiff alleges that this is the type of information that could have been and should have been disclosed earlier.

119. *August 9, 2001*: On August 9, 2001, Halliburton filed Form 10-Q with the SEC, in which it increased its accrued net liability for known open asbestos claims to $124 million (from $60 million on June 28, 2001, $30 million on March 31, 2001, and $29 million on Dec. 31, 2000). This is an instance where the Company released negative news, all of which concerned its potential asbestos liability. This disclosure caused a statistically significant decline in Halliburton's share price. That day Halliburton's stock price declined 4.48%, down from $33.50 to close at $32.00. The company-specific return that day is negative 5.2%, a statistically significant decline. This disclosure is related to Halliburton's misstatements and omissions—specifically those concerning the significance of Halliburton's exposure to asbestos liabilities.

120. The decline in Halliburton's stock price on August 9, 2001, was attributed to the information

released in the 10-Q related to the Company's asbestos liability:

> Halliburton Co, the world's No. 1 oilfield services firm, saw its stock fall 4.5 percent on Thursday after the company released information showing a sharp increase in its asbestos litigation liability.
>
> Dallas-based Halliburton, headed until August 2000 by U.S. Vice President Dick Cheney, said it estimated its net liability for open asbestos claims against current and former Halliburton subsidiaries at $124 million as of June 30, 2001, up from $30 million on March 31, 2001 and $29 million on Dec. 31, 2000.
>
> The information, contained in a 10-Q filing with the Securities and Exchange Commission (SEC), hit Halliburton's stock which closed $1.50 lower at $32.
>
> "When you look at the growth in claims and you look at these numbers, we're concerned," said Scott Gill, an analyst with Houston-based energy investment bank Simmons & Co.
>
> Gill said the information about the asbestos claims—which date back to the 1970s—was far more detailed than the company had made in 10-Q statements in previous quarters.[81]

121. I have reviewed all of the news and analysts reports surrounding August 9, 2001, that are available to me at this time; I do not see other news or information that can explain the company-specific stock price decline on August 9, 2001, other than the

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[81] *Reuters News*, "Halliburton stock down as asbestos liability rises," August 9, 2001, 7:12 pm.

asbestos-related disclosure. The stock price decline on August 9 was caused by information that partially corrected investors' prior erroneous assessments Halliburton's asbestos liability. Lead Plaintiff alleges that this is the type of information that could have been and should have been disclosed earlier.

122. *October 31-November 1, 2001*: After market close, on Tuesday, October 30, 2001, Halliburton announced that on October 26, 2001, a jury in Mississippi found Dresser (through Harbison) liable in two of six asbestos cases for total compensatory damages of $21.3 million ($10.7 million per plaintiff). The case was against three companies, and the total verdict was $150 million. This verdict had not yet been affirmed and a judgment had not yet been entered against the Company. The Company stated that it would "file post trial motions and vigorously appeal if the verdict is not set aside."[82] This is an instance where the Company released negative news, all of which related to Halliburton's misstatements—specifically the misstatements concerning the significance of Halliburton's exposure to asbestos liabilities. This disclosure caused a statistically significant decline in Halliburton's share price. On October 31, 2001, Halliburton's stock price declined 6.3%, down from $26.35 to close at $24.69. The company-specific return that day is negative 4.9%, a statistically significant decline. The Company's stock continued to decline 2.88% on November 1, 2001, to close at $23.98. The company-specific decline is 3.7%, a statistically significant decline because the market was up that day.

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[82] *PR Newswire*, "Halliburton Disputes Asbestos Claims," October 30, 2001, 8:05 pm.

123. One analyst was surprised by the size of the award, and expected the news to have a negative impact on the Company's stock price:

> Six plaintiffs were each awarded $25 million and Dresser (through the Harbison-Walker (H-W) subsidiary) was found liable in two of the six cases for total compensatory damages of $21.25 million ($10.675 million per plaintiff). Potential 4Q2001E impact is small: $5mil or $3mil tax effected = less than $0.01/share hit. If appeal is unsuccessful, reserves could move up sharply.
>
> This jury award sets new precedents; the size of award is enormous. . . .
>
> Size of jury award was unexpected and is likely to have a negative impact on stock price tomorrow. We expect a vigorous defense by [Halliburton's] and remain optimistic that the asbestos liability will remain under control. Given the significant discount relative to its peer group, we believe that [Halliburton's] current stock price adequately discounts potential asbestos liability risk.[83]

124. I have reviewed all of the news and analysts reports surrounding the October 30 disclosure that are available to me at this time; I do not see other news or information that can explain the company-specific stock price decline on October 31 and November 1, 2001, other than the Company's asbestos-related disclosure on October 30. The stock price declines on October 31 and November 1, 2001 were caused by information that partially corrected investors' erron-

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[83] A.G. Edwards, "Asbestos Case in Small Mississippi Town Yields $150 Million Jury Award Against HAL, MMM and Others—Vigorous Appeal Expected," October 31, 2001.

eous assessments Halliburton's asbestos liability. Lead Plaintiff alleges that this is the type of information that could have been and should have been disclosed earlier.

125. *December 4-7, 2001*: During the period December 4 through December 7, 2001, Halliburton disclosed recent adverse asbestos jury verdicts in Form 8-K SEC filings and there was substantial discussion in the news and by analysts related to Halliburton's potential asbestos exposure. This is an instance where the Company released several pieces of negative news, all of which were concerning the asbestos claims. These disclosures caused statistically significant declines in Halliburton's share price.

126. On Tuesday, December 4, the Company filed Form 8-K with the SEC, in which it disclosed that a Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001.[84]

In the same filing, the Company disclosed that the same district court also entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs in the aggregate amount of $35.7 million related to an alleged breach of a purported settlement agreement. The Company stated that it intended to appeal the three judgments "on the grounds that it wasn't a party to the settlement agreements and that it didn't authorize anyone to

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[84] This verdict was known to the public before December 4. For example, an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report.

settle on its behalf. The company said it believes its appeal will be successful."[85]

127. On December 3, 2001, Halliburton's stock price closed at $22.06. On December 4, Halliburton's stock price declined 0.73%. This is a statistically significant negative return because both the market and the industry were up that day. On December 5, Halliburton's stock price increased 0.46%, which also is a statistically significant negative return because both the market and the industry were up that day. On December 6, the stock declined 5.23%. This is not a statistically significant return because both the market and the industry were down that day. Halliburton closed at $20.85 on December 6.

128. On the morning of December 7, 2001, the Company filed Form 8-K with the SEC disclosing that on December 5 a Maryland jury had awarded a $30 million verdict against Dresser in favor of five plaintiffs in an asbestos litigation. The Company stated that it intended to "aggressively" appeal the verdict:

> The company said it believes the trial court committed numerous errors and that the evidence didn't support the verdict, according to the filing. The company intends to challenge the verdicts by post trial motion and, if those motions aren't successful, to pursue an appeal "aggressively."[86]

129.Several analysts issued reports that day in response to the Company's SEC filing. Analyst Geoff

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[85] *Dow Jones Corporate Filings Alert*, "Texas Court Enters $65M Verdict Against Halliburton," December 4, 2001, 8:45 am.

[86] *Dow Jones Corporate Filings Alert*, "Jury Returns $30M Verdict against Halliburton Subsidiary," 8:17 am.

Kieburtz with Salomon Smith Barney downgraded his rating for Halliburton (to 3H from 1M) and dropped his price target to $20 from $36 citing mounting asbestos liabilities:

> This verdict comes on the heels of a $21 million Mississippi jury verdict, a $65 million judgment in Orange, Texas, and an additional $36 million, representing a settlement previously negotiated by Harbison-Walker. All of these cases pertain to Harbison-Walker, a former subsidiary. The company has indicated that in all cases that it believes the trial courts have committed numerous errors, and that it expects to prevail on appeal. While the stock heavily discounts Halliburton's asbestos exposure, the specter of lawsuits spiraling out of control is likely to adversely impact the stock for the foreseeable future, and thus we cannot recommend it at this time.[87]

130. Analyst Sen with Jefferies & Co. put his rating for Halliburton under review citing uncertainty regarding the asbestos litigations and near-term earnings risk:

We have remained cautious on Halliburton for two main reasons: 1) uncertainty surrounding ongoing asbestos litigation, and 2) near-term earnings risk. . . . These [asbestos related disclosures] are surprising developments following management's rather positive asbestos update during its 3Q01 conference call on October 23. During the conference call management had provided further assurances that current reserves are adequate to cover projected asbestos liabilities. We

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[87] Salomon Smith Barney, "HAL: Downgrading on Mounting Asbestos Liabilities," December 7, 2001.

now believe that [Halliburton's] asbestos-related net liabilities could be significantly higher than currently estimated (estimated at $125 million by the company). We continue to remain cautious on the stock. Our rating is under review (with a negative bias) pending further update from management on asbestos.[88]

131. UBS Warburg analyst, James Stone, downgraded his rating for Halliburton to "Hold" from "Strong Buy" and reduced his 12-month target price to $24 from $38:

> While we do not anticipate that every claim filed against Halliburton will end up in court, in fact the vast majority of claims should continue to be settled at or near the company's historical settlement rates. Nevertheless, if only 1% of cases resulted in jury verdicts of a similar magnitude and the awards were upheld at the appellate level, the future liability would be significantly greater than our previous expectations.[89]

132. On December 7, 2001, Halliburton's stock price declined 42.4%, down from $20.85 to close at $12.00.

The company-specific return that day is negative 42.7%, a statistically significant decline. Trading volume was almost 77 million shares that day, more than 22 times the average daily trading volume for Halliburton stock during the Class Period. Several news articles attributed the decline in Halliburton's stock price on December 7 to the recent asbestos

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[88] Jefferies, "Halliburton: Update On Asbestos Litigation; Stay Cautious," December 7, 2001.

[89] UBS Warburg, "Halliburton: Downgraded to Hold from Strong Buy," December 7, 2001.

disclosures.[90] I have reviewed all of the news and analysts reports surrounding December 4-7, 2001, that are available to me at this time; I do not see other news or information that can explain the company-specific stock price declines during December 4-7, 2001, other than the asbestos-related disclosures. The cause of the large decline in Halliburton's stock price on December 7 was directly related to the disclosures regarding its asbestos exposure and subsequent market assessments at to the possible financial consequences to the Company of that asbestos exposure. Lead Plaintiff alleges that this is the type of information that could have been and should have been disclosed earlier.

B. Summary of the Decline in Halliburton's Stock Price during the Class Period

133. The total decline in Halliburton's stock price was 72.0% from the start of the Class Period through December 7, 2001: from June 3, 1999, (the closing price was $42.88) to December 7, 2001 (the closing price was $12.00). (See Exhibit 14.) As can be seen in Exhibit 14, during the same period, Halliburton's industry rose 14.2% (from $10.50 to $12.00) and the market fell 6.2% (from $12.80 to $12.00). (In Exhibit 14, the market and industry indices are indexed to $12.00 on December 7, 2001.[91]) Thus, the full decline

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[90] *See, e.g., The Wall Street Journal*, "Halliburton Stock Falls Nearly 43% After Recent Asbestos Verdicts," December 10, 2001.

[91] The value of Halliburton stock was $12.00 after at least several partial disclosures. It would be misleading to use Halliburton's stock price at the start of the Class Period as the point at which to anchor the market and industry indices because Lead Plaintiff alleges that if the stock price would have been at its true value, but for the alleged fraud, it would have been much lower.

in Halliburton's stock price during the Class Period cannot be attributed to the decline in the market or to the increase in the industry. Moreover, Lead Plaintiff does not allege that Halliburton's stock price should not have declined; Lead Plaintiff contends that Halliburton's stock price would have declined earlier had Halliburton's financial results been reported correctly and accurately and Defendants had correctly characterized Halliburton's potential asbestos liabilities.

134. My analysis shows that the partial disclosures related to the accounting and asbestos claims made by Halliburton during the Class Period caused the price of Halliburton to decline. Specifically, the partial disclosures related to its undisclosed losses from large fixed-price construction contracts and unrealized benefits from the acquisition of Dresser, caused a decline in Halliburton's stock price on October 5, 1999, January 5, 2000, October 25, 2000 and December 22, 2000. The partial disclosures related to Halliburton's asbestos liability caused a decline in Halliburton's stock price on June 29, 2001, August 9, 2001, October 31, 2001, November 1, 2001, December 4, 5 and 7, 2001. If Halliburton had timely reported its operational problems and the full extent of its exposure to asbestos liability, the decline in the value of Halliburton stock that occurred during the Class Period would have occurred earlier when Lead Plaintiff alleges that Halliburton should have reported its operational problems and the full extent of its exposure to asbestos liability.

/s/
Jane D. Nettesheim

Appendix to Report of Jane D. Nettesheim: Regression Analysis and Event Study

1. I used regression analysis to determine the dates on which Halliburton's daily stock price returns are significantly different from the returns which would have been expected based on the returns on a market index and on an industry index of companies comparable to or competitors of Halliburton, and on the correlation of Halliburton's returns with market and industry returns.[1]

2. Regression analysis is a statistical tool commonly used by economists to estimate the relationships between two or more variables. In this case, the regression analysis is used to measure the relationship between the Halliburton stock returns and (1) changes in market-wide factors that would be expected to impact all stocks and (2) changes in industry-wide factors that would be expected to impact all stocks in a particular industry. By measuring how the stock returns of Halliburton move in relation to an overall market index and an industry index, I can also measure how it responds to news.

3. A period of time over which to estimate the regression equation, a control period, must be selected. It is important to select a control period that is representative of the Company during the Class Period. It also is important to select a control period with as little impact as possible from the fraud in determining the normalized relationship between a company's stock returns and the returns on a market

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[1] A daily return is the percentage change in Halliburton's closing share price from its closing share price on the previous trading day.

index and an industry index.[2] In this case, I used a control period from October 1, 1998 through September 30, 1999. This is a one-year period that begins shortly after the Dresser Merger, and overlaps approximately the first four months of the Class Period. The control period is typically a one-year period that occurs prior to the start of the Class Period. However, in this case, the control period must start after the Dresser Merger in order to reflect the stock price of the combined companies. The regression equation from the control period explains the expected variation in the Halliburton stock returns based on changes in the market and industry. The explained variation is measured by the square of the correlation coefficient, or r^2,[3] and the regression equation is statistically significant, as measured by the F-statistic.[4] The regression analysis and regression equation are provided in Exhibit 15.

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[2] *See, e.g.*, Cornell, Bradford and R. Gregory Morgan, "Using Finance Theory to Measure Damages in Fraud on the Market Cases," *UCLA Law Review*, 37 (June 1990) 883, p. 898.

[3] The correlation coefficient, r, is a dimensionless index that ranges from -1.0 to 1.0 inclusive and reflects the extent of a linear relationship between two data sets. The r-squared value can be interpreted as the proportion of the variance in the dependent variable attributable to the variance in the independent variables and ranges from 0 to 1.0. In this case, the dependent variable is Halliburton stock returns and independent variables are market index returns and industry index residual returns. The r- squared value measures the percentage of the total variance in Halliburton's stock return that is explained by the market and industry index returns. The r^2 is 77% for this regression; in these types of regressions, the usual range is from 0.10 to 0.50.

[4] The F-statistic is the result of a statistical test to determine whether a significant relationship exists between the dependent variable and the set of independent variables. Here the F-statistic is 415 and is significant at greater than the 99% level of

4. The market index is a market capitalization weighted composite of all stocks traded on the NYSE, American Stock Exchange ("Amex"), and NASDAQ (the NYSE/Amex/NASDAQ composite index, or "NAN"). This broad-based market index is commonly used by economists as a representation of the market and the data are provided by CRSP.[5]

5. Many companies were considered for use in an industry index. Companies considered for the industry index include those that are referred to in analysts' reports as competitors or comparables to Halliburton, and constituents in certain Halliburton industry indices.[6, 7] A list of companies considered for, and those included in, the industry index is provided in Exhibit 16.

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confidence, i.e., there is a greater than 99% probability that there is a statistically significant relationship between Halliburton stock returns and returns on the market and industry indices.

[5] CRSP is the Center for Research in Securities Prices at the Graduate School of Business, University of Chicago.

[6] A company was considered for the industry index if it was listed in at least four of the following indices: Bloomberg Oil & Gas Services Index; Bloomberg United States Oil & Gas Services Index; FactSet's Index of Oil Service and Equipment Companies; Morgan Stanley Oil Services Index; Oil Service HOLDRS Index; Philadelphia Oil Service Sector Index; S&P 150 Super Composite Oil & Gas Equipment & Services Index; Standard and Poor's Supercomposite Energy Equipment & Services Index. A company was considered for the industry index if it was included in an analyst report as comparable to or a competitor to Halliburton.

[7] Halliburton did not list specific competitors in its SEC filings: "We conduct business worldwide in over 100 countries. Since the markets for our services and products are vast and cross numerous geographic lines, a meaningful estimate of the number of competitors cannot be made." (Halliburton's SEC Form 10-K for 2001).

6. First, the daily stock returns for each company considered for the industry index were regressed on the market index returns during the control period, October 1, 1998 to September 30, 1999. The residual returns[8] from each of these regression equations were calculated. Halliburton stock's daily returns then were regressed as a dependent variable against the residual returns from each of these regressions as the independent variable, to determine whether they were significantly correlated (i.e., to determine whether after excluding market effects each company's daily residual returns helped to explain the daily returns on Halliburton stock). Those companies whose daily residual returns are significantly and positively correlated with Halliburton stock's daily returns are included in the index.[9]

7. The industry index is formed from the returns of each of the companies whose residual returns are statistically correlated with Halliburton stock returns. The individual companies weighting in the industry index are according to their market capitalization. The industry index is regressed on the market index and

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[8] The residual return is the difference between the actual return on each day and the day's expected return calculated from a regression equation and is a measure of the portion of each daily return not explained by changes in the market index.

[9] Statistical significance is measured by the t-statistic of the regression coefficient of the residual returns of the competitor or comparable company in the regression equation. If the t- statistic is greater than 1.98, there is a 95% probability that the regression coefficient is not equal to zero, i.e., it is not a spurious result, and that Halliburton stock returns are correlated with the residual returns of the competitor or comparable company. The 95% level of confidence is a measure frequently employed by economists to determine statistical significance.

the residual returns of the industry index are used in the final regression analysis.

8. Finally, daily Halliburton stock returns are regressed on daily market index returns and daily residual industry index returns for the control period. Halliburton stock's daily returns are statistically significantly correlated with the daily returns of both the market and industry indices, as indicated by the t-statistics for each index in Exhibit 15. The result of this regression is the regression equation that is used to estimate expected Halliburton stock returns; the results of the regression analysis and the regression equation appear in Exhibit 15.

9. Expected Halliburton stock returns are those changes in Halliburton stock prices due to market and industry factors, *i.e.*, stock prices can and do change when new information or valuation assessments can potentially change the values of all stocks in an economy (market effects) or in a particular industry (industry effects). On each day of the Class Period, the expected returns for Halliburton stock are calculated from the regression equation. The formula demonstrating how expected returns are calculated is shown on Exhibit 17. On each day of the Class Period, the difference between the actual Halliburton stock return and its expected return is a measure of the change in the stock price due to company-specific events.[10] Company-specific events include any news,

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[10] The measure of significance is the z-statistic and is equal to: (actual return — expected return) / standard error. The standard error of the prediction measures the relative volatility of Halliburton stock returns compared to the predicted returns on Halliburton stock. The larger the standard error, the greater the residual return must be in order to be considered statistically different from its predicted return. If the z-statistic is greater

analyst coverage, oral commentary, or other information that changes market participants' perceptions about the value of a company.

10. An event study is used to disentangle the effects of company-specific information from market and industry information—in other words, to determine whether news affecting Halliburton promptly caused a measurable share price reaction after accounting for general market and industry effects. An event study as applied to litigation has been described as:

> The execution of an event study is quite simple. It involves the identification of an event that causes investors to change their expectations about the value of a firm. The investigator compares a stock price movement contemporaneous with the event to the expected stock price movement if the event had not taken place. There are three basic steps in conducting an events study: (i) define the event window; (ii) calculate abnormal stock price performance around the event; and (iii) test for statistical significance of the abnormal stock price performance. . . .
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> For those events that are subject to leakage, defining the beginning of the event window can be problematic. . . . Ideally, the first day of the event window corresponding to a[n event] would be the date on which investors began trading on news about the upcoming [event], regardless of whether the news was based on rumors, inside

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than or equal to 1.96 or less than or equal to -1.96, the difference between the two returns is significantly difference from zero at the 95% level of confidence, *i.e.*, there is a 95% probability that the difference between the actual return and expected return is not equal to zero.

information, a Schedule 13D filing, or a public announcement [about the event]. In practice, this date is difficult to define and some degree of judgment is required generally based on price and volume movements prior to the [event] announcement.

. . . [I]n many securities fraud cases the relevant information is revealed slowly over time, while during the same period investors receive other, sometimes unrelated, information about the firm(s) in question. In the latter case, it is relatively difficult to choose an appropriate window. The main advice is to carefully identify the exact dates during which the information is in question reached the market, and then restrict the window to a short period, if possible, generally two or three days around each release of new information. . . .

In general, a test of significance aims to answer the question of whether an observed difference is real or simply occurred by chance.

. . . An often used convention is the five percent rule—[z-statistics] greater than or equal to 1.96 standard deviations from the mean value are considered significantly different from the typical value because there is only a five percent chance that a randomly selected value will be 1.96 or more standard deviations from the true mean. . . . The decision rule may be more stringent. For example, . . . a one percent likelihood . . . if the z-statistic is greater than or equal to 2.58 . . . A third commonly used decision rule is ten percent . . . a randomly selected value will lie 1.65 standard deviation or more from the mean value. Generally, researchers use a decision rule based on one

> percent, five percent, or ten percent significance levels.
>
> . . . the finding that the associated stock return is large enough to be statistically significant implies the information is material.[11]

11. The event study is provided as Exhibit 18. Exhibit 18 shows each day during the Class Period with the day's closing stock price, volume, stock return, titles of news articles,[12] indication of SEC filings, and titles of analyst reports. Based on the event study, I identified a total of 31 days with statistically significant stock price returns during the Class—Period—seven with statistically significant positive returns and 24 days with statistically significant negative returns. A discussion of the news and analysis from these dates follows.

12. June 18, 1999: On Friday, June 18, 1999, Halliburton's stock price declined 3.7% to close at $45.88. The company-specific decline is 4.1%, a statistically significant decline.[13] There was no company-specific news on that day to explain the movement of the stock. However, on the following trading day, Monday, June 21, there was news that oil

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[11] Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," *The Business Lawyer*, 49, 545.

[12] Headlines were obtained from www.factiva.com. The entire articles are publicly available and are not included in Exhibit 18 in order to reduce the length of Exhibit 18. This Exhibit includes only those articles where "Halliburton" is mentioned in the title or lead paragraph.

[13] The company-specific return is the stock return net of the expected return based on market index and industry index returns.

inventories were high and that this could put pressure on oil prices and, therefore, on values of oil companies and oil services companies.

13. On Monday, June 21, Halliburton's stock price continued to decline another 4.5% (the company-specific decline is not a significant decline because the industry was down that day). Monday's decline in the stock prices of oil companies and oil services companies was attributed to "the perception that recent price gains were at odds with current supply fundamentals:"

> Oil shares slipped as oil prices fell and as investors worried over second-quarter profits after a Wall Street analyst cut second-quarter earnings estimates for Exxon Corp. and Chevron Corp. . . . Last week, the American Petroleum Institute (API) reported a 4.4-million-barrel increase in U.S. crude stocks, which pushed inventories to a two-month high of 337.3 million barrels.
>
> One Midwestern oil trader said the trading community thinks there is still too much oil around to justify the current high prices.
>
> Oil prices peaked at $19.05 on May 5 and then fell as low as $16.21 on June 1. Crude oil has since climbed back up, but last week, it started slipping down again after the most recent weekly buildup in crude stocks and, as refiners, plagued by low margins, adopted economic cuts in production runs.
>
> The shares of oil companies followed oil future contract prices lower, especially after ABN AMR() Inc. analyst Eugene Nowak said he cut second-

> quarter earnings estimates for Exxon and Chevron, due to poor refining conditions.
>
> Oil-service stocks that lost ground Monday included Halliburton Co., down $2.0625 to $43.8125; Kerr McGee Corp., down $1.50 to $49.9375, and Schlumberger Ltd., down $1.4375 to $63.[14]

Halliburton stock price declines on June 18 and 21, 1999 are consistent with reported concerns related to declines in oil prices.

14. October 5, 1999: After market close, on Monday, October 4, 1999, Halliburton announced that Dresser had elected to sell its interests in two joint ventures.[15] The Company said it would receive approximately $1.1 billion in cash in the deal. The Company also warned that it expected its 1999 third-quarter earnings to be in the range of 11 to 13 cents per diluted share. The previous average analyst estimates was 19 cents per share. The Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group.[16]

> [Halliburton] shares could slip in Tuesday morning trading due to its earnings warning. The oil driller said that its Dresser Equipment Group

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[14] *Reuters News*, "Oil prices retreat, dragging share prices down," June 21, 1999, 6:36 pm. (Times listed herein are Eastern Time.)

[15] Halliburton held an invitation-only conference call with analysts. *Dow Jones Business News*, "Halliburton Sells Stakes In Joint Ventures For $1.1 Billion," October 4, 1999, 7:43 pm.

[16] *Reuters News*, "Halliburton to Exit Two Ventures, Sees Lower Q3 EPS," October 4, 1999; 5:23 pm.; Halliburton SEC Form 8-K filed October 4, 1999.

> business segment and its Engineering and Construction business segment are warning of lower profits. As a result, Halliburton expects a third quarter profit between 11 and 13 cents a share, while analysts currently expect a profit of 19 cents a share. Halliburton also announced that its subsidiary Dresser Industries will sell its interests in two joint ventures to Igersoll-Rand [sic] Co. for a total of $1.1 billion. The sales will result in a one-time fourth-quarter gain of 84 cents a share. Shares closed down 2 1/16 to 39 3/4 ahead of the news.[17]

15. On October 5, 1999, Halliburton's stock price dropped 13.2% to $34.50. The company-specific return is -9.0%, a statistically significant negative return. News commentary and analysts attributed the decline in Halliburton's stock price that day to the reduction in the Company's near-term expected earnings.[18]

> Shares of Halliburton Co. plunged 13.2 percent Tuesday after the company said its Dresser Industries unit will sell its stake in two joint ventures to Ingersoll-Rand for $1.1 billion, after poor performance by the businesses hurt third quarter results.
>
> Dresser Industries decided to sell the interests amid the Dresser Equipment Group segment's poor current and projected financial performance

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[17] *CBS MarketWatch.com*, "Earnings Advisories," October 4, 1999, 6:11 pm.

[18] *See, e.g.*, Dain Rauscher Wessels, "Halliburton Selling Joint-Venture Interests; Expects To Miss Previous Third-Quarter Guidance," October 5, 1999; *Dow Jones Business News*, "Earnings Warning Pressures Shares Of Oil-Services Firm Halliburton," October 5, 1999, 11:26 am.

at D-R and at IDP. D-R is expected to report an operating loss in the third-quarter while the entire business segment forecasts weaker operating results, compared to previous predicttions, for the third and fourth quarters.

Analysts appear to agree that Halliburton's sale of the poor-performing joint ventures was a good move and that the earnings shortfall will be temporary.

In a research note, analyst James Stone of Schroders said Halliburton's move is "a better-than-expected outcome" for the company and even though "it will negatively affect earnings in the fourth quarter and for at least part of 2000, it is a much better scenario than having bought out Ingersoll-Rand."

Stone reduced his third-quarter earnings-per-share estimate to 12 cents from 21 cents, but noted that the sale's impact on the company is short-term and will ultimately be to Halliburton's advantage.

Additionally, Arvind Sanger, analyst at Donaldson, Lufkin & Jenrette downgraded his third-quarter estimate to 12 cents a share from 18 cents, fourth-quarter earnings-per-share estimate to 18 cents from 28 cents. However, in his research note, he maintained a "buy" rating on the company's stock, viewing the sales as "a good strategic move."[19]

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[19] *CBS MarketWatch.com*, "Halliburton to sell interests in two joint ventures; issues third-quarter earnings warning," October 5, 1999, 8:06 pm.

Analysts lowered their forecasts after the Company's earnings warning. For example:

Deutsche Banc Alex. Brown:

> We view the recent announcement by Halliburton that the company will sell its interests in [Dresser-Rand and Ingersoll-Dresser Pumps] as a strategic positive given that oil services will account for an increasing proportion of Halliburton's future earnings. We estimate that the sales of the interests to Ingersoll Rand will be dilutive to Halliburton's estimated 2000 earnings given that projected net cash proceeds of about $630 million will likely be used near term to pay-down the company's short-term debt.
>
> In light of the company's 3Q99 earnings pre-announcement on October 4, we are reducing our 1999 EPS estimate from $0.69 to $0.59 to primarily reflect likely lower Energy Service and Dresser Equipment Group earnings. Of the $98 million (or 15%) reduction in Halliburton's estimated 1999 operating income, about $34 million (or 35%) was attributable to lower Energy Services income (due to lower non-North American rig activities) and $62 million (or 63%) was due to lower estimated Energy Equipment earnings (due to much lower results at D-R and IDP).[20]

CIBC:

> We have revised our estimates for 3Q and 4Q99 to $0.12 and $0.18 from $0.18 and $0.25, respectively. We are preliminarily raising our

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[20] Deutsche Banc Alex. Brown, October 5, 1999.

> 2000 and 2001 estimates to $1.56 and $2.15 from $1.49 and $2.08, respectively. We reiterate our Buy rating and 12- to 18-month price target of $56.
>
> The sale of the joint-venture interest comes as a major surprise to Wall Street, which assumed [Halliburton] wanted to own the compressor and pump businesses. . . . Reducing financial leverage and creating potentially accretive earnings transactions made the sale decision mandatory, from the point of view of shareholder value creation.
>
> The company's announcement of weakness across virtually every business line in 3Q is not surprising, given the slower than anticipated oilfield industry recovery. [Halliburton] is merely the latest company to confess to this situation.
>
> We believe a significant disconnect exists between oilfield service stock prices and improving industry fundamentals. . . . [21]

16. *October 15, 1999*: On Friday, October 15, 1999, Halliburton's stock price was down 5.78% to close at $34.63. The company-specific return was -3.6%, a statistically significant decline. The stock price continued to decline another 2.17% on Monday, October 18 (this is not a statistically significant decline). There was no company-specific news on that day to explain the movement of the stock. On October 18, Schlumberger Ltd., which at that time was world's second biggest oilfield services company (second by revenues to Halliburton), reported third quarter earnings which fell 60 percent compared with the prior

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[21] CIBC World Markets, October 5, 1999.

year but rose four percent from the previous quarter "as firm oil and gas prices fuelled a modest industry recovery." [22] While Schlumberger's stock rose that day, news commentators noted that "Most other stocks in the same sector closed lower, with the OSX oilfield services index down down [sic] 2.43 points at 68.17."[23]

17. October 27, 1999: On October 27, 1999, Halliburton's stock price declined 3.4%; the company-specific return was -3.5%, a statistically significant decline. On that day, an analyst at Brown Brothers Harriman lowered her estimates for fourth quarter 1999 and for the year 2000.

> Following the company's third quarter earnings announcement last week, we are making the following adjustments to our earnings estimates: For 1999, we are increasing our full-year estimate by a penny to $0.66 from $0.65 to reflect the $0.02 better-than-expected third quarter results ($0.13 compared to our $0.11 estimate), offset by a $0.01 reduction to our fourth quarter estimate (to $0.16 from $0.17). For 2000, we are reducing our 2000 EPS estimate to $1.10 from $1.25 to reflect lower earnings contributions from the company's Dresser Equipment Group and, to a lesser extent, lower projections for the Energy Services group. For 2001, we are lowering our forecast modestly to $1.75 from $1.80, reflecting lower earnings at the Dresser Equipment Group. The estimate reductions in the Dresser Equipment Group reflect Halliburton's planned sale of its interests

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[22] *Reuters News*, "Schlumberger says Q3 earns fall but worst is over," October 18, 1999, 1:27 pm.

[23] *Reuters News*, "FOCUS—Schlumberger says earns fall but worst over," October 18, 1999, 5:12 pm.

> in its two joint ventures (51%-owned Dresser Rand and 49%-owned Ingersoll Dresser Pump); we now forecast operating income of $136 million versus $236 million previously. The estimate reduction in the Energy Services area reflects less aggressive margin assumptions in 2000 (7.6% versus 8.8% previously). In comparison, consensus estimates currently are at $0.16 for fourth-quarter 1999; $1.19 for 2000 and $1.78 for 2001. Despite our estimate reductions, we remain enthusiastic about the recovery and Halliburton's earnings prospects. Consequently, we are reiterating our Buy/Buy ratings on the shares.[24]

18. The small but significant price decline on October 27, 1999 is consistent with the analyst's reduction in estimates while maintaining her Buy ratings.

19. January 5, 2000: On Wednesday, January 5, 2000, Merrill Lynch analyst Simpson cut his estimates of Halliburton's earnings for 2000 and 2001, and downgraded the Company's intermediate-term rating on the stock to "Accumulate" from "Buy," while retaining the long-term buy rating. Simpson attributed the cut to "reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America and 'less powerful synergies from the Dresser merger than he had envisioned.'"[25] Analyst Carol Lau with Brown Brothers Harriman & Co. also reduced her fourth-quarter 1999 and 2000 EPS estimates following a

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[24] Brown Brothers Harriman & Co., "HAL: Reducing Estimates; Maintaining Buy," October 27, 1999.

[25] *Reuters News*, "Research Alert—Halliburton Estimates Cut," January 5, 2000, 9:59 am.

conversation with the company that morning.[26] On January 5, 2000, Halliburton's stock price dropped 4.38% to $36.81. The company-specific return was -4.3% that day, a statistically significant negative return.

20. *January 10, 2000*: On Monday, January 10, 2000, an analyst at A.G. Edwards reduced his earnings estimates for 2000.[27] Halliburton's stock price was down 4.0% to close at $39.06. The company-specific decline that day is -3.9%, which is a statistically significant decline.

> We believe the sequential improvement that Halliburton has experienced in its ES segment in late 1999 has positive implications for oilfield service activity levels in 2000. We believe that the industry is turning the corner and North America will continue to drive near-term quarterly earnings growth. In the second half of 2000, we expect Halliburton's international ES business and [Engineering and Construction] businesses to add fuel to the recovery. Although major oil companies are increasing upstream budgets, the underlying commodity price assumptions appear very conservative and the year could get off to a slow start. If commodity prices are favorable,

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[26] Brown Brothers Harriman & Co., "HAL: Reducing Estimates; Maintaining Buy Ratings," January 5, 2000.

[27] On Friday, January 7, 2000, BJ Services, a major competitor in the pressure pumping business, pre-announced its quarterly earnings, stating earnings would be stronger than expected due to a strong recovery in North American drilling activity. Analysts stated on Monday that they expected that Halliburton would also benefit from the stronger market. On Friday, Halliburton's stock price was up 6.02% (this is not a significant increase because both the market and the industry were up that day).

which we expect, a positive surprise in the trend in capital spending is likely. Although we expect a pickup in international markets in 2000, it will be heavily weighted toward 2H2000. As a result, we are lowering our 2000 EPS to $1.00 from $1.05.[28]

21. January 12, 2000: On Wednesday, January 12, the Houston Chronicle reported that "Oil-field service companies' earnings are also expected to be a mixed bag. Weatherford International, Smith International, Halliburton and Schlumberger are all projected to earn less in the 1999 fourth quarter than they did the year before."[29] On January 12, Halliburton's stock price was down 6.79% to close at $37.75. The company-specific decline that day is -3.6%; this is a statistically significant decline.

22. On Tuesday, January 11, an analyst with Deutsche Banc Alex. Brown reduced his 2000 and 2001 EPS estimates for Halliburton to $0.94 (from $1.05) and to $2.00 (from $2.15), respectively, "based on a recent conversation with Halliburton management." The reductions were "entirely due to a likely slower earnings recovery at Brown & Root Energy Services (BRES), Halliburton's offshore construction (marine fabrication/installation and

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[28] A.G. Edwards & Sons, Inc., "North America Continues to Lead—Positive BJS EPS Pre-Announcement," January 10, 2000; SunTrust Robinson Humphrey Capital Markets, "Oil Services Industry—BJS Pre-Release & Positive Implications," January 10, 2000.

[29] *Houston Chronicle*, "How energy industry fared / Oil profits reveal mixed results / Major integrated companies best at riding out energy cycles," January 12, 2000.

pipelay services), subsea services, pipecoating services, and flexible pipe manufacturing division."[30]

23. *February 10, 2000*: On Thursday, February 10, 2000, Halliburton's stock price was down 0.18% to close at $35.44. The company-specific decline is -5.1%, a statistically significant decline. This company-specific decline is driven by the industry and the market, both of which were up that day.[31] There is no other company-specific information at this time that can explain why Halliburton's stock price was down, if modestly, when the market and industry were up.

24. February 25, 2000: On Friday, February 25, 2000, Halliburton's stock price declined 4.9% to close at $33.69. The company-specific decline is 3.6%, a statistically significant decline. There was speculation regarding an upcoming meeting between the then-U.S. Energy Secretary and the oil minister for Saudi Arabia:

> Oil stocks performed well in anticipation of Saturday's meeting between Ali al-Naimi, the oil minister for Saudi Arabia, the world's biggest oil producer, and U.S. Energy Secretary Bill Richardson. The two leaders will meet to discuss a wide range of oil supply issues that recently have sent oil and gasoline prices sky-high. . . .
>
> Oil services companies closed down for the day, with Halliburton (NYSE:HAL) falling 1 3/4 (-

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[30] Deutsche Banc Alex. Brown, "Halliburton—Reducing 2000/01 EPS Estimates," January 11, 2001.

[31] Also that day, ING Barings issued a positive report regarding Halliburton's earnings results which were released on January 27, 2000 (entitled "Strong U.S. Oilfield Boosts Results Above Expectations").

> 4.94%) to 33 11/16 and Schlumberger (NYSE:SLB) dropping 1 7/16 (-2.10) to 67.[32]

Although there was no company-specific information on February 25 to explain the decline that day in the stock, analysts commented on the recent poor performance in the stock prices of oil service companies:

> We like oil stocks and oil service stocks, companies like ARCO and Phillips, Baker Hughes, Schlumberger and Halliburton. These stocks haven't moved because of nervousness over long-term oil prices. But it looks like oil will hold above $20 a barrel for a good while.[33]

25. May 2, 2000: On Tuesday, May 2, 2000, Halliburton's stock price rose 7.06%, to close at $47.38. The company-specific return was 3.7%, a statistically significant increase. News commentators attributed the gain in Halliburton's stock price to OPEC's anticipated decision to not increase production quotas:

> [Traders] did have some opportunities to play off one piece of encouraging news, as crude-oil prices rose on expectations that the Organization of Petroleum Exporting Countries won't increase production quotas at its June meeting. An output increase, of course, would have hurt pricing. . . .
>
> Oil-service stocks also improved in the session. Halliburton rose 3 1/8 to 47 3/8. Schlumberger

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[32] *Business Wire*, "SmartPortfolio.Com Announces Investment Opinion," February 26, 2000, 8:25 am ("Stock prices are reflective of February 25, 2000 at 5:30 PM, EST").

[33] *Austin American-Statesman*, "When less will become more: Looking for value stocks' rebound," February 26, 2002.

gained 2 9/16 to 77 9/16. Transocean Sedco Forex moved up 2 to 49 5/16.[34]

26. *May 19, 2000*: On Friday, May, 19, 2000, Halliburton's stock price rose 2.52% to close at $50.88. The company-specific return that day is 3.9%, which is a statistically significant increase because the market was down that day. There was no company-specific information on May 19 to explain the increase that day in the stock, although analysts later commented on the recent increase in the stock prices of oil service companies. For example, on the following Monday, May 22, an analyst with Donaldson, Lufkin & Jenrette raised his 12-month price target for the Company to $57 from $51, and raised his EPS estimate for 2001 "to reflect the assumption of more accretive acquisitions than [his] prior assumptions and secondarily to reflect a stronger oilfield recovery than [he] had anticipated."[35]

27. May 30, 2000: On Saturday, May 27, the weekly financial newspaper *Barron's* issued a positive report on Halliburton, stating it expected Halliburton's stock price to recover over the next 18 months:

> Oilfield stocks are rallying. The major energy companies will likely reopen their wallets soon. So why do shares of Halliburton, the world's second-largest oil-service outfit, lag? The short answer is that the Dallas-based company gets about 70% of its revenues from the international market, where

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[34] *The Wall Street Journal*, "AT&T's Profit Warning Reverses Gains Seen in Tech, Telecom Issues," May 3, 2000.

[35] Donaldson, Lufkin & Jenrette, "Raising 2001 Ests. and Target Price Based on Acquisition and Stronger Oilfield Recovery Assumptions; Lowering Rating to Market Performance on Valuation," May 22, 2000.

> exploration and production have yet to take off. Moreover a large part of Halliburton's business is in engineering and construction activities that traditionally begin to pay off late in the oil cycle. In other words, the very things that are holding the stock back now are likely to power it higher over the next 18 months or so.[36]

On Tuesday, May 30, 2000,[37] an analyst at Jefferies & Company, Inc. raised its price target for Halliburton:

> We are maintaining our Accumulate rating on Halliburton Company, however, we are raising our price target on Halliburton to $56 per share from $50 per share based on recent positive developments at the Company and continuing signs that the Company's earnings are poised to turn higher. . . . There is no question that most of the investment news surrounding Halliburton has been very positive in the last six months, however, Halliburton must continue to demonstrate that the Company can achieve projected peak earnings potential due to higher drilling, and engineering and construction activity, favorable management decision making and the favorable reinvestment of free cash flow into new opportunities. Should Halliburton meet these criteria, the stock can reach or exceed our new price target.[38]

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[36] Dow Jones International News, "Barron's: Gusher Ahead: Expect Halliburton's Profits—And Its Share Price—To Continue Rising," May 27, 2000, 2:01 am.

[37] The U.S. stock markets were closed Monday, May 29, 2000, in observance of Memorial Day.

[38] Jefferies & Company. Inc., "Halliburton Company: Raising Price Target To $56," May 30, 2000.

On May 30, 2000, Halliburton's stock price rose 4.7%, to $49.00. The company-specific return was 3.6% that day, a statistically significant positive return.

28. *June 8, 2000*: On Thursday, June 7, 2000, an analyst with Donaldson, Lufkin & Jenrette met with the Company. The analyst's report was issued on Friday, June 8, based on that meeting, in which he lowered his estimate for second-quarter operating earnings for the Company by a penny to 64 cents:

> Donaldson, Lufkin & Jenrette analyst Arvin Sanger on Friday lowered his second quarter operating earnings on oil exploration giant Halliburton by a penny after a meeting with the company's management Thursday.
>
> In a research report, Sanger lowered his estimate to 11 cents to reflect a still-sluggish engineering and construction environment, bringing the full-year estimate down a penny to 64 cents.
>
> "We are a little ahead of the Street," said an analyst in the group about the adjustment to Halliburton's second quarter earnings.[39]

29. *October 6, 2000*: On October 5, 2000, Owens-Corning, a maker of fiberglass insulation and other building products, filed for bankruptcy protection "after it ran out of options to pay asbestos lawsuit claims that could eventually cost the company $7 billion."[40] The October 9 edition of Barron's discussed

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[39] *Reuters*, "Research Alert—DLJ trims Halliburton Q2 operating earns by a pen [sic]," June 9, 2001, 9:21 am.

[40] *Associated Press Newswire*, "Owens Corning seeks bankruptcy protection to cope with asbestos claims," October 5, 2000, 9:36 am.

Halliburton's asbestos litigation exposure in light of the Owens-Corning situation:

> Halliburton's exposure so far has been slight compared to Owens-Corning and others. The oil-services concern paid out a total of $99 million in claims through the end of 1999, with all but $23 million covered by insurance. In its 10K and latest 10Q filing, Halliburton says Dresser has insurance covering "in whole or in part" its asbestos liability, and that it believes "pending asbestos claims will be resolved without material effect on our financial position or results of operations." This language and the relatively modest claims payments to date suggest the company doesn't have a meaningful problem.
>
> One potential thorn could come from a former division of Halliburton, Highlands insurance, which provided coverage to Brown & Root. Highlands sued Halliburton in April, arguing that Halliburton assumed liability for asbestos claims filed after the Highlands spinoff in 1996. Halliburton has countersued, arguing that the Brown & Root exposure is Highlands' problem. Highlands has $162 million in statutory capital, an amount Halliburton says should be enough to pay remaining asbestos claims. Halliburton had 107,000 open cases at the end of June.
>
> Given Halliburton's market value of $20 billion and its financial strength, even a worst-case asbestos scenario probably wouldn't be significant. But the asbestos issue could get more

attention in the months to come at Halliburton and elsewhere.[41]

On October 6, 2000, Halliburton's stock price was down 5.0%, to $43.94. The company-specific return was -3.8% that day, a statistically significant negative return.

30. October 23, 2000: On Monday, October 23, 2000, Halliburton reported that its Brown & Root Services unit was a target of the federal grand jury investigation. On that day, Halliburton's stock price was down 6.5%, to close at $41.19. The company-specific return was -3.5% that day; this is a statistically significant decline.

> Halliburton Company (NYSE: HAL) stated today that one of its business units, Brown & Root Services ("BRS"), is a defendant in civil litigation pending in federal court in Sacramento, California, alleging that it violated certain provisions of the False Claims Act while performing work for the U.S. Army at Ft. Ord in California (the "Qui Tam" litigation). This lawsuit was filed by a former employee in 1997. BRS has denied the allegations and is preparing to defend itself at trial, which is expected to occur in late 2001. Halliburton believes that the outcome of this civil litigation will not have a material adverse impact on it.
>
> Although in 1998 the U.S. Department of Justice declined to join the Qui Tam litigation, it has now advised BRS that BRS is the target of a federal grand jury investigation regarding the contract

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[41] *Barron's*, "Financials, Broadcasters Sideswiped in Latest Tech Wreck," October 9, 2000.

> issues raised in the Qui Tam litigation. In addition, BRS has been served with grand jury subpoenas, which require the production of certain documents relating to the Ft. Ord contract. BRS is cooperating in the investigation and believes that it has acted in accordance with the law and the Ft. Ord contract. At the present, the Department of Justice has not made any specific allegations against BRS.[42]

31. *October 24, 2000*: On October 24, 2000, Halliburton's stock price was up 1.06%, to close at $41.63. The company-specific return was 4.2% that day; this is a statistically significant increase because both the market and the industry were down that day. There is no company-specific news on this day.

32. *October 25, 2000*: After market close, on October 24, 2000, Halliburton announced that it intended to restructure and shrink its engineering and construction units into a single unit. The changes would "put some major businesses, including construction giant Kellogg Brown & Root and Brown & Root Services, under one management." Lesar said that:

> [T]he engineering and construction units have been hurt because customers have been slow to move ahead with major construction projects and that profits have been unsatisfactory.
>
> . . . Kellogg Brown & Roots profits have been adequate so far because that unit has been working through a backlog of projects.

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[42] *PR Newswire*, "Brown & Root Services to Defend Civil Litigation," October 23, 2000, 2:00 pm.

However, its profit margins will erode as it finishes projects and customers continue to delay decisions on major new construction.

The announcement, made toward the end of Halliburton's discussion of third-quarter earnings, overshadowed the company's sharply improved profits. The company said it earned $157 million in the three months ended Sept. 30, up 171 percent from the same period in 1999. The results equaled 35 cents per share diluted on $3.02 billion in revenue. In third quarter 1999, Halliburton earned $58 million, or 13 cents a share, on revenue of $2.97 billion.[43]

33. The announcement by the Company on October 24 prompted certain analysts to cut earnings forecasts.

Shares of oil-services firm Halliburton Co. slumped Wednesday after the company announced a restructuring of its engineering and construction units.

Company officials said after the close of markets Tuesday that a slowdown in new orders was threatening profits in the units.

ING Barings lowered its rating on the stock from "buy" to "hold," Southwest Securities downgraded from "buy" to "accumulate," and Damn Rauscher Wessels said that because of "too many uncertainties" in the non-oilfield units investors should focus on purely oil-service stocks.

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[43] *Knight Ridder Tribune Business News*, "Dallas-Based Halliburton Co. to Combine Engineering, Construction Units," October 25, 2000.

In trading Wednesday morning, Halliburton shares were down $5.13, or more than 12 percent, to $37.06.

The Dallas-based company, which was led until August by Republican vice presidential candidate Dick Cheney, said it plans to restructure and shrink its engineering and construction businesses into a single unit.

The company made the announcement while releasing its third-quarter results. Halliburton said excluding one-time items, it earned $109 million, or 24 cents per share, a penny better than expected by analysts surveyed by First Call/Thomson Financial. Revenue was $3 billion.

Chairman and chief executive Dave Lesar the company is not satisfied with profits in the engineering and construction business, as customers have delayed major projects.

Lesar said profit margins at Kellogg Brown & Root will shrink as it finishes a backlog of jobs and customers delay decisions on major new construction.[44]

34. Several analyst reports were released on October 25.

Merrill Lynch analyst Kevin Simpson said he had cut his estimate of Halliburton's 2001 earnings per share to $1.30 from $1.50 but was maintaining an accumulate rating on the stock.

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[44] *Associated Press Newswires*, "Halliburton stock slides on news of restructuring, slowing projects," October 25, 2000, 12:24 pm.

> "The engineering and construction side of the business is turning much more slowly than they had expected and than I had expected," he said.
>
> Mark Kellstrom, an analyst with Jefferies & Co., said he thought the market had overreacted by driving down Halliburton's stock so much. He maintained a buy rating for the stock and kept his 2001 earnings per share estimate unchanged at $1.65.
>
> "At this point engineering and construction is not a big driver of the company's earnings," he said.
>
> Kellstrom said continuing recovery at Halliburton's oilfield services business could more than make up for the decline in earnings from engineering and construction.
>
> "The company's long-term earnings power is still intact," he said.[45]

35. Analyst James K. Wicklund with Dain Rauscher Wessels released a report that day that stated that Halliburton's third-quarter EPS beat expectations, but "[m]ore interestingly, the company announced a major restructuring of its Engineering and Construction Group which continues to show disappointing results." He stated:

> We applaud the company's attempt to improve the results of the ECG and believe that the ESG is well positioned to benefit from the continued oilfield services cyclical recovery with strong market positions in several products/services segments. However, we believe there are too many

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[45] *Reuters News*, "Update 2—Halliburton stock hit by engineering slowdown," October 25, 2000, 4:26 pm.

> uncertainties regarding the recovery in the non-oilfield service businesses. We recommend investor's focus on pure-play oilfield service stocks that are more highly leveraged to the continued cyclical recovery. We continue to rate the stock Neutral.[46]

The report also states that the "expected increase in international activity is materializing at a much slower rate than originally anticipated [and i]nvestor concerns of asbestos liabilities may dampen investor's interest in the stock until the ultimate outcome becomes more clear. Wicklund reduced his fourth-quarter estimates to "reflect the increasing weakness in the engineering and construction business and the slower-than-expected increase in international activity."

36. Analyst Allen Brooks with CIBC stated in his report that day:

> We are maintaining our Buy rating but reducing our price target to $50 from $56. We anticipate much market confusion due to the uncertainty about future earnings, the valuation of the stock and what Halliburton may look like in the future. . . . Our basic conclusion is that the stock price can move higher over the next 12 months given the strength of the oilfield service industry recovery, especially internationally where Halliburton derives 64% of its business. The stock price may go lower first, however.
>
> The shock in the conference call was management's statement that, given the outlook

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[46] Dain Rauscher Wessels, "Halliburton Reports: Announces Major Restructuring Initiative," October 25, 2000.

> for customer spending in the shallow water marine construction market and the downstream [Engineering and Construction] business, it is not sure that Halliburton has the critical mass to generate consistent and predictable profitability and profit growth from these sectors. Management believes the stock is being punished for the lack of this predictability. Therefore, it will look to a significant restructuring of these businesses with an eye to achieving this goal during 2001. We could envision a substantial shrinking of these operations as they are presently constituted. In the end, the company should produce better returns on capital that should produce an improved valuation. The issue is how long it will take to accomplish this goal and what the nearterm costs are.[47]

37. Analyst Fratt with A.G. Edwards & Sons, Inc. stated that Halliburton's EPS was ahead of expectations "due to strong North American drilling market," but that the "near-term outlook [was] less robust." Fratt lowered his estimates for the Company to "reflect weaker [Engineering and Construction] business," concluding that the "[r]estructuring is positive and oilfield service recovery continues." Fratt reiterated his "Accumulate/ Aggressive" rating for the Company.[48]

38. Analyst Asit K. Sen with ABN AMRO stated:

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[47] CIBC, "Weak E&C Outlook Prompts Restructuring; Reducing Estimates," October 25, 2000.

[48] A.G. Edwards & Sons, Inc., "North America Drives Positive Earnings Surprise—Lowering Estimates to Reflect Weaker E&C Business," October 25, 2000.

> Strong performance from the oil field services business . . . were essentially offset by weaker results from the Engineering and Construction (E&C) business. . . . The company indicated that it is embarking on a strategic restructuring program to improve results from the E&C business that we view positively. . . . We are lowering our 2000 EPS estimate to $0.55 (from $0.58) and 2001 estimate to $1.35 (from $1.50).[49]

39. In a later report that day, Sen of ABN AMRO stated that the Company's shares "were off as much as 18% this morning following management's cautious comments on the outlook of the Engineering and Construction (E&C) business. We view this as an overreaction."[50]

40. On October 25, 2000, Halliburton's stock price declined 10.96%, to close at $37.06. The company-specific return that day is negative 6.6%, a statistically significant decline. Trading volume was 25.35 million shares that day, more than 7 times the average daily trading volume for Halliburton stock during the Class Period.[51]

41. *December 18, 2000*: On December 18, 2000, Halliburton's stock price was up 4.03% to close at $38.75. However, the company-specific return that day is negative 3.76%, a statistically significant decline because the industry was up sharply that day. There was considerable positive industry news on December

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[49] ABN AMRO, "HAL: Lowering 2000 and 2001 Earnings Estimates," October 25, 2000.

[50] ABN AMRO, "HAL: Bruised But Not Broken—Sensitivity Analysis," October 25, 2000.

[51] The average daily trading volume for Halliburton stock during the Class Period was 3.46 million shares.

18, 2000, which was reflected in Halliburton's share price, but not to the same extent as industry peers.

42. Moody's Investors Service issued a press release stating it expected the oil services industry to recover by the end of 2001:

> Improving fundamentals have created a generally stable to positive rating outlook for the oil services industry, according the new Moody's Investors Service annual outlook for the sector. Moody's also believes consolidation among these companies will continue.
>
> "We expect the overall sector to recover by the end of 2001, based on strong oil and natural gas prices and higher budgeted capital spending by major oil companies, national oil companies, and independent E&P companies," says Moody's vice president and senior credit officer Alexandra Parker, author of the outlook.[52]

43. Also that day, analyst Geoff B. Kieburtz with Salomon Smith Barney issued a positive report on the oilfield equipment and services industry in which he recommended Halliburton's stock for investors seeking exposure to the accelerating international recovery.[53]

> The investment bank's comments contributed to a jump in oilfield service stocks, with the main

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[52] *Dow Jones Newswire*, "Moody's: Stable To Positive Outlook For Oil Service Indus," December 18, 2000, 11:21 am.

[53] Salomon Smith Barney, "Oilfield Equipment & Services; 19th Annual E&P Spending Survey Forecasts 20.2% Growth in 2001," December 18, 2000.

> index for the volatile sector showing a gain of almost 8 percent by early afternoon. . . . [54]

Lehman Brothers Holdings Inc. also issued a positive sector report that day.

The positive outlook from analysts at Lehman Brothers Holdings Inc. and Citigroup's Salomon Smith Barney touched off a rally among the stocks of oilfield-service and equipment companies, which make their profit from spending on exploration-and-drilling projects. . . . Sector bellwethers Schlumberger Ltd. (SLB) and Halliburton Co. (HAL) also posted gains of $5.06, or 7%, to $77 and $1.50, or 4%, to $38.75, respectively. [55]

44. *December 22, 2000*: On Thursday, December 21, 2000, Halliburton pre-announced fourth-quarter earnings and formally unveiled the restructuring of its engineering and construction units. The press release stated that it planned to take a charge of $120 million in the fourth quarter, the bulk of which was due to cost overruns at several overseas projects.[56]

> [Halliburton will] record[] approximately $120 million after tax charges in the fourth quarter related to restructuring and charges on projects of the engineering and construction businesses. Both Brown & Root Energy Services and Kellogg

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[54] *Reuters News*, "Research Alert—Salomon sees E&P spending growth," December 18, 2000, 1:03 pm.

[55] *Factiva Energy Digest*, December 19, 2000, 8:59 am.

[56] Aftermarket close, on January 30, 2001, Halliburton released its fourth-quarter 2000 earnings results in which the Company increased the $120 million charge announced December 21 to $193 million (of which, $157 million was attributed to project losses).

Brown & Root are impacted by the charges and reorganization.

The portion of the charges related to reorganization costs is expected to be approximately $25 million after tax and primarily relate to severance costs associated with a reduction in the number of senior management positions and costs to exit several facilities no longer required, while the remaining charges primarily relate to project specific matters.

During the quarter, several large fixed fee engineering and construction projects, including two projects where Kellogg Brown & Root participates as a member of a construction joint venture, incurred significant additional costs related to projected completion of the projects. Much of the additional costs relate to labor disturbances in Venezuela and West Africa that have significantly affected productivity on the projects. While claims will be made for a large portion of the additional costs, management does not believe that all the claims will be recovered. In addition, negotiations with customers regarding cost increases on seven other projects have not resulted in resolution of certain claims as originally anticipated.[57]

45. In general, analysts were surprised by the charges related to the cost overruns.

Halliburton said approximately $25 million of the charge will cover costs of the restructuring, which

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[57] *PR Newswire*, "Halliburton Announces New Structure and Engineering and Construction Charges," December 21, 2000, 8:59am.

analysts said could foreshadow spinning off the engineering and construction units into a separate company. But the bulk of the charge, about $95 million, was related to delays and cost overruns. The company blamed some on labor problems in Venezuela and West Africa and said it will make claims to recoup the money. It is also negotiating, so far unsuccessfully, to recover extra costs on seven other projects.

The Dallas-based company had hinted about the restructuring two months ago, but the cost overruns caught observers off-guard.

"There are nine projects (with overruns). That points more to a problem with the bidding process," said Jim Wicklund, an analyst with Dain Rauscher Wessels who rates Halliburton stock "neutral."

Allen Brooks, an analyst with CIBC World Markets Corp., attributed the overruns to doing business in places such as Nigeria.

"It was a little bit of a surprise, but I don't raise too high a flag about it," said Brooks.[58]

46. Analysts continued to express concerns on December 22:

Two investment analysts who follow Halliburton expressed some unhappiness about the write-off from cost overruns and higher expenses, which came as a surprise to them.

"I knew there would be charges," said Fred A. Mutalibov with Southwest Securities Inc. in

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[58] *Associated Press*, "Halliburton to split into two divisions," December 21, 2000, 5:31 pm.

Dallas. "But one of the problems with the big companies like Baker Hughes, Halliburton and Schlumberger within my industry is that what are called one-time or non-recurring charges keep coming again and again."

Jim Wicklund, analyst with Dain Rauscher Wessels in Dallas, said excluding the charges makes it difficult for investors to compare Halliburton's earnings from quarter to quarter. It isn't the first time Halliburton has written off cost overruns on projects, he said.

"This is $95 million in charges where they had significant cost overruns and seven projects that they had cost increases that they haven't been able to pass along. With no offense meant toward Halliburton, that's a lack of good contingency consideration," he said.

Halliburton shares, after trading off as much as $1.31, closed down 75 cents to $37 Thursday on the New York Stock Exchange.

Guy Marcus, Halliburton's vice president of investor relations, declined to identify the projects or customers with which Halliburton has incurred the higher costs.

Halliburton said "several large fixed-fee" projects, including two where its Kellogg Brown & Root unit is part of a construction joint venture, "incurred significant additional costs" coming up to completion.

It said "labor disturbances" in Venezuela and West Africa "have significantly affected productivity on the projects."

"While claims will be made for a large portion of the additional costs, management does not believe that all the claims will be recovered," Halliburton said.

The company also said that on seven other projects, it has been unable to resolve claims over cost increases as it had first anticipated.[59]

47. Although the stock fell 2.0% on December 21, this was not a statistically significant return. On December 22, 2000, Halliburton's stock price declined 2.7%, to close at $36.00. The company-specific return that day is negative 3.9%, a statistically significant decline (although the industry was down that day, the overall market was up more than 3.0%). The price reactions on December 21 and 22 are consistent with the charge for cost overruns at various projects that was a surprise to the market.

48. Several analysts issued reports on December 21 and 22 in response to the Company's announcement.

A.G. Edwards & Sons:

Although these project adjustments will undoubtedly have a positive impact on [Engineering and Construction] profitability in 2001-2, the extent of the adjustments is much wider than previously thought, in our view, and is evidence that execution problems have also had a negative impact on [Engineering and Construction] operating results. With the restructuring and project adjustments, we believe that [Halliburton's] [Engineering and Construction] business should be on track to meet

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[59] *Texas*, "Dallas-Based Oil Services Firm Halliburton to Take $120 Million Charge," December 22, 2001.

its 3% margin goal in 2001 and generate closer to 5% margins in the future. We point out that the [Engineering and Construction] backlog has improved slightly since the end of 3Q2000 and additional activity should materialize as integrated oil companies increase capital spending in 2001.[60]

CIBC:

The struggling [Engineering and Construction] division has been a drag on [Halliburton's] stock performance. Based on our 2001 EPS estimates, [Halliburton] currently trades at a 35% valuation discount to other major oil services companies. Although part of this discrepancy is warranted due to the weak performance of the [Engineering and Construction] business, we believe [Halliburton] can narrow the valuation gap with a successful reorganization.

Additionally, the strength of the recovery in the oilfield service industry should also enhance stock price appreciation.[61]

49. *February 12, 2001*: On February 12, Halliburton's stock price rose 0.42%. The company-specific return is 4.6%, a statistically significant increase because the industry was down that day. Schlumberger stock, a major Halliburton competitor, was down 12% that day on news of a proposed cash purchase of Sema PLC, a British technology

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[60] AG Edwards & Sons, Inc. "E&C Business Restructuring Formally Announced-4Q2000 EPS ON Track," December 21, 2000.

[61] CIBC, "4Q Outlook In Line With Prior Guidance, Restructuring Charge Announced," December 21, 2000.

information firm, which dragged down the overall industry return.[62]

50. *April 26, 2001*: After market close on April 25, 2001, Halliburton released its first-quarter 2001 financial results, reporting earnings on the low end of analysts' estimates, and stating that the company expected 2001 EPS to be at or above $1.30, which was higher than analysts' consensus forecast of $1.20, "as a recovery in demand for oilfield services gradually spreads beyond North America. Halliburton said its customers stepped up their drilling activity in response to high oil and natural gas prices."[63]

51. In response to the Company's first quarter earnings results, certain analysts raised their estimates and/or rating for Halliburton. For example, on April 26, 2001, analyst Tom Escott with Robinson Humphrey raised his estimates for Halliburton's EPS and raised his rating to "Outperform" from "Neutral," stating: "After downgrading [Halliburton] to Neutral last August at $53.50, we are upgrading our rating to Outperform based on the improved earnings outlook."[64] Credit Suisse First Boston Corporation ("CSFB") raised its 2001 and 2002 estimates for Halliburton "to reflect company guidance and incorporate stronger revenue and margin growth in

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[62] *Chicago Tribune*, "Schlumberger Buying Firm to Help Diversify Oil Field Giant to Pay $5.2 Billion for Sema," February 13, 2001.

[63] *Reuters News*, "UPDATE 2—Halliburton earnings more than triple," April 25, 2001, 7:33 pm; Reuters News, "Halliburton sees 2001 EPS at or above $1.30," April 25, 2001, 5:46 pm.

[64] Robinson-Humphrey, "HAL: Estimates Raised: Rating Boosted to OUTPERFORM," April 26, 2001.

the oilfield operations."[65] Prudential Securities raised its investment recommendation on Halliburton to "Strong Buy" from "Accumulate" on increased earnings forecasts.[66]

52. Some analysts maintained the ratings and estimates for the Company. CIBC maintained its estimates and rating for Halliburton, stating "Business trends and outlook comments by management support our thesis of a recovery of international activity becoming the principal driver of [Halliburton's] earnings in 2H01 and thereafter."[67] UBS Warburg maintained its ratings for Halliburton, stating: "Although the outlook for [Halliburton's] core business is improving, we still do not find the risk/reward ratio as attractive as that of some of its peers. Our rating remains Hold."[68]

53. On April 26, Halliburton's stock price rose 9.09%, to close at $42.13. The company-specific return was 3.7%, a statistically significant increase. News commentators attributed the Company's stock price gain to its positive earnings release.[69]

54. *June 29, 2001*: On Thursday, June 28, 2001, after market close, Halliburton announced that Harbison had been requesting the Company's

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[65] CSFB, "HAL: MWR: Q101 In-line, Forward Guidance Raised," April 26, 2001.

[66] *Reuters News*, "RESEARCH ALERT-Prudential ups Halliburton," April 26, 2001, 10:13 am.

[67] CIBC World Markets, "Halliburton Co.: 1Q01 EPS In Line; Broadening Recovery Under Way," April 26, 2001.

[68] UBS Warburg Research Note, "Halliburton: Below Expectations for 1Q; Guides Higher for 2Q," April 26, 2000.

[69] *Reuters News*, "Oil services shares surge on rosy outlook," April 26, 2001, 2:28 pm.

financial assistance with asbestos claims Harbison agreed to assume in 1992 after it was spun off from Dresser. Dresser had agreed to handle asbestos claims filed prior to the split, and Harbison agreed to handle asbestos claims filed afterward. Dresser was named as a defendant in the claims, and the companies were in effect co-insured. Halliburton stated that it had "substantial interest" in resolving the claims, and that this development exposed the Company, net of insurance recoveries, to a worst case asbestos liability cost of $60 million[70] On June 29, 2001, Halliburton's stock price declined 4.22%, to close at $35.60. The company-specific return that day is negative 4.6%, a statistically significant decline.

55. Certain analysts expressed concern over the Company's potential exposure to asbestos liability, which is reflected in the decline in the stock price. On June 29, Goldman Sachs removed Halliburton from its list of top recommendations, citing anticipated pressure on the Company's stock price due to this asbestos related disclosure:

> Analyst Terry Darling ["Darling"] wrote in a report, "Although [Halliburton's] operating performance is improving (second quarter upside surprise likely) and it's unlikely that this event substantially increases [Halliburton's] financial risk from asbestos liabilities, we believe the incremental uncertainty created by this new development is likely to place further pressure on [Halliburton] shares.[71]

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[70] *Dow Jones News Service*, "Harbison-Walker Asks Halliburton For Asbestos Claims Help," 4:47 pm, June 28, 2001.

[71] *Reuters News*, "Research Alert—Goldman cuts Halliburton from recommended list," June 29, 2001, 8:04 am.

CNBC discussed the Goldman Sachs downgrade:

> [Halliburton] was downgraded today by Goldman Sachs. The bottom line from Goldman is that Goldman says the company has issues with w-- asbestos [*sic*] liabilities. That's going to be a problem, even though the fundamentals appear to be improving for Halliburton. The firm is taking the stock off of its recommend list. They make it a market performer on the heels of the company, saying it may assume asbestos liabilities of Harbison Walker, which was spun off by Dresser Industries as Indresco back in 1992.[72]

56. Analyst Geoff Kieburtz with Salomon Smith Barney, stated:

> There is risk from the company's asbestos liability on three fronts. First, the possibility of a dramatic increase in the number of new claims filed. The first quarter of 2001 saw 18,000 new claims filed, versus a total of 45,000 during all of 2000, indicating a potential annual total this year of 72,000 new claims. Second, claimants could become more aggressive in terms of the amount of money being sought, as has been the case with other asbestos defendants, such as McDermott International. Third, the Delaware Supreme Court could uphold the lower court ruling that Highlands is not obligated to provide insurance coverage for asbestos claims filed against Kellogg Brown & Root, thereby removing Halliburton's primary insurance coverage for these claims.

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[72] *CNBC Squawk Box*, "Newscast: Squawk Box, 9:30 AM; today's business news," June 29, 2001.

> Despite the risks detailed above, we do not expect that Halliburton's asbestos exposure presents a material risk to the company's existence as a going concern. Firstly, the magnitude of the company's exposure is an order of magnitude lower than that of McDermott International, while Halliburton is a significantly larger and more profitable company. With $278 million of cash at the end of the first quarter, against an $84 million accrued liability for open claims, assuming no insurance coverage, Halliburton appears to have sufficient financial resources to manage this exposure. Thus, we reiterate our Buy rating on the stock."[73]

57. Analyst Sanger with Deutsche Banc Alex. Brown stated:

> This charge, if taken, will be in Q2 for discontinued operations, and will be easily offset by the $300 million after-tax gain on the sale of Dresser Equipment Group. While insignificant by itself, it does remind people of [Halliburton's] asbestos liabilities and could depress its multiple as these concerns rear their head again. We continue to rate [Halliburton] a Buy because of its recent sharp pull back but prefer RIG, BHI and SLB (all Strong Buy rated) among the large caps. Our target price remains unchanged at $54 . . .[74]

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[73] Salomon Smith Barney, "HAL: Possible Additional Asbestos Exposure," June 29, 2001.

[74] Deutsche Banc Alex. Brown, "Halliburton Increases Asbestos Reserve. Reiterate Buy, but Renewed Concerns Could Impact Valuation," June 29, 2001.

58. *July 26, 2001*: After market close on July 25, 2001, Halliburton released its second quarter financial results, reporting strong revenue and earnings:

> [S]econd-quarter earnings from continuing operations more than doubled as oil and gas companies stepped up their drilling activity in response to strong energy prices during the quarter.
>
> Dallas-based Halliburton, headed until August 2000 by U.S. Vice President Dick Cheney, said second-quarter earnings from continuing operations and excluding one-time items rose to $143 million, or 33 cents per share, from $52 million, or 12 cents a share, in the same period of 2000.
>
> Analysts' earnings estimates had ranged from 28 to 32 cents per share, with a mean estimate of 30 cents, according to research firm Thomson Financial/First Call.[75]

59. Several analysts raised their estimates for Halliburton in response to the results:

For example, analyst Sanger raised EPS estimates for the Company, stating:

> Although we expect a drilling slowdown in the US to negatively impact [Halliburton], the near term strength there and the longer-term leverage to the international recovery are higher than we had assumed. Consequently, we are raising our EPS estimates for 2001 from $1.19 to $1.32, leaving 2002 unchanged at $1.63. We are also maintaining our target price of $44 based on a 27

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[75] *Reuters News*, "Halliburton operating earnings more than double," July 25, 2001, 4:11 pm.

> multiple of 2002 EPS (implying an 11.9 multiple of 2002 EBITDA), and we continue to rate [Halliburton] a Buy.[76]

ABN AMRO also raised their EPR targets for the Company:

> We are raising our 2001 EPS estimate to $1.40 from $1.25 to reflect the upside surprise, as well as a more rapid improvement in the international markets than we had previously anticipated. In addition, we are increasing our 2002 EPS estimate to $2.10 from $2.00.[77]

That day, Halliburton's stock price rose 3.65% to close at $35.50. The company-specific return was 3.4%, a statistically significant increase.

60. *August 9, 2001*: On August 9, 2001, Halliburton filed Form 10-Q with the SEC, in which it increased its accrued net liability for known open asbestos claims to $124 million (from $30 million on March 31, 2001 and $29 million on Dec. 31, 2000). In response to the Company's filing, an analyst at A.G. Edwards stated that the situation was now more complex and uncertainty increased, although it appeared manageable:

> With these recent developments the scope of Halliburton's potential asbestos liabilities has expanded and uncertainty has increased. The inherent uncertainty of litigation as well as the

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[76] Deutsche Banc Alex. Brown, "Q2 Earnings Higher Than Expected; Raising Ests, but Maintaining 2002 Ests, Target Price and Strong Buy Rating Because of Rapidly Improving Fundamentals," July 26,2001.

[77] ABN AMRO, "International Stength [*sic*] Drives Upside Surprise," July 26,2001.

> possibility that a series of adverse court rulings or new legislation could quickly alter [Halliburton's] position, makes it very difficult for the company accurately predict the outcome. However, based on its: historical experience with similar claims; understanding of the facts and circumstances that gave rise to asbestos claims; and estimate of amounts that will be recovered from insurance companies; along with the time elapsed since Halliburton and its former divisions or subsidiaries discontinued sale of products containing asbestos; and the time elapsed since Kellogg Brown & Root used materials containing asbestos in any construction process; [Halliburton] believes that the known open asbestos claims are manageable and will be resolved without a material adverse effect on its financial position or results of operations. Regardless, the situation should be monitored closely and the uncertainty could continue to hamper Halliburton's valuation relative to its peers (BHI and SLB).[78]

61. On August 9, 2001, Halliburton's stock price declined 4.48%, to close at $32.00. The company-specific return that day is negative 5.2%, a statistically significant decline. The decline was attributed to the information released in the 10-Q:

> Halliburton Co, the world's No. 1 oilfield services firm, saw its stock fall 4.5 percent on Thursday after the company released information showing a sharp increase in its asbestos litigation liability.

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[78] A.G. Edwards, "Net Liability for Asbestos Claims Rises—More Complex Situation Appears Manageable but Uncertainty Increases," August 10, 2001.

> Dallas-based Halliburton, headed until August 2000 by U.S. Vice President Dick Cheney, said it estimated its net liability for open asbestos claims against current and former Halliburton subsidiaries at $124 million as of June 30, 2001, up from $30 million on March 31, 2001 and $29 million on Dec. 31, 2000.
>
> The information, contained in a 10-Q filing with the Securities and Exchange Commission (SEC), hit Halliburton's stock which closed $1.50 lower at $32.
>
> "When you look at the growth in claims and you look at these numbers, we're concerned," said Scott Gill, an analyst with Houston-based energy investment bank Simmons & Co.
>
> Gill said the information about the asbestos claims—which date back to the 1970s—was far more detailed than the company had made in 10-Q statements in previous quarters.[79]

62. *October 31-November 1, 2001*: After market close, on Tuesday, October 30, 2001, Halliburton announced that on October 26, 2001, a jury in Mississippi found Dresser (through Harbison) liable in two of six asbestos cases for total compensatory damages of $21.3 million ($10.7 million per plaintiff). The case was against three companies, and the total verdict was $150 million. This verdict had not yet been affirmed and a judgment had not yet been entered against the Company. The Company stated that it

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[79] *Reuters News*, "Halliburton stock down as asbestos liability rises," August 9, 2001, 7:12 pm.

would "file post trial motions and vigorously appeal if the verdict is not set aside"[80]

63. One analyst was surprised by the size of the award, and expected the news to have a negative impact on the Company's stock price:

> Six plaintiffs were each awarded $25 million and Dresser (through the Harbison-Walker (H-W) subsidiary) was found liable in two of the six cases for total compensatory damages of $21.25 million ($10.675 million per plaintiff). Potential 4Q2001E impact is small: $5mil or $3mil tax effected = less than $0.01/share hit. If appeal is unsuccessful, reserves could move up sharply. This jury award sets new precedents; the size of award is enormous. . . .
>
> Size of jury award was unexpected and is likely to have a negative impact on stock price tomorrow. We expect a vigorous defense by [Halliburton's] and remain optimistic that the asbestos liability will remain under control. Given the significant discount relative to its peer group, we believe that [Halliburton's] current stock price adequately discounts potential asbestos liability risk.[81]

64. Another analyst noted the risks:

> We continue to monitor the situation closely and we recognize the unpredictability and apparent irrationality of the asbestos litigation environment in general. For example, at least

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[80] *PR Newswire*, "Halliburton Disputes Asbestos Claims," October 30, 2001, 8:05 pm.

[81] A.G. Edwards, "Asbestos Case in Small Mississippi Town Yields $150 Million Jury Award Against HAL, MMM and Others—Vigorous Appeal Expected," October 31, 2001.

> 95% of the claims filed against Halliburton are by claimants that have no symptoms of illness and a very small fraction, under 3%, have diagnosed cancer. Notably, the five claimants in the Orange County case all had been diagnosed with cancer. In addition, each case that is filed against Halliburton has many other co-defendants, creating a degree of competition between defendants to avoid being tagged with a liability. However, because of these factors and others, we cannot confidently develop a "worst case scenario" for Halliburton's ultimate asbestos liability.[82]

65. On October 31, 2001, Halliburton's stock price declined 6.3%, to close at $24.69. The company-specific return that day is negative 4.9%, a statistically significant decline. The Company's stock continued to decline 2.88% on November 1, 2001, to close at $23.98. The company-specific decline is -3.7%, a statistically significant decline because the market was up that day.

66. November 6, 2001: On November 6, 2001, Halliburton's stock price declined 3.85%, to close at $21.72. The company-specific return that day is negative 3.5%, a statistically significant decline. There was no company-specific news on that day consistent with the price decline.

67. After market close on November 6, 2001, based on the Company's third quarter earnings, which were released after market close on October 23, 2001, investment firm Hibernia Southcoast Capital reduced its EPS estimates and 12-month price target for

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[82] Salomon Smith Barney, "HAL: Further Asbestos Developments," October 31, 2001.

Halliburton (to $34 from $60). The firm maintained its "Buy/Strong Buy" rating for the Company's shares.[83]

68. *November 9, 2001*: On November 9, 2001, Halliburton's stock price rose 0.18%, to close at $22.76. However, the company-specific return that day is negative 3.4%, a statistically significant decline, because the industry was up that day.

69. On November 9, 2001, Salomon Smith Barney issued a report on Halliburton that was generally positive but in which the analyst lowered his earnings estimates for fourth quarter 2001 and maintained his 2002 estimate and Buy rating.

70. *December 4-7, 2001*: During the period December 4 through December 7, 2001, Halliburton disclosed recent adverse asbestos jury verdicts in Form 8-K SEC filings and there was substantial discussion in the news and by analysts related to Halliburton's potential asbestos exposure.

71. On Tuesday, December 4, the Company filed Form 8-K with the SEC, in which it disclosed that a Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001.[84] In the same filing, the Company disclosed that the same district court also entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs in the aggregate amount of $35.7 million related to an alleged breach of a purported settlement agreement. The Company stated

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[83] Hibernia Southcoast Capital, "Halliburton Co.," November 6, 2001.

[84] This verdict was known to the public before December 4. For example, an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report.

that it intended to appeal the three judgments "on the grounds that it wasn't a party to the settlement agreements and that it didn't authorize anyone to settle on its behalf. The company said it believes its appeal will be successful."[85]

72. On December 3, 2001, Halliburton's stock price closed at $22.06. On December 4, Halliburton's stock price declined 0.73%. The company-specific return is -3.7%; this is a statistically significant negative return because both the market and the industry are up that day. On December 5, Halliburton's stock price increased 0.46%, which also is a statistically significant negative return because both the market and the industry are up that day (the company-specific return is -3.8%). On December 6, the stock declined 5.23%. This is not a statistically significant return because both the market and the industry are down that day. Halliburton closed at $20.85 on December 6.

73. Analysts recognized the market's concern with Halliburton's asbestos exposure but continued to recommend the stock. This is consistent with the net stock price decline over December 4-6. Analyst Fratt with A.G. Edwards lowered his price target for Halliburton and reiterated his "Strong Buy/ Speculative" rating:

> In our view, these large jury awards are troubling due to the size of awards and jury findings appear to based [sic] on the possibility of development of asbestos-related illnesses, not actual presence of asbestosis, a form of asbestos-related lung cancer, or mesothelioma, a cancer that is caused by exposure to asbestos. Nonetheless, [Halliburton's]

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[85] *Dow Jones Corporate Filings Alert*, "Texas Court Enters $65M Verdict Against Halliburton," December 4, 2001, 8:45 am.

> asbestos liability remains large and the overhang could remain in place for the next several years in spite of [Halliburton's] vigorous defense (in part due to the lengthy appeals process). . . .
>
> Although disappointing earnings, a weak engineering & construction (E&C) business environment and exposure to asbestos litigation have weighed on the stock price, an extensive restructuring in the E&C business, the sale of Dresser Equipment Group and improving Energy Service operating results, especially outside of North America, should enable Halliburton to perform better in the near-term. In addition, a slowing of asbestos litigation claims could help the stock perform better.[86]

74. Analyst Sanger of Deutsche Banc Alex. Brown reiterated his Strong Buy rating for Halliburton, stating that the market was over-discounting the Company's potential asbestos liability:

> Improved disclosure does not mean improved clarity: The asbestos issue continues to overhang [Halliburton] and better disclosure of its liabilities, a strategy which [Halliburton] has now decided to pursue, does not provide investors with comfort on either the upper-end or the potential ultimate liability or on the timing of the development of a clearer definition of what that liability might be.
>
> Recommendation: We continue to rate [Halliburton] a strong Buy and we believe that the

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[86] A. G. Edwards, "Asbestos News Continues to Develop—North American Drilling Market Weak and 2001-2 EPS Estimates Lowered," December 5, 2001.

> current valuation over-discounts the asbestos liability. . . .[87]

75. On the morning of December 7, 2001, the Company filed Form 8-K with the SEC disclosing that on December 5 a Maryland jury had awarded a $30 million verdict against Dresser in favor of five plaintiffs in an asbestos litigation. The Company stated that it intended to "aggressively" appeal the verdict:

> The company said it believes the trial court committed numerous errors and that the evidence didn't support the verdict, according to the filing. The company intends to challenge the verdicts by post trial motion and, if those motions aren't successful, to pursue an appeal "aggressively."[88]

76. Several analysts issued reports that day in response to the Company's SEC filing. Analyst Geoff Kieburtz with Salomon Smith Barney downgraded his rating for Halliburton (to 3H from 1M) and dropped his price target to $20 from $36 citing mounting asbestos liabilities:

> This verdict comes on the heels of a $21 million Mississippi jury verdict, a $65 million judgement in Orange, Texas, and an additional $36 million, representing a settlement previously negotiated by Harbison-Walker. All of these cases pertain to Harbison-Walker, a former subsidiary. The company has indicated that in all cases that it believes the trial courts have committed

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[87] Deutsche Banc Alex. Brown, "Better Asbestos Disclosure Does Not Help Stock Price," December 5, 2001.

[88] *Dow Jones Corporate Filings Alert*, "Jury Returns $30M Verdict against Halliburton Subsidiary," 8: 17 am.

> numerous errors, and that it expects to prevail on appeal. While the stock heavily discounts Halliburton's asbestos exposure, the specter of lawsuits spiraling out of control is likely to adversely impact the stock for the foreseeable future, and thus we cannot recommend it at this time.[89]

77. Analyst Sen with Jefferies & Co. put his rating for Halliburton under review citing uncertainty regarding the asbestos litigations and near-term earnings risk:

> We have remained cautious on Halliburton for two main reasons: 1) uncertainty surrounding ongoing asbestos litigation, and 2) near-term earnings risk. . . . These [asbestos related disclosures] are surprising developments following management's rather positive asbestos update during its 3Q01 conference call on October 23. During the conference call management had provided further assurances that current reserves are adequate to cover projected asbestos liabilities. We now believe that [Halliburton's] asbestos-related net liabilities could be significantly higher than currently estimated (estimated at $125 million by the company). We continue to remain cautious on the stock. Our rating is under review (with a negative bias) pending further update from management on asbestos.[90]

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[89] Salomon Smith Barney, "HAL: Downgrading on Mounting Asbestos Liabilities," December 7, 2001.

[90] Jefferies, "Halliburton: Update On Asbestos Litigation; Stay Cautious," December 7, 2001.

78. UBS Warburg analyst, James Stone, downgraded his rating for Halliburton to "Hold" from "Strong Buy" and reduced his 12-month target price to $24 from $38:

> While we do not anticipate that every claim filed against Halliburton will end up in court, in fact the vast majority of claims should continue to be settled at or near the company's historical settlement rates. Nevertheless, if only 1% of cases resulted in jury verdicts of a similar magnitude and the awards were upheld at the appellate level, the future liability would be significantly greater than our previous expectations. From a value standpoint, it is arguable that the stock is still quite undervalued. . . . When all is said and done, we still believe that our analysis and our conclusions are reasonable. However, the current climate is sufficiently uncertain to merit more caution on our part. If we were to see several signs that would allow us to believe that the liability is confinable at the level of our previous analysis, we would be inclined to re-evaluate the stock. Since the value gap that results from our previous analysis is so great, we are not uncomfortable missing some of the initial upside if we wait for better signals.[91]

79. On December 7, 2001, Halliburton's stock price declined 42.4%, to close at $12.00. The company-specific return that day is negative 42.7%, a statistically significant decline. Trading volume was almost 77 million shares that day, more than 22 times the average daily trading volume for Halliburton stock

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[91] UBS Warburg, "Halliburton: Downgraded to Hold from Strong Buy," December 7, 2001.

during the Class Period. Several news articles attributed the decline in Halliburton's stock price on December 7 to the recent asbestos disclosures.[92]

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[92] *See, e.g., The Wall Street Journal*, "Halliburton Stock Falls Nearly 43% After Recent Asbestos Verdicts," December 10, 2001.

SUPPLEMENTAL APPENDIX

EXHIBITS TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION FILED SEPTEMBER 17, 2007:

Exhibit 1 ..... SA1

Exhibit 2 ..... SA7

Exhibit 3 ..... SA9

Exhibit 4 ..... SA28

Exhibit 5 ..... SA33

Exhibit 6 ..... SA35

Exhibit 7 ..... SA45

Exhibit 8 ..... SA47

Exhibit 9 ..... SA49

Exhibit 10 ..... SA52

Exhibit 11 ..... SA54

Exhibit 12 ..... SA70

Exhibit 13 ..... SA87

Exhibit 14 ..... SA89

Exhibit 15 ..... SA91

Exhibit 16 ..... SA93

Exhibit 17 ..... SA96

Exhibit 18 ..... SA110

DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION DATED NOVEMBER 16, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of Itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY and DAVID J. LESAR,

Defendants.

DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Respectfully submitted,

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[TABLES INTENTIONALLY OMITTED]

The Court should deny Lead Plaintiff Archdiocese of Milwaukee Supporting Fund, Inc.'s ("AMSF") Motion for Class Certification ("Motion"). As in two recent decisions of the Fifth Circuit and the Northern District of Texas, the proposed class fails because AMSF has failed to prove loss causation by a preponderance of the admissible evidence. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 262, 269 (5th Cir. 2007); *Ryan v. Flowserve Corp.*, __ F.R.D. __, No. 3:03-CV-1769-B, 2007 WL 3357692, at *8 (N.D. Tex. Nov. 13, 2007) (Boyle, J.). The Expert Report of Jane Nettesheim—AMSF's only evidence of loss causation—fails to satisfy loss causation requirements in the Fifth Circuit and is based on unreliable methodology and analysis. Nettesheim repeatedly admits that she did not conduct the type of inquiry the Fifth Circuit requires, and the evaluation she did conduct fails to meet basic standards for experts in her field.[1] AMSF's Motion also fails because the proposed class representatives, Ben Alan Murphey and AMSF, do not satisfy the requirements of adequacy and typicality under Federal Rule of Civil Procedure 23.

LEAD PLAINTIFF'S BURDEN OF PROOF

The issue of class certification should not be considered lightly. In Oscar, Judge Higginbotham recently noted the "lethal force of certifying a class of purchasers of securities enabled by the fraud-on-the-market doctrine." *Oscar*, 487 F.3d at 262. A court must conduct a "rigorous analysis" to determine whether there is sufficient evidence to satisfy each of the

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[1] *See* Defendants' Motion to Strike the Report of Jane Nettesheim ("Motion to Strike"), filed contemporaneously with this Response and fully incorporated herein.

requirements of class certification. *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). In doing so, a court must look beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *Griffin v. GK Intelligent Sys., Inc.* 196 F.R.D. 298, 300 (S.D. Tex. 2000).

AMSF bears the burden of establishing each requirement of Rule 23 and is entitled to no presumptions. *Unger*, 401 F.3d at 321 ("The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification."); *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). "Unsupported allegations that the case satisfies the requirements of Rule 23 are an insufficient basis for certifying a class action." *Kase v. Salomon Smith Barney, Inc.*, 218 F.R.D. 149, 152 (S.D. Tex. 2003). If AMSF has not satisfied the requirements for class certification, it is improper to certify a class on the possibility that it might make the required showing at a later stage in the litigation.[2]

Rule 23's requirements include that: (1) the proposed class is so numerous that joinder of all

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[2] *See Oscar*, 487 F.3d at 268 ("[A] district court must resolve factual disputes relevant to each Rule 23 requirement and find that whatever underlying facts are relevant to a particular Rule 23 requirement have been established. . . . The obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue. . . .") (internal citations omitted); *Castano*, 84 F.3d at 742 ("Given the plaintiffs' burden, a court cannot rely on assurances of counsel that any problems . . . can be overcome.").

members is impracticable; (2) there are questions of law or fact common to the proposed class; (3) the claims or defenses of the representatives are typical of those of the proposed class; and (4) the representative parties will fairly and adequately protect the interests of the proposed class. FED. R. CIV. P. 23(a). Under Rule 23(b)(3), AMSF must also show that common questions of law or fact "predominate over" individual issues and that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 23(b)(3).

To satisfy Rule 23(b)(3), AMSF relies on the fraud-on-the-market presumption, without which individual issues of reliance would predominate and the class would fail. The reliance element of a plaintiff's securities claim is presumed for a company whose shares are traded in an efficient market. *Basic Inc. v. Levinson*, 485 U.S. 224, 244 (1988). Under the Fifth Circuit's interpretation of *Basic*, classwide reliance is presumed if there is proof that: "(1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiff[] traded shares between the time the misrepresentations were made and the time the truth was revealed." *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 661 (5th Cir. 2004). To benefit from the presumption of reliance, however, a plaintiff must also prove that the material "misstatement *actually moved* the market" and therefore caused the alleged losses. *Oscar*, 487 F.3d at 265; *see also Greenberg*, 364 F.3d at 665. The Fifth Circuit thus requires "plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption." *Oscar*, 487 F.3d at 265.

Recognizing the gravity of certifying a securities class action relying on the fraud-on-the-market presumption, the Fifth Circuit has held that the district court must make a "find[ing]" that "loss causation [is] established at the class certification stage." *Id.* at 269. Elaborating on the reasons for this requirement, the Fifth Circuit stated:

> In short, the efficient market doctrine facilitates an extraordinary aggregation of claims. We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until "trial" a merit inquiry central to the certification decision, and failing to insist upon a greater showing of loss causation to sustain certification, at least in the instance of simultaneous disclosure of multiple pieces of negative news. Nor is there sound reason for an early "tentative" certification, which leaves loss causation for later more focused examination.

Id. at 267. Under *Oscar*, it is AMSF's burden to establish, and the Court must find, loss causation by a preponderance of the evidence. *Id.* at 269. Absent such a finding, the proposed class cannot rely on the fraud-on-the-market presumption, and the class therefore fails. *Id.*; *Flowserve*, 2007 WL 3357692, at *8, *16.

BACKGROUND

The Fourth Consolidated Class Action Complaint ("Fourth Complaint") alleges that a class of plaintiffs suffered damages because Halliburton's "financial falsifications and other misleading statements" inflated Halliburton's stock price throughout the class

period from June 3, 1999 to December 7, 2001.[3] Specifically, AMSF's Motion premises its argument on alleged misrepresentations concerning: (1) the success of its acquisition of Dresser Industries, Inc., including projected cost savings from the integration of Dresser's and Halliburton's operations; (2) its accounting for unapproved claims (claims that were in the process of being negotiated with customers); and (3) the Company's liability for asbestos lawsuits.[4]

AMSF's own expert, however, affirmatively disproved the most basic element of securities fraud—inflation of the stock price. For example, she could not identify any instances before April 2001 when Halliburton's stock price increased in connection with a Company announcement in a way significantly different from an index of similar companies.[5] AMSF made all its purchases prior to this date, and the other proposed class representative, Ben Alan Murphey, made all his purchases and sales prior to that date.[6] Neither AMSF nor its expert contend that the two instances of a stock price increase in the over 600- day class period provide any support whatsoever to their failed attempt to prove loss causation. The expert also fails to link any corrective disclosure causing a decline in the stock price with a prior misstatement by Halliburton or Lesar. The timing and content of Halliburton's disclosures demonstrate the absence of

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[3] Fourth Compl. ¶ 3.

[4] *See* Motion at 3-8.

[5] AMSF App. 96 (Nettesheim Rep. ¶ 53); App. 49 (Nettesheim Dep. 77).

[6] App. 15-18 (AMSF Dep. 115-17; 120; 125-27); App. 39, 42-44 (Murphey Dep. 152-53; 165-66; 171).

loss causation and AMSF's failure to prove the requirements of class certification.

I. The only two alleged class period representations regarding the Dresser merger merely repeated information disclosed to the market before the class period.[7]

AMSF alleges two class period statements regarding Dresser; both statements, if even actionable, merely repeat nonactionable statements prior to the class period.[8] Lesar's alleged September 13, 1999 projection that the Dresser merger would result in "annual benefits of $500 million" mirrored a report issued on March 1, 1999—three months before the class period began.[9] Likewise, Cheney's statement in paragraph 122 of the Fourth Complaint describing the successful merger and integration of Dresser confirmed pre-class period statements that projected positive and synergystic effects of the merger and integration.[10] There is no evidence that Halliburton's stock price

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[7] The Fifth Circuit has held that only non-confirmatory statements—those that disclose information not already known to the market—can provide the basis for loss causation. Greenberg, 364 F.3d at 663; *see also Flowserve*, 2007 WL 3357692, at *10 (holding that confirmatory statements are not "capable of moving the market" and provide no support for loss causation).

[8] As the Motion demonstrates, the statement that the Dresser merger was a "win" for shareholders was made in 1998, and claims based on that statement are time-barred. *See* Motion at 6; March 14, 2006 Order at 3.

[9] *Compare* Fourth Compl. ¶ 115 *with id.* ¶ 93 (quoting report that "[c]ost savings from the merger . . . should yield over $500 million").

[10] *See, e.g., id.* ¶¶ 83-84.

reacted to these alleged representations. As AMSF's own expert admits, "successive announcements of the same information will have no additional effect on share price."[11]

II. Halliburton's disclosures regarding accounting for unapproved claims were not accompanied by any decline in Halliburton's stock price.

An understanding of Halliburton's various business segments is instructive in evaluating AMSF's claim of loss causation regarding the unapproved claims allegations. The Fourth Complaint and AMSF's Motion frequently refer generally to the Company's engineering and construction operations when discussing the unapproved claims allegations. As detailed below, however, the major fixed-price construction projects on which the Company accrued unapproved claims were not part of the Company's Engineering Construction Group. For that reason, disclosures related generally to engineering and construction, or "E&C," do not necessarily relate, as AMSF and Nettesheim suggest, to the unapproved claims allegations.

Halliburton is one of the world's largest providers of services and products to the energy industry.[12] During the proposed class period from June 3, 1999 to December 7, 2001,[13] Halliburton provided two types of services—energy services and engineering and

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[11] AMSF App. 18 (Nettesheim Rep. ¶ 40).

[12] App. 124-25 (Apr. 5, 2007 Press Release, *Halliburton Completes Separation of KBR*).

[13] The Court previously dismissed "all claims asserted by Plaintiffs for actions of any Defendant predating June 3, 1999" as time-barred. March 14, 2006 Order at 3.

construction services.[14] The Company's Energy Services Group serviced companies involved in the exploration, development, and production of oil and gas.[15] Until 2001, one of the Energy Services Group's business units, Brown & Root Engineering Services ("BRES"), provided engineering and construction services, such as oil-field development, to the *upstream* oil and gas industry.[16] With the exception of BRES, the Energy Services Group provided non-construction related energy services.[17]

The Company's Engineering and Construction Group, which included the Kellogg Brown & Root ("KBR") and Brown & Root Services business units, provided engineering and construction services to *downstream* energy customers involved in processing and refining petroleum, and to non-energy and governmental customers involved in such industries as mining and forestry.[18] At the end of 2000, the Company announced plans to combine its engineering and construction operations into one company, KBR, reporting as the Engineering and Construction Group.[19] As a result of this reorganization, the BRES business unit was moved from the Energy Services Group to the Engineering and Construction Group.[20]

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[14] *See* App. 100-01 (June 2001 Form 10-Q at 5-6).

[15] *See* App. 101 (June 2001 Form 10-Q at 6).

[16] App. 72 (1999 10-K at 2); *see infra* note 20

[17] App. 71-73 (1999 10-K at 1-3).

[18] App. 73-74 (1999 10-K at 3-4).

[19] *See* App. 114-16 (Dec. 21, 2000 Press Release, *Halliburton Announces New Structure and Engineering and Construction Charges*).

[20] *See id.*; App. 100 (June 2001 Form 10-Q at 5).

To support loss causation, AMSF points to unapproved claims allegations in the Fourth Complaint that pre-date the reorganization of Halliburton's construction operations in 2001.[21] The major projects for which Halliburton accrued unapproved claims were BRES projects.[22] At the time, BRES was a part of Halliburton's Energy Services Group, not its Engineering and Construction Group.[23] Thus, any disclosures concerning the non-construction related services of the Energy Services Group and the downstream construction operations of the Engineering and Construction Group have little, if any, relevance to the unapproved claims allegations.

Prior to the class period, Halliburton's BRES unit began to recognize revenue from unapproved claims when the revenue was deemed probable of recovery and the amount could be estimated.[24] Accordingly, in its 1998 Form 10-K, issued before the class period, Halliburton deleted a statement in prior reports that the Company's claims for additional compensation were recognized when resolved.[25] Allegations regarding this change, the propriety of the amounts recorded, or other unapproved claims disclosures referenced on pages 3-4 of AMSF's Motion predate the class period, are barred by limitations, and thus provide no basis for class certification or any claim in

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[21] *See* Motion at 1-5.

[22] *See SEC v. Morris*, No. Civ. A. H-04-3096, 2007 WL 614210, at *1 (S.D. Tex. Feb. 26, 2007).

[23] *See* App. 65 (1998 Form 10-K at 1).

[24] *See Morris*, 2007 WL 614210, at *2.

[25] App. 66 (1998 Form 10-K at 26).

this litigation.[26] *See* March 14, 2006 Order at 3 (dismissing as time-barred all claims based on pre-June 3, 1999 conduct).

In March 2000, Halliburton's 1999 Form 10-K specifically informed shareholders that "[c]laims and change orders, which are in the process of being negotiated with customers, for extra work or changes in the scope of work are included in revenue when collection is deemed probable."[27] At the same time, Halliburton also disclosed in the notes to its financial statements that its unbilled receivables included $89 million in unapproved claims in 1998 and $98 million in 1999.[28] As AMSF's own expert demonstrates, however, these disclosures regarding the accounting change and its effect had no impact on the price of Halliburton stock.[29] There was no statistically

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[26] The Paine Webber Energy Conference and subsequent analyst reports referenced on pages 4-5 of the Motion did not occur on June 9, 1999 as the Motion states. Rather, according to the Fourth Complaint, that conference occurred on February 9, 1999, and the related analyst reports were released in February and March 1999, all well before the class period. *See* Fourth Complaint 1111 91-93.

[27] App. 76 (1999 Form 10-K at 34); *see also* App. 82 (2000 Form 10-K at 28); App. 88 (2001 Form 10-K at 35).

[28] *See* App. 76 (1999 Form 10-K at 34); *see also* App. 82 (2000 Form 10-K at 28 ($113 million)); App. 88 (2001 Form 10-K at 35 ($234 million)).

[29] *See* AMSF App. 124 (Nettesheim Rep., Ex. 3 at 8) (showing that the stock price *increased* following the release of the 1999 10-K on March 30, 2000). Although the Fourth Complaint alleges that the March 2000 disclosure was partially misleading, AMSF does not contend loss causation exists as to this allegation, for which there is no alleged corrective disclosure causing any decline in the stock price.

significant change in the stock price following the March 2000 disclosure.[30]

III. Halliburton accurately disclosed its asbestos liability for pending claims.

Halliburton made meaningful and truthful disclosures during the class period concerning its expected liability for pending asbestos claims. Halliburton informed investors both quarterly and annually of the actual number of then-pending asbestos claims and the precise amount of reserves Halliburton had accrued for those claims.[31] Far from downplaying its asbestos liability, Halliburton regularly reported estimates of multiple millions of dollars.[32] Halliburton's estimates were predictive in nature, and the Company expressly warned that future events could negatively affect its estimates: "We recognize the uncertainties of litigation and the possibility that a series of adverse court rulings . . . could materially impact the expected resolution of asbestos related claims."[33]

Thus, Halliburton cautioned investors both in formal disclosures and in press releases that if actual amounts paid on claims or recovered from insurance companies differed from projections, it may have to take a loss. Before the class period, for example, Halliburton disclosed a dispute with a former Dresser affiliate, Harbison-Walker, related to its contractual

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[30] AMSF App. 124 (Nettesheim Rep., Ex. 3 at 8).

[31] *See* App. 77-78 (1999 Form 10-K at 43-44); App. 83 (2000 Form 10-K at 37); App. 96 (June 2000 Form 10-Q at 10).

[32] *See* App. 72-78 (1999 Form 10-K at 43-44); App. 83 (2000 Form 10-K at 37).

[33] App. 84 (2000 Form 10-K at 38).

obligation to indemnify Dresser for certain asbestos claims.[34] Further, in June 2001, the Company issued a press release announcing that its potential asbestos liability could increase by at least $50-60 million because Harbison-Walker had asked Dresser for financial assistance in meeting its indemnity obligations.[35] There is no allegation in the Fourth Complaint—and certainly no evidence—that Harbison-Walker required Dresser's assistance prior to this disclosure. Additionally, in late 2001, Halliburton told investors about a recent judgment and two jury verdicts, which were significant departures from the Company's previous experience concerning its asbestos liability.[36] There is no evidence of any prior representation regarding the potential outcomes of these lawsuits. Rather, disclosure of them was in line with the Company's previous warning that a series of such results "could materially impact" its expectations regarding resolutions of its asbestos claims.[37]

AMSF's Motion misconstrues the content of the Company's asbestos disclosures in an attempt to fabricate a misrepresentation. AMSF contends that Halliburton falsely represented that it had "adequately reserved for potential asbestos liability."[38] Halliburton plainly and repeatedly disclosed, however, that its reserves were only for pending

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[34] App. 67 (1998 Form 10-K at 39).

[35] App. 117-18 (June 28, 2001 Press Release, *Harbison-Walker Asks Halliburton for Assistance*).

[36] App. 121-23 (Dec. 7, 2001 Press Release, *Halliburton Comments on Asbestos Judgments*).

[37] *See* App. 78 (1999 Form 10-K at 44).

[38] Motion at 6 (emphasis added).

claims and that reserves were not accrued for potential claims that might be filed in the future.[39]

AMSF provides no evidence in the form of analyst statements or otherwise that investors somehow believed that Halliburton's reserves were for anything other than pending claims.

ARGUMENT

I. Class certification must be denied because AMSF has failed to prove loss causation.

In *Oscar*, the Fifth Circuit expressly held that "loss causation must be established at the class certification stage by a preponderance of all admissible evidence." *Oscar*, 487 F.3d at 269. "[A]ny showing that severs the link between the misrepresentation and the plaintiff's loss," including the absence of any element of loss causation, "rebuts on arrival the plaintiff's fraud-on-the-market theory." *Id.* at 265 (internal quotation marks omitted). If the fraud-on-the-market presumption fails, questions of individual reliance by each class member then predominate, and a motion for class certification must be denied. *Id.* at 271; *Flowserve*, 2007 WL 3357692, at * 7.

AMSF has not met and cannot meet its burden to prove loss causation. Specifically, AMSF must show that an alleged misstatement "*actually* moved the market." *Oscar*, 487 F.3d at 265. In other words, there must be proof that the alleged misrepresentations inflated the stock price, which later decreased when the truth was revealed. *See Greenberg*, 364 F.3d at 665. Courts in the Fifth Circuit have held that plaintiffs must prove the fraud's effect on the market

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[39] App. 83 (2000 Form 10-K at 37); App. 92 (March 2000 Form 10-Q at 10); App. 96 (June 2000 Form 10-Q at 10).

in at least one of two ways: (1) "an increase in stock price immediately following the release of positive information";[40] or (2) proof of "actual negative movement in the stock price following the release of the alleged 'truth' of the earlier misrepresentation." *Id.*; *Flowserve*, 2007 WL 3357692, at *10. Additionally, when multiple pieces of information are released contemporaneously with the corrective disclosure, there must be empirical proof that the corrective disclosure, as opposed to other unrelated information, caused a significant amount of the decline in stock price. *Oscar*, 487 F.3d at 270-71; *Greenberg*, 364 F.3d at 666.

AMSF's only proof of loss causation is Nettesheim's report, which fails to demonstrate loss causation:

- Nettesheim admitted that she "did not find any statements by Halliburton which had a statistically significant positive impact on Halliburton's stock price" except for April and June 2001 earnings releases that Nettesheim does not link to any subsequent corrective disclosure.[41]

- To the extent Nettesheim identified any "corrective" disclosure causing a statistically significant decline in the stock price, she admitted repeatedly that she "didn't . . . match[] particular prior statements to [such alleged corrective] disclosures."[42]

- Nettesheim did not attempt to analyze what portion of any statistically significant stock price

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[40] Proof of stock price inflation is a necessary, but not sufficient, component of loss causation. *See infra* note 46.

[41] App. 49 (Nettesheim Dep. 77).

[42] App. 54 (Nettesheim Dep. 121); *see also* App. 57, 58, 59A, 59B, 60A (Nettesheim Dep. 137, 138, 164-65, 167, 168, 180).

decline was attributable to Halliburton's correction of a potentially actionable prior disclosure (as opposed to the simultaneous disclosure of other nonactionable, negative news). In fact, although she explained she has conducted such an empirical inquiry in the past, she "was not asked to do" so in this case.[43]

In addition to expressly rejecting the very standards the Fifth Circuit has imposed for loss causation, Nettesheim's report and testimony fails to satisfy the basic requirements of reliability for experts in her field.[44] Nettesheim claims to have conducted an "event study"—a method of determining the effect of an event on a company's stock price—but she fails even to follow the methodology of the experts that she cites in her report.[45] Because AMSF has failed to meet its burden of proving that Halliburton's alleged misrepresentations caused any losses during the class period, class certification must be denied.

A. AMSF failed to prove that any class period misrepresentation inflated Halliburton's stock price.

Loss causation requires a plaintiff to show that the defendant made an actionable, nonconfirmatory, positive statement that inflated the stock price. *Greenberg*, 364 F.3d at 666. To meet this requirement, plaintiffs "ordinarily show[] an increase in stock price immediately following the release of positive

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[43] App. 51 (Nettesheim Dep. 91-92).

[44] *See* Motion to Strike at 2-10 (including in its Appendix the Expert Report of Dr. Lucy Allen of NERA).

[45] *See* Motion to Strike at 3-4. This and other methodological problems with Nettesheim's report are reviewed in detail in the Motion to Strike and provide independent grounds for the Court to deny class certification.

information."[46] *Id.* at 665; *see also Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001); *In re Zonagen, Inc. Sec. Litig.*, 322 F. Supp. 2d 764, 775-82 (S.D. Tex. 2003).

The premise of AMSF's entire case is that Halliburton's stock traded at prices significantly inflated because of multiple misrepresentations throughout the class period.[47] Yet AMSF's expert—who provides AMSF's only proof of loss causation—examined every single day in the class period and found only two instances of a statistically significant stock price increase that she connected to any Company-specific information.[48] Both instances were late in the class period, and neither AMSF's Motion nor Nettesheim's Report even contends that these instances demonstrate loss causation.[49] Nettesheim

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[46] Proof that the misrepresentation caused inflation of the stock price is a necessary, but not sufficient, component of loss causation. *Flowserve*, 2007 WL 3357962, at *10 (holding that evidence of disclosures accompanying stock price increases were no evidence of loss causation because "there was no statistically significant price reaction" and "[w]ithout any price reaction, particularly a negative one, no investor could have suffered a loss"); *Zonagen*, 322 F. Supp. 2d at 781 ("Merely showing that the stock price was inflated when plaintiff purchased it, however, is not sufficient to demonstrate loss causation.").

[47] Fourth Compl. ¶ 3.

[48] AMSF App. 96, 99 (Nettesheim Rep. ¶¶ 53, 59).

[49] *See* Motion at 19-23; AMSF App. 37-66 (Nettesheim Rep. ¶¶ 79-134). These instances occurred at the tail end of the class period in April and July 2001, and Nettesheim does nothing to link them to any corrective disclosure of any alleged culpable information causing a decline in the stock price. They therefore cannot serve as any basis for loss causation. *See Flowserve*, 2007 WL 3357962, at *10 (holding that earnings statements accompanying a stock price increase provided no evidence of loss

essentially disproves the entire premise of AMSF's case. Her failure to demonstrate the central aspect of any securities case—that a misrepresentation inflated the stock price—is a fatal flaw. *See, e.g., Zonagen*, 322 F. Supp. 2d at 775-82 (granting summary judgment for defendant because the plaintiffs' expert failed to present any evidence that the alleged misrepresentation at issue inflated the defendant's stock price).

B. AMSF does not prove any link between a potentially actionable, nonconfirmatory misrepresentation and corrective disclosure that reveals its falsity and causes a decline in the stock price.

AMSF attempts to prove loss causation through the second method the *Greenberg* court identified: linking "an allegedly false, non-confirmatory positive statement" with "negative 'truthful' information" that later "caus[es] the decrease in [the stock] price." Greenberg, 364 F.3d at 666. AMSF's Motion looks solely to Nettesheim's testimony to satisfy this requirement. Nettesheim, however, admitted during her deposition that she did not conduct the required analysis. She explained repeatedly that she "didn't . . . match[] particular prior statements to [alleged corrective] disclosures."[50]

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causation because there was no relationship between them and subsequent price drops).

[50] App. 53 (Nettesheim Dep. 121); *see also* App. 57, 58, 59A, 59B, 60A (Nettesheim Dep. 137, 138, 164-65, 167, 168, 180).

1. Nettesheim failed to isolate any actionable misrepresentations, and AMSF's reliance on confirmatory and other nonactionable statements to support loss causation is contrary to Fifth Circuit authority.

The *Greenberg* and *Flowserve* cases demonstrate the proper procedure for linking an alleged corrective disclosure with a prior actionable misrepresentation. The first step is to isolate the alleged actionable, nonconfirmatory misstatements. *Id.* at 666 ("Of the alleged misrepresentations made by Crossroads regarding the features of its products, only those made on [particular dates] are non-confirmatory and therefore actionable."); *see also Zonagen*, 322 F. Supp. 2d at 778-81 (granting summary judgment because plaintiff's expert failed to demonstrate a link between the corrective disclosure and an actionable misrepresentation, as opposed to an alleged misrepresentation that did not survive the motion to dismiss). Thus, at "the threshold of class certification," the *Flowserve* court "look[ed] for alleged falsehoods that are capable of moving the market." *Flowserve*, 2007 WL 3357692, at *10. The court then held that almost half of the alleged misrepresentations were "confirmatory, had already been digested by the market, and [could not] serve as the basis for a fraud-on-the-market presumption." *Id.*

Nettesheim's entire analysis is flawed because she categorically refused to pinpoint any "particular statement" for which she claimed to have found loss

causation.[51] Nettesheim's analysis merely references broad categories of allegations in the Fourth Complaint and does not identify specific representations made at any particular time by any particular Halliburton official.[52] Nettesheim thus failed to complete the first essential step of the analysis under Greenberg and Flowserve.

Setting aside Nettesheim's failure to identify any specific misrepresentations, even AMSF's Motion plainly argues that loss causation exists as to alleged misrepresentations that the Court has previously dismissed and to non-actionable confirmatory statements. Almost all of the alleged misrepresentations regarding unapproved claims to which AMSF points (including those it describes on pages 3-4 of its Motion) predate June 3, 1999, are time-barred, and do not provide any basis for loss causation.[53] See March

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[51] App. 52A (Nettesheim Dep. 114); *see also* App. 57, 58 (Nettesheim Dep. 137, 138); App. to Motion to Strike (Allen Report at 15-18, 29-31, 33-39).

[52] AMSF App. 39-65 (Nettesheim Rep. ¶¶ 82-132). Nettesheim conducted her statistical analysis backwards. Rather than starting with the potentially actionable misrepresentations and corrective disclosures alleged in the Fourth Complaint and determining whether they caused a statistically significant movement of the stock, Nettesheim analyzed each and every day during the nearly 3-year-long class period to find any day on which the stock had a statistically significant movement. As to all of those days, she then combed the news sources to see if she could find any disclosure relating in any fashion to any topic at issue in the Fourth Complaint. This methodology is unreliable and contrary to the very authority Nettesheim cites in her own report. *See* Motion to Strike at 3-4.

[53] In fact, all of the claims asserted in the Fourth Complaint are time-barred and cannot support loss causation. The Fourth Complaint alleges in no uncertain terms that there was a "shocking public revelation" of Halliburton's prior alleged

14, 2006 Order at 3 (dismissing as time-barred all claims based on pre-June 3, 1999 conduct). AMSF also relies on several time-barred statements related to the Dresser merger and asbestos in its Motion.[54] These statements (and any allegations in paragraphs 64- 107 in the Fourth Complaint) cannot serve the basis of loss causation. *Id.* Similarly, AMSF's Motion points only to two statements in the class period concerning the success of the Dresser merger.[55] These statements, however, are confirmatory and therefore not actionable. *See supra* p. 5; *Greenberg*, 364 F.3d at 666; *Flowserve*, 2007 WL 3357692, at *10. To summarize, there can be no loss causation as to: (1) almost all of the unapproved claims allegations to which AMSF's Motion points; (2) the pre-June 3, 1999 asbestos-related statements; (3) and all of the Dresser merger-related statements.[56]

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fraudulent conduct on October 24, 2000. Fourth Compl. ¶ 31; *see also id.* ¶¶ 144-45. Nettesheim also states that there was a statistically significant drop in the stock price following what she claims to be corrective disclosures on October 25 and December 22, 2000. Plaintiffs were then required to "proceed with a reasonable and diligent investigation" and file a complaint no later than October 24, 2001. Because the first complaint was not filed until June 3, 2002, all of the claims are time-barred. *See* March 14, 2006 Order at 3 (dismissing as time-barred all claims based on pre-June 3, 1999 conduct).

[54] Motion at 6-7 (citing ¶¶ 8, 88, 101 of the Fourth Complaint, all of which pre-date June 3, 1999).

[55] Motion at 7.

[56] Only misrepresentations for which the Fourth Complaint properly alleges materiality, falsity, and scienter are potentially actionable for the purposes of loss causation. *See Zonagen*, 322 F. Supp. 2d at 777, 779; *see also Flowserve*, 2007 WL 3357962, at *7 ("The predominance query begins with a review of the basic elements of a § 10(b) and Rule 10b-5 actions . . . [which include] (1) a misstatement or omission; (2) of a material fact; (3) made

Additionally, neither AMSF's Motion nor Nettesheim's Report even mentions the hodgepodge of alleged "accounting irregularities" in paragraphs 247-87 of the Fourth Complaint, let alone attempt to prove loss causation with respect to them. As a result, these claims cannot provide any basis for class certification.

2. Nettesheim's claimed corrective disclosures do not reveal the falsity of any prior misrepresentation and therefore do not support loss causation.

The next task is to determine whether there is a link between any remaining misstatements and a later corrective disclosure that (1) revealed the falsity of the prior statement; and (2) caused a decrease in the stock price. *Greenberg*, 364 F.3d at 666-67; *Flowserve*, 2007 WL 3357692, at *11-15. Under *Greenberg*, the necessary relationship between the corrective disclosure and the earlier misstatement is satisfied only if the corrective disclosure "specifically reveal[s]" the prior misstatement. *Greenberg*, 364 F.3d at 666.

Proof that a disclosure merely concerns the same general subject as the supposed misrepresentation is no evidence that the later disclosure is *corrective*. For example, in *Greenberg*, the plaintiffs alleged that the defendants made a number of misrepresentations

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with scienter; (4) on which they *relied*; and (5) that proximately caused their injuries"). For example, any alleged misrepresentations attributed only to the former individual defendants are not actionable because the Court has held that the Fourth Complaint does not demonstrate that those statement were uttered with scienter. *See* Fourth Compl. ¶¶ 28, 38, 46, 132, 175, 181, 183, 185 (all containing statements attributed only to defendants that have been dismissed).

related to its business of designing, manufacturing, and selling storage routers. An alleged misrepresentation regarding router speed, however, was not actionable because the alleged corrective disclosure discussed problems with a competitor in the router business and reported that earnings would be below analysts expectations, but made "no reference to increased router speed." *Id.* at 667. Likewise, there was no proof of loss causation as to misrepresentations regarding *first* quarter results and *second* quarter analyst expectations because the alleged corrective disclosure mentioned only expected *third* quarter earnings. *Id.* Thus, even if the disclosure discusses the same concept or business as the prior misrepresentation, it is not a corrective disclosure unless it "specifically" corrects the prior misrepresentation and reveals the "truth[]." *Id.* at 666; *Flowserve*, 2007 WL 3357692, at *11-12 (holding that revised earnings per share guidance was not sufficiently related to a previous alleged misrepresentation discussing projected earnings per share because it did not reveal any prior fraud); *Congregation of Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151, 167-68 (N.D. Tex. 2007) (dismissing suit because plaintiff failed to "explicitly allege a corrective disclosure—*i.e.*, a statement that corrects a previous misrepresentation or discloses a prior omission").

The *Flowserve* court further elaborated on the requirement that a corrective disclosure must reveal the prior fraud. The court rejected an expert's claim that acute drops in the stock price reveal the "true financial condition" of a company and are proof loss causation "even if the fraudulent conduct itself is not revealed." *Flowserve*, 2007 WL 3357692, at *13. Under that expert's logic, the court explained, "a plaintiff . . . with debatable evidence of fraud can pick the largest

stock drop irrespective of the actual reason and still relate the fraud" to a prior disclosure. *Id.* The court held that this approach to loss causation would "undermine the objectives of securities law and disregard[] precedent" in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) and *Greenberg*. *Id.*

Additionally, the court held that even if the alleged "corrective disclosure" had a "*negative* effect on the price of [the] stock," that alone does not "demonstrate a *corrective* effect on the price of [the] stock." *Id.*, at *18-19 (emphasis in original). The *Flowserve* court found analysis from the Southern District of New York instructive on the distinction between a *negative* disclosure and a *corrective* disclosure:

> The fact that an event—in this case, a failure to meet earnings forecasts or a statement foreshadowing such a failure—disabused the market of that belief [that the securities were valuable] does not mean that the event disclosed the alleged scheme to the market. In other words, a failure to meet earnings forecasts has a *negative* effect on stock prices, but not a *corrective* effect. Such a failure does not imply that defendants concealed a scheme to depress earnings estimates and drive up prices. It does not disclose the scheme; therefore, it cannot correct the artificial inflation caused by the scheme.

Id., at *18 n.31 (quoting *In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (emphasis in original)). Under *Greenberg* and *Flowserve*, it is not enough that the disclosure mentions the same subject matter as the prior alleged misrepresentation omission and causes a decline in the stock price. AMSF must also prove that the

disclosure actually revealed the prior fraud to the market. *See Flowserve*, 2007 WL 3357692, at *13, *19.

Nettesheim's approach to loss causation is directly contrary to this standard. Just as the expert in *Flowserve*, she premises her entire analysis on the invalid theory that disclosures, which she concedes do not reveal the alleged fraud, are somehow "corrective."[57] She attempts to prove loss causation through "partial disclosures of information," which "changed investors' perceptions of the *true value of Halliburton*," but that "*did not admit the alleged fraud.*"[58] Under *Greenberg* and *Flowserve*, her "true value of Halliburton" theory is no evidence of loss causation and, if accepted, would undermine the objectives of the securities laws. *Id.*, at *13 (rejecting expert's similar "true financial health" theory).

Even when Nettesheim attempts to link alleged corretive disclosures to prior (but unspecified) misrepresentations, her approach is contrary to Fifth Circuit authority. Nettesheim identifies 24 days during the class period with statistically significant decreases in Halliburton's stock price.[59] As to those 24 dates, Nettesheim identifies only eight involving a statement by Halliburton (as opposed to news about a competitor, oil prices, or other such information not specific to the

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[57] *See* App. to Mot. to Strike (NERA Report at 15-18, 29- 31, 33-39).

[58] AMSF App. 36 (Nettesheim Rep. ¶ 77) (emphasis added); *see also* AMSF App. 35 (Nettesheim Rep. ¶ 75) (admitting that in her view "[t]he corrective disclosure has a causal link to the alleged misrepresentations even though the company had not admitted to prior misrepresentations or to fraud").

[59] AMSF App. 19 (Nettesheim Rep. ¶ 42).

Company).[60] As to each such date, she nakedly asserts that a Company disclosure, regardless of its content, has some unspecified relationship with the general subjects of the Complaint, such as unapproved claims, asbestos liability, or the Dresser merger.[61] For example, in answering a deposition question about the link between the December 2000 stock price decline and a prior misrepresentation, she stated:

> Q. [I]n your mind, [the December 2000 press release, which contained multiple pieces of news[62]] is a corrective disclosure or partial corrective disclosure of what statements made by Halliburton?
>
> A. This is related to the – what's generally called the unapproved claims or the cost overruns in the engineering and construction units.
>
> Q. And how in your mind is it related to the unapproved claims issue?
>
> A. It's my understanding that those relate to cost overruns.
>
> Q. And I take it in your mind if there is a negative stock price movement of a statistically significant amount, and in the day preceding that movement there was some company announcement about fixed price

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[60] AMSF App. 20-23 (Nettesheim Rep. ¶ 45). It is unclear if AMSF is alleging loss causation as to each of these eight dates. AMSF's Motion only refers to four of the dates. *See* Motion at 2.

[61] AMSF App. 42-43, 46, 52, 56-57, 65 (Nettesheim Rep. ¶¶ 87, 92, 105, 112, 132); *see also* App. to Motion to Strike (Allen Report at 15-18, 29-31, 33-39).

[62] *See infra* pp. 27-28.

> contracts, whatever it may be, that is a sufficient relationship in your mind to make this a corrective disclosure or partial corrective disclosure?
>
> A. In this case, yes.[63]

Nettesheim fails to demonstrate that any disclosure corrected and "specifically reveal[ed]" any particular prior misrepresentation.[64] *See Greenberg*, 364 F.3d at 666-67 (rejecting evidence of disclosure merely mentioning the same general subject as a prior misstatement as not probative of loss causation).

Like the expert in *Flowserve*, Nettesheim takes a "results-oriented approach," and "discount[s] inconvenient but relevant facts" along the way. *See Flowserve*, 2007 WL 3357962, at *12. For example, she reviewed an October 4, 1999 disclosure containing *positive* news about Dresser and claimed it somehow revealed alleged fraud concerning the Dresser merger. The October 4, 1999 press release, which is not even mentioned in the Fourth Complaint, reported that Dresser had elected to sell its interest in two joint ventures and predicted that the sale would "result in net cash inflow of approximately $630 million which will be used to repay short-term debt" and "significantly strengthen[] Halliburton's balance

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[63] App. 56 (Nettesheim Dep. 130-31); *see also* App. 53-54 (Nettesheim Dep. 119, 121, 124) (contending disclosures concerning asbestos, regardless of their content, correct all prior disclosures concerning asbestos).

[64] *See* App. to Motion to Strike (Allen Report at 15-18, 29-31, 33-39).

sheet."[65] Analysts reacted to this news positively.[66] Nettesheim's conclusion that this information somehow corrected an unidentified prior fraudulent statement concerning the Dresser merger demonstrates the unreliability of her methodology and conclusions.[67]

Nettesheim's report is AMSF's only evidence of loss causation. Her opinions are premised on a theory that is directly contrary to Fifth Circuit authority, and her analysis demonstrates the absence of loss causation. Class certification must be denied.

C. AMSF provides no empirical evidence that the alleged corrective disclosures, as opposed to other unrelated news, caused a significant amount of the stock price decline.

When an alleged corrective disclosure is released with other negative news, a plaintiff must show "'that it is more probable than not that it was [the corrective disclosure of the alleged misrepresentation], and not other unrelated negative statements, that caused a significant amount of the decline.'" *Oscar*, 487 F.3d at 266 (quoting *Greenberg*, 364 F.3d at 666). Nettesheim failed to conduct this analysis. In fact, she admits that she "was not asked to do" so.[68]

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[65] App. 109-10 (October 4, 1999 Press Release, *Halliburton to Sell Two Joint Ventures, Announces Earnings Outlook*).

[66] *See, e.g.*, App. 126-27 (October 4, 1999 Dow Jones Business News, *Halliburton Sells Stakes in Joint Venture for $1.1 Billion*).

[67] See App. 60 (Nettesheim Dep. 175-76).

[68] App. 51 (Nettesheim Dep. 91-92); *see also* App. 50A (Nettesheim Dep. 89).

The *Oscar* case demonstrates the rigor of this requirement. The issuer in that case, Allegience, was a national telecommunications provider. Claimants alleged that the defendants fraudulently misrepresented Allegiance's line-installation count. The defendants later restated the line-installation count in a disclosure containing various other items of bad news. *Id.* at 263. Plaintiff's expert conducted a study demonstrating that the company's stock price declined in a statistically significant amount after the disclosure. The Fifth Circuit vacated and remanded, however, holding that the expert's report did not establish loss causation, and the district court abused its discretion in certifying the class. *Id.* at 262, 270. The Fifth Circuit explained that "when unrelated negative statements are announced contemporaneous of a corrective disclosure, the plaintiff must prove that 'it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline.'" *Id.* at 270 (quoting Greenberg, 364 F.3d at 666).

The Fifth Circuit also discussed the kind of proof necessary to meet this requirement. An event study showing only that the "stock reacted to the *entire bundle* of negative information" in the corrective disclosure is insufficient. *Id.* at 271. Rather, a plaintiff's evidence must be "empirically-based" and "more than well-informed speculation." *Id.* at 270-71. In *Oscar*, as here, the plaintiff's evidence of the amount of the stock price decline attributable to the revelation of the prior misstatement "consist[ed] chiefly of analyst commentary," which the court held was no evidence of loss causation. *Id.* at 270. Rather, the Fifth Circuit requires an "empirical" showing "that some percentage of the drop was attributable to the

corrective disclosure" and "demands a peek at the plaintiff's damages model." *Id.* at 270-71.

Just as in *Oscar*, Nettesheim relied on the opinion of market analysts to supply the evidence that the stock price drop was attributable to the revelation of an alleged misrepresentation as opposed to other unrelated negative information.[69] Nettesheim, like the *Oscar* expert, failed to provide an "empirically-based" showing that Halliburton's stock price dropped in response to revelation of the prior misstatements, and not other negative news about the company. *Id.* at 270.[70] Her report therefore provides no evidence of loss causation; and under *Oscar*, the Court must refuse to certify the class.

C. Nettesheim neither links the eight alleged "corrective disclosures" to previously released nonconfirmatory information nor provides empirical evidence that they caused a significant portion of the decline in stock price.

Nettesheim repeated the very mistakes that the Fifth Circuit determined to be fatal in *Greenberg* and *Oscar*. She conducted a methodologically flawed analysis that neither links a corrective disclosure with a potentially actionable misrepresentation, nor proves that the stock price reacted negatively to correction of the alleged fraud as opposed to other items of bad news. *See Oscar*, 487 F.3d at 270-71; *Greenberg*, 364 F.3d at 666-67. Specifically, the following disclosures,

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[69] App. 50A, 51 (Nettesheim Dep. 89-92)

[70] *See also* App. to Motion to Strike (Allen Report at 22-27, 40-41).

the only support in her report for loss causation, cannot be construed as "corrective":

October 4, 1999. After the market closed on October 4, 1999, Halliburton issued a press release that, as Nettesheim admits, discusses multiple pieces of news.[71] The Fourth Complaint does not mention this press release and certainly does not claim that it reveals any prior fraud. Nettesheim's report does not link any disclosures in the release with any particular misrepresentation. Instead, her report references pages 1-2 of the Fourth Complaint,[72] which contain no alleged misrepresentations at all, much less allegations regarding any of the subjects of the press release. In fact, nowhere in the Fourth Complaint are there any allegations whatsoever regarding these subjects, including Dresser Equipment Group or any joint ventures it owned. As in *Flowserve*, there is no apparent relationship between the disclosures in the press release and any potentially actionable prior misrepresentation (which Nettesheim does not identify). *Flowserve*, 2007 WL 3357692, at *11.

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[71] *See* App. 50 (Nettesheim Dep. 82). The October 4, 1999 press release relates to the following subjects, none of which are mentioned in the Fourth Complaint: (1) Dresser's election to sell its interests in two joint ventures; (2) under performance of the Dresser Equipment Group business segment; (3) lower than expected profits in Dresser Equipment Group's joint ventures and other business units; (4) 1999 third quarter results, which were affected by a decline in downstream Engineering and Construction business segment; (5) 1999 third quarter earnings in the Energy Service Group segment, which would remain flat to slightly up due to continued low spending levels by the company's energy industry customers. App. 109-10 (October 4, 1999 Press Release, *Halliburton to Sell Two Joint Ventures, Announces Earnings Outlook*).

[72] AMSF App. 42-43 (Nettesheim Rep. ¶ 87 & n.51).

Additionally, as discussed above, Nettesheim's testimony that the *positive* news about the sale of Dresser's joint ventures somehow discloses previous (unidentified) fraudulent statements regarding the Dresser merger[73] demonstrates her refusal to apply the requirement that a corrective disclosure "specifically reveal[]" the prior fraud. *Greenberg*, 364 F.3d at 666.

Because Nettesheim's report characterized the press release as containing only one piece of news, she never attempted to evaluate whether a significant portion of the stock price decline was attributable to alleged culpable versus nonculpable news. Thus, even if the press release revealed the falsity of a prior misrepresentation, it would still not support loss causation. Nettesheim conducted no empirical analysis concluding that revelation of the truth, as opposed to other negative news—such as the decline in the *downstream* Engineering and Construction Group and the low spending by customers in the Energy Services Group—caused a significant portion of the stock price decline. *Oscar*, 487 F.3d at 270. This press release is not corrective of anything and is no evidence of loss causation.[74]

January 5, 2000. On January 5, 2000, analyst Carol Y. Lau issued a report after she had an alleged call with Halliburton. The report reduced earnings per share projections for various Halliburton segments, including Energy Services, and discussed lower oilfield services profits.[75] The Fourth Complaint does not

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[73] App. 60 (Nettesheim Dep. 175-76).

[74] *See also* App. to Motion to Strike (Allen Report at 23-24, 29).

[75] App. 128-29 (Jan. 5, 2000 Brown Brothers Harriman & Co. Report).

mention Lau's report or claim that it is a corrective disclosure.[76] Nettesheim admits that she did not link any piece of news in Lau's report to any prior statement by Halliburton.[77] A reduced earnings per share estimate—in this case, one emanating from an analyst, not the Company—that does not specifically reveal prior fraud is no evidence of loss causation. *See Flowserve*, 2007 WL 3357962, at *13, *18-19.

Although Nettesheim admits that the Lau report contained nonculpable news,[78] she concludes that news and analyst reports suggest that the "reductions in earnings estimates *are based at least in part* on the problems with the large fixed-price contracts and the lack of benefits from the Dresser merger."[79] This conclusion is a far cry from the *Oscar* requirement of an *"empirically-based"* analysis (as opposed to a review of news or analyst reports) concluding that a *"significant amount"* of the decline was due to the correction of prior fraud. *Oscar*, 487 F.3d at 270 (emphasis added). This is particularly true considering that the Lau report does not even mention unapproved claims or the Dresser merger.[80] The

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[76] Under *Flowserve*, Lau's report could not constitute a corrective disclosure because there is no proof that the market recognized any relationship between the disclosure and the alleged fraud. *Flowserve*, 2007 WL 3357692, at *19 (holding that "[w]hen fraud is revealed through indirect disclosure, 'plaintiffs must provide proof that the market recognized a relationship between the event disclosed and the fraud' in order to establish loss causation").

[77] App. 59 (Nettesheim Dep. 142-43).

[78] AMSF App. 43 (Nettesheim Rep. ¶ 88).

[79] AMSF App. 45 (Nettesheim Rep. ¶ 92) (emphasis added).

[80] App. 128-29 (Jan. 5, 2000 Brown Brothers Harriman & Co. Report). Nettesheim cites a Merrill Lynch report by analyst K.

January 5, 2000 stock price drop is not evidence of loss causation.

October 24, 2000. After the market close on October 24, 2000, Halliburton issued a press release and held a conference call with analysts. The press release disclosed the following negative news: (1) BRES's operating income of $10 million in the 2000 third quarter was negatively impacted by continuing low capacity utilization and by delayed customer projects; (2) Engineering and Construction Group business segment's revenues in the 2000 third quarter was a declined 21 percent from the previous year; (3) the Engineering and Construction Group's revenue decline was attributable to reduced customer spending associated with KBR's downstream petroleum industry; (4) operating income for the Engineering and Construction Group was flat at compared to the previous year.[81]

Analyst reports following the October 24, 2000 conference call indicate the market's awareness of the following news: (1) lower earnings in the Engineering

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Simpson in which Simpson explains that he cut earnings estimates for a number of reasons, some of which Nettesheim admits are nonculpable. AMSF App. 42 (Nettesheim Rep. ¶ 89). Simpson references "less powerful synergies from the *Dresser* merger than *[h]e* had envisioned." AMSF App. 42 (Nettesheim Rep. ¶ 89) (emphasis added). A single analyst report referencing *his own* prior expectation about Dresser (and not Halliburton's), does not even rise to the level of "well-informed speculation," which the Fifth Circuit held is not probative of loss causation. *See Oscar*, 487 F.3d at 271. Under *Oscar*, Nettesheim's mere review of Simpson's report is no evidence of loss causation. *Id.*; *see also* App. to Motion to Strike (Allen Report at 24-25, 29-30

[81] App. 111-13 (Oct. 24, 2000 Press Release, *Halliburton Releases Third Quarter Earnings, Up Significantly Over Prior Year and Previous Quarter*).

and Construction segment;[82] (2) depressed outlook for customer spending and the lack of profit predictability in the shallow water marine construction market;[83] (3) reduced customer spending in the KBR downstream petroleum business;[84] (4) plans for restructuring of the Engineering and Construction segment;[85] (5) lower than expected international revenues and decreased international spending by major oil companies;[86] (6) increased concerns about exposure to asbestos liability.[87]

Nettesheim admits that she "did not go back and match this partial disclosure with any particular statement."[88] Rather, she concludes with no explanation that the variety of news percolating in the market somehow related to unapproved claims and the lack of benefits from the Dresser merger.[89] And *presto*, loss causation! Under *Greenberg*, *Oscar*, and *Flowserve*, it is not that easy. First, neither the Company's statements nor the analyst reports say a single thing about

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[82] App. 149-54 (Oct. 25, 2000 CIBC World Markets Report); App. 138-41 (Oct. 25, 2000 Morgan Stanley Report); App. 142-44 (Oct. 25, 2000 Paine Webber Report); App. 145-48 (Oct. 25, 2000 Salomon Smith Barney Report).

[83] App. 149-54 (Oct. 25, 2000 CIBC World Markets Report); App. 142-44 (Oct. 25, 2000 Paine Webber Report).

[84] App. 149-54 (Oct. 25, 2000 CIBC World Markets Report); App. 142-44 (Oct. 25, 2000 Paine Webber Report).

[85] App. 149-54 (Oct. 25, 2000 CIBC World Markets Report); App. 135-37 (Oct. 25, 2000 Dain Rauscher Wessels Report); App. 138-41 (Oct. 25, 2000 Morgan Stanley Report); App. 145-48 (Oct. 25, 2000 Salomon Smith Barney Report).

[86] App. 135-37 (Oct. 25, 2000 Dain Rauscher Wessels Report).

[87] App. 135-37 (Oct. 25, 2000 Dain Rauscher Wessels Report).

[88] App. 57 (Nettesheim Dep. 137).

[89] AMSF App. 47, 51 (Nettesheim Rep. ¶¶ 93, 103).

unapproved claims or the Dresser merger. This is another instance in which the disclosure and the prior (unspecified) misrepresentation have no apparent relationship and loss causation is therefore absent. *See, e.g.*, *Flowserve*, 2007 WL 3357962, at *13 (holding that a disclosure accompanying a stock price drop is not corrective simply because it revealed the true financial condition of a company).

Second, there is no proof that a significant amount of the stock price drop is due to the revelation of the truth regarding any prior misrepresentation. *See Oscar*, 487 F.3d at 270. Again, Nettesheim relies on her review of analyst reports and news stories to determine the cause of the price decline.[90] Her analysis of that news, however, bears little relation to the facts. For example, she contends that because analysts reported on problems with the Engineering and Construction segment (specifically, KBR), that showed that a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking of unapproved claims and the lack of benefits of the Dresser merger.[91] She fails to recognize, however, that the BRES business unit, not KBR, conducted the majority of projects on which the Company booked unapproved claims.[92] She also fails to consider that the challenges facing the KBR business unit were driven by reduced customer spending, not alleged problems with the Dresser merger.[93]

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[90] AMSF App. 46-47 (Nettesheim Rep. ¶ 93).

[91] AMSF App. 47-52 (Nettesheim Rep. ¶¶ 95-105

[92] *Morris*, 2007 WL 614210, at *1.

[93] App. 135-37 (October 25, 2000 Dain Rauscher Wessels Report).

If the analyst reports show anything, they reveal that a variety of negative information existed in the marketplace. Most, if not all, of that information—low customer spending in KBR's downstream petroleum business[94] and decreased international spending by major oil companies,[95] for example—bears no relation to the allegations regarding unapproved claims or the Dresser merger. Nettesheim does not provide any empirical evidence that the stock price decline was due to revelation of any alleged misrepresentation as opposed to this nonculpable information. *See Oscar*, 487 F.3d at 270. In fact, Nettesheim does not even prove that there was *any* corrective disclosure on October 24, 2000, much less that such disclosure caused the stock price decline.[96]

December 22, 2000. On December 21, 2000, the company issued a press release formally announcing the restructuring of its engineering and construction units into one business segment and stating that the company would take an after-tax charge. The charge related to (1) restructuring costs (such as severance costs associated with reduction of senior management positions); (2) current losses during the quarter on KBR's construction joint ventures, much of which was caused by labor disturbances in Venezuela and West Africa; (3) and some unapproved claims, which the

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[94] App. 135-37 (October 25, 2000 Dain Rauscher Wessels Report).

[95] App. 135-37 (October 25, 2000 Dain Rauscher Wessels Report).

[96] *See* App. to Motion to Strike (Allen Report at 25-27, 30).

company was unable to favorably resolve with customers.[97]

Nettesheim cannot connect this release, which makes no mention of the Dresser merger, to any nonconfirmatory prior statement about Dresser.[98] Her claim that this disclosure relates generally to allegations regarding unapproved claims and cost overruns[99] is contrary to *Greenberg's* requirement of a specific corrective connection. *See Greenberg*, 364 F.3d at 668 (holding that a disclosure concerning third quarter expectations had no relationship with a prior alleged misrepresentation concerning first and second quarter results). Additionally, as the *Flowserve* court held, a disclosure of a change in circumstances—here, an unfavorable resolution of unapproved claims with its customers—does not constitute a correction of a prior statement.[100] See *Flowserve*, 2007 WL 3357692, at *18 & n.31.

Nettesheim does not explain how losses during the quarter on KBR joint venture projects never

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[97] App. 114-16 (December 21, 2000 Press Release, *Halliburton Announces New Structure and Engineering and Construction Charges*). Recording of current losses is not and cannot be a correction of any prior misstatement. Additionally, the Company's decision to take a charge for prior unapproved claims does not mean that the prior recording of such unapproved claims was improper.

[98] As discussed above, there is no allegation of a nonconfirmatory statement during the class period about Dresser. *See supra* p. 5.

[99] App. 56 (Nettesheim Dep. 130)

[100] AMSF has not presented evidence of when the company originally recorded the unapproved claims discussed in this release and whether that recording was even during the class period and therefore actionable.

mentioned in the Fourth Complaint could possibly relate to any alleged prior misrepresentation. Analyst commentary indicates that these losses related to labor disturbances, a shrinking customer base resulting from consolidations, and financially troubled competitors who were driving down prices.[101] The release plainly contains nonculpable negative news.[102] But when Nettesheim responded to a question about whether she conducted any statistical analysis of the various factors affecting the stock price decline, she explained that she reviewed news reports (which themselves contain multiple pieces of negative news).[103] She conducted no empirical analysis separating the various potential reasons for the stock-price decline as required by *Oscar*. The December 22, 2000 decline in stock price is therefore no evidence of loss causation.

June 28, 2001. On June 28, 2001, Halliburton issued an after-market press release stating that Harbison-Walker Refractories Company, a former subsidiary of Dresser had requested Halliburton's financial assistance for asbestos claims Harbison-Walker assumed financial responsibility for when it was spun off from Dresser in 1992.[104] Halliburton could not have disclosed this information until June 2001 because Halliburton had only then received Harbison-Walker's request for assistance.[105]

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[101] App. 151 (December 22, 2000 CIBC World Markets Report at 3).

[102] *See* App. to Motion to Strike (Allen Report at 27-28, 31).

[103] App. 55 (Nettesheim Dep. 128).

[104] App. 117-18 (June 28, 2001 Press Release, *Harbison-Walker Asks Halliburton for Assistance*).

[105] App. 102 (June 2001 10-Q at 11).

Nettesheim contended there was a sufficient link between this disclosure and a prior—but unidentified—misstatement merely because the disclosure "talk[ed] about asbestos claims."[106] She could not, however, provide any evidence that the disclosure revealed the falsity of any specific prior misrepresentation, as required by *Greenberg*. In fact, she refused to testify that the disclosure contained information that Halliburton should have disclosed earlier.[107] There is no such evidence. The release itself states that Harbison-Walker's request was an "unexpected development" and that Harbison-Walker had recently reaffirmed its responsibility for the relevant asbestos claims.[108] There is no proof that this disclosure is corrective, and it is therefore no evidence of loss causation. *See Flowserve*, 2007 WL 3357962, at *18 (holding that an unexpected disclosure's negative effect on the price of the stock does not demonstrate any corrective effect).[109]

August 9, 2001, October 31, 2001, and December 4-7, 2001. On August 9, 2001, Halliburton filed its Form 10-Q, which Nettesheim admits contained a "lot of information"[110] including that the Company increased its reserves for known asbestos claims. The Fourth Complaint does not allege that this 10-Q contained any corrective disclosure. On October 30, 2001, the Company issued a press release concerning a jury verdict in a Mississippi asbestos suit against

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[106] App. 54 (Nettesheim Dep. 124).

[107] App. 54 (Nettesheim Dep. 123).

[108] App. 117-18 (June 28, 2001 Press Release, *Harbison-Walker Asks Halliburton for Assistance*).

[109] *See also* App. to Motion to Strike (Allen Report at 33-39).

[110] App. 53 (Nettesheim Dep. 121).

Harbison-Walker.[111] The Fourth Complaint does not mention this press release or claim that it resulted in losses to the class. On December 4, 2007, the Company announced that a Texas court entered judgment in asbestos litigation against Dresser.[112] On December 7, 2001, the Company issued a press release concerning a Maryland jury verdict in an asbestos suits against Dresser.[113]

Nettesheim merely contends that these disclosures generally relate to prior, unidentified statements about asbestos.[114] Despite the requirement in Greenberg that there be evidence that such disclosures "specifically reveal[]" a prior misrepresentation, Nettesheim provided no testimony of any such prior misrepresentation and could not explain when or why Halliburton should have disclosed this information earlier.[115] Halliburton's increase of its asbestos reserves in the August 2001 10-Q results from the previously announced inability of Harbison-Walker to satisfy its indemnitee obligations, reflects a change Halliburton's estimation of its liability on pending claims, and is no evidence of a corrective disclosure.[116] Further, disclosures of adverse jury verdicts—particularly when, as here, the disclosure occurred within days of the verdict—corrects nothing.

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[111] App. 119-20 (Oct. 30, 2001 Press Release, *Halliburton Disputes Asbestos Claims*).

[112] App. 107 (Dec. 4, 2001 Form 8-K at 2).

[113] App. 121-23 (Dec. 7, 2001 Press Release, *Halliburton Comments on Asbestos Judgments*).

[114] App. 52, 53 (Nettesheim Dep. 110-11, 120, 121).

[115] App. 53 (Nettesheim Dep. 120).

[116] App. 103 (June 2001 10-Q at 12); App. to Motion to Strike (Allen Report at 37).

Flowserve, 2007 WL 3357692, at *19 (holding that a negative disclosure is not necessarily a corrective disclosure).[117] In fact, the disclosures merely confirmed the Company's previous and repeated warning that a series of such results "could materially impact" its expectations regarding resolutions of its asbestos claims.[118]

For all these reasons, and the reasons in the Expert Report of Dr. Lucy Allen, these eight disclosures cannot be construed as corrective and provide no evidence of loss causation. Because AMSF has provided no evidence of loss causation, class certification must be denied.

II. A class should not be certified as to Lesar because AMSF has not and cannot prove loss causation as to any misrepresentation attributed to him.

AMSF did not even attempt to prove the most basic element of its securities claim against Lesar—that a statement he made inflated the stock price. Nettesheim identifies only two dates late in the more than 600-day class period on which the stock price increased. On neither of those dates did Lesar make a factual statement that AMSF has alleged to be false. Nor does AMSF or its expert claim that either of these statements support loss causation. Nettesheim's failure to demonstrate inflation of the stock price due to a statement by Lesar during the class period is fatal. *See Zonagen*, 322 F. Supp. 2d at 776.

Likewise, Nettesheim fails to identify any disclosure accompanying a stock price drop that corrects any

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[117] *See also* App. to Motion to Strike (Allen Report at 34-38).

[118] *See* App. 78 (1999 Form 10-K at 44).

prior actionable statement by Lesar. As discussed above, his statement concerning benefits from the Dresser merger is confirmatory and thus not actionable, and none of the eight disclosures Nettesheim identifies could possibly be construed as correcting the statement. *See supra* pp. 5, 23-31. As Nettesheim freely admits, she did not link any of the eight disclosures to any prior particular statement, including any statement by Lesar. Her analysis does not pass muster in the Fifth Circuit, and class certification must be denied as to Lesar. *See Greenberg*, 364 F.3d at 667; Flowserve, 2007 WL 3357692, at *11-12. AMSF has failed to prove loss causation (which Defendants contend it never pleaded) as to Lesar. The Court should not only refuse to certify a class as to him but should also grant the pending motion for reconsideration and dismiss any claims in the Fourth Complaint against Lesar.

III. Proposed class representatives Murphey and AMSF are neither typical nor adequate.

Neither Murphey nor AMSF have made the requisite showings to satisfy the typicality and adequacy requirements imposed under Rule 23(a). Murphey has not been appointed by the Court as a lead plaintiff, and AMSF's Motion offers no reason whatsoever for appointing him as class representative. His vulnerability to a number of unique defenses, his unfamiliarity with and lack of control over the litigation, and his small stake in the outcome of the litigation make him an improper representative. Similarly, unique defenses that may be asserted against AMSF render it an atypical and inadequate class representative.

A. Rule 23(a)'s requirements for typicality and adequacy.

A plaintiff's claims lack typicality if his legal or factual position is "markedly different from that of other [class] members, even though common issues of law or fact are raised." *Kas v. Fin. Gen. Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984). Thus, "the typicality requirement is not met when the circumstances of the representatives or the legal theory upon which their claims are premised are notably different from circumstances or claims of the class members." *Weikel v. Tower Semiconductor, Ltd.*, 183 F.R.D. 377, 390 (D.N.J. 1998). Similarly, when the representatives' claims and the defendants' defenses thereto "will be dominated by individual evidence," the typicality requirement of Rule 23(a)(3) is not satisfied. *Martin v. Home Depot U.S.A., Inc.*, 225 F.R.D. 198, 201 (W.D. Tex. 2004); *In re FirstPlus Fin. Group, Inc., Sec. Litig.*, No. Civ. A. 3:98-CV-2551-M, 2002 WL 31415951, at *5 (N.D. Tex. Oct. 28, 2002).

The typicality requirement of Rule 23(a)(4) is heightened in securities cases because "the PSLRA raises the standard adequacy threshold," requiring that "competent plaintiffs, rather than lawyers, direct such cases." *Berger*, 257 F.3d. at 483-84. "[B]ecause absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times." *Id.* at 480; *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 532 (N.D. Tex. 2005). Accordingly, the Fifth Circuit has interpreted Rule 23(a)(4) to mandate an inquiry not only into the "zeal and competence of the representative[s'] counsel," but also into "the

willingness and ability of the *representative[s]* to take an *active role in and control* the litigation and to protect the interests of the absentees." Berger, 257 F.3d at 479 (quoting *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) (emphasis added). A class representative is inadequate when the evidence demonstrates that his or her understanding of the case is "limited to derivative knowledge acquired solely from counsel." *Berger*, 257 F.3d at 483 n.18; *Ogden*, 225 F.R.D. at 535; *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 587 (W.D. Tex. 2002).

B. Murphey is neither typical nor adequate as required by Rule 23(a).

1. Murphey cannot satisfy the typicality requirement.

Murphey—basically a day-trader, who profited from buying Halliburton stock and whose class period trades occurred before any alleged artificial inflation in the stock price—fails to satisfy the typicality requirement because he is subject to unique defenses concerning his reliance. *See Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984) (affirming denial of class certification because, among other reasons, of "concern that representation of the class will suffer if the named plaintiff is preoccupied with a defense . . . applicable only to himself").

First, as a day-trader, he looked at short-term price patterns of Halliburton stock, rather than the market price, to determine whether to buy or sell the stock.[119] He frequently bought and sold Halliburton stock on the same day.[120] Evidence that a person "focuses on

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[119] App. 37-40 (Murphey Dep. 149-51; 156-58).

[120] App. 37-40 (Murphey Dep. 149-51; 156-58).

technical price movements rather than price" is a "compelling reason to rebut the [fraud on the market] reliance presumption." *See In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003).[121]

Second, Murphey profited from every trade he made during the class period, and is therefore not a typical representative.[122] *See In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 401 (D. Mass 2007) (concluding that the plaintiff would not be a typical representative if he actually benefited from an artificially inflated price). The only shares that he held at the end of the class period—the 300 shares he bought on September 13, 2000 for $15,843.75—he still holds today. Those shares have grown through stock splits and dividend reinvestments to over 600 shares and are worth considerably more than Murphey paid.[123]

Third, the timing of Murphey's transactions demonstrates Murphey's atypical position with respect to reliance and injury.[124] All of Murphey's class period

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[121] Murphey also admits that he relied on non-market information in making the decision to purchase Halliburton stock. Unlike other class members, he bought Halliburton stock because he *personally* observed Halliburton's work overseas, and even he believes that there is not "another person in the class" who invested for these reasons. App. 35-36 (Murphey Dep. 133-34).

[122] *See* App. 42 (Murphey Dep. 164-65) (admitting that he profited on every sale of Halliburton stock during the class period and therefore had a 100 percent success rate); *see also* App. 255 (Ben Alan Murphey Class Period Trades).

[123] *See* App. 42-44 (Murphey Dep. 165-70); *see also* App. 158-254, (Yahoo! Finance Stock Price Chart).

[124] Plaintiffs purport to rely on the fraud-on-the-market theory to establish a "class-wide presumption of reliance." Motion at 16. "Ordinarily, under a fraud-on-the-market theory, there is a presumption that an investor who buys or sells stock at the price

trades occurred between March 14, 2000 and September 13, 2000,[125] and before the only two instances of a statistically significant price increase that AMSF's expert has tied to any Halliburton- specific statement.[126] Thus, Murphey is subject to the defense that he cannot benefit from the fraud-on-the-market presumption because he did not trade any shares "between the time [any actionable] misrepresentations were made and the time the truth was evealed."[127] *See Greenberg*, 364 F.3d at 661.

2. Murphey cannot satisfy the adequacy requirement.

Murphey sued Halliburton many months after this class action was first filed,[128] and he did so only after being contacted by Neil Rothstein, AMSF's "special counsel" with whom he had had no prior contact.[129] Murphey's testimony shows that he lacks the necessary understanding of the allegations and the

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set by the market does so in reliance on the integrity of that price." *Safeguard*, 216 F.R.D. at 582 (internal quotations omitted). However, a defendant may rebut the presumption by "showing that . . . the plaintiff would have made the purchase regardless of the misstatement/omission." *Id.*

[125] App. 38, 42-44 (Murphey Dep. 152-54, 165-66, 171).

[126] *See* AMSF App. 20-23 (Nettesheim Rep. ¶ 45) (identifying first such increase on April 26, 2001).

[127] Moreover, all of Murphey's trades occurred on or after the day that Halliburton issued its 1999 Form 10-K, which disclosed Halliburton's accounting for unapproved claims and therefore cannot be based on the alleged misrepresentations related to those claims. *See* App. 38 (Murphey Dep. 152:3-153:16); App. 76 (1999 Form 10-K at 34).

[128] App. 26-27 (Murphey Dep. 53-55).

[129] App. 25, 29-30 (Murphey Dep. 34-35, 64-66).

procedural history of this case to serve as a class representative.[130]

He is not in control of the litigation.[131] He does not remember having any input into the filing of the original complaint filed in his name;[132] he admits it was not his decision to file the Fourth Complaint;[133] and he does not know if he reviewed the class certification motion before it was filed with the Court.[134] In fact, Murphey does not even actively contact his lawyers.[135] He is unfamiliar with the parties to the suit, the remaining claims at issue, or whether any claims have been dismissed.[136] Accordingly, Murphey is not an "active, able class representative[] who [is] informed and can demonstrate that [he is] directing the litigation." *Berger*, 257 F.3d at 483; *see also Kase*, 218 F.R.D. at 159 (finding named plaintiff an inadequate representative because he had "not participated in many of the key strategic decisions" in the case and he had "stated that he would permit class counsel to pursue [the] lawsuit as they saw fit"); *Krim*, 210 F.R.D. at 588 ("An example of an adequate class representative is one with 'commendable familiarity with the complaint . . . .'") (quoting *Horton*, 690 F.2d at 484).

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[130] App. 30, 32, 34, 45 (Murphey Dep. 62; 106-08; 109; 122- 23; 201).

[131] App. 46 (Murphey Dep. 211).

[132] App. 28 (Murphey Dep. 59–60).

[133] App. 33 (Murphey Dep. 119).

[134] App. 33 (Murphey Dep. 120-21).

[135] App. 32 (Murphey Dep. 109).

[136] App. 45, 34, 32 (Murphey Dep. 201, 122-23, 106-08).

A putative class representative is also inadequate if he has "an insufficient stake in the outcome." *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).[137] As discussed above, Murphey did not lose money; he actually profited by purchasing Halliburton stock. Because Murphey, by his own admission, does not have enough at stake in the outcome "to ensure zealous advocacy," he will not adequately protect the interests of the unnamed class members. *See Vodak v. City of Chicago*, No. 03 C 2463, 2006 WL 1037151, at *6 (N.D. Ill. Apr. 17, 2006).

C. AMSF cannot satisfy the typicality and adequacy requirements.

1. AMSF's complete reliance on money managers renders it atypical and/or inadequate.

Because AMSF decided to grant unfettered authority over its investment decisions to third parties, it cannot satisfy the typicality requirement. Courts have recognized that plaintiffs who rely solely upon third parties to make investments are subject to a unique defense—namely that they have not relied upon the misrepresentations and omissions allegedly made by the defendant to the market. *See In re Caremark Int'l, Inc. Sec. Litig.*, No. 94 C 4751, 1996 WL 351182, at *6 (N.D. Ill. June 24, 1996); *see also Fry v. UAL Corp.*, 136 F.R.D. 626, 635-36 (N.D. Ill.

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[137] The rebuttable presumption in the PSLRA that the most adequate plaintiff is the person with "the largest financial interest in the relief sought by the class" further illustrates the importance of a class representative's financial interest in the outcome of the litigation. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(bb) (2000).

1991).[138] As such, they may be atypical or inadequate and cannot serve as class representatives.

In Fry, the court refused to allow plaintiff Marra to be a class representative because (1) Marra stated that a third party had "complete discretionary authority over his account"; (2) Marra did not follow the affairs of UAL; and (3) Marra "was not even aware that his funds had been invested" in UAL. *Fry*, 136 F.R.D. at 636. The court reasoned that "someone who abdicated complete authority over his relevant financial affairs" could not be found an adequate representative. *Id.* Similarly, in *Caremark*, the court held that "a certain minimal level of participation by the plaintiff in the relevant stock transaction must be demonstrated" in order for that plaintiff to satisfy the typicality or adequacy requirements of Rule 23(a). *Caremark*, 1996 WL 351182, at *6 (quoting Fry, 136 F.R.D. at 635). In refusing to certify one of the plaintiffs as a class representative, the *Caremark* court stated that

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[138] No court within the Fifth Circuit has addressed whether a proposed class representative who delegates authority over its investments to a third party satisfies the typicality and/or adequacy requirements of Rule 23(a). But the *Caremark* and *Fry* decisions holding that plaintiffs who abdicate their investment decisions to others are not adequate or typical are consistent with the Fifth Circuit's careful approach to the Rule 23 requirements. In contrast, some courts have found such plaintiffs adequate and typical in circumstances not present in this case. *See In re Vicuron Pharm., Inc. Sec. Litig.*, 233 F.R.D. 421, 426-27 (E.D. Pa. 2006) (approving class representative that delegated investment decisions to a manager but created investment guidelines and monitored investment activities); *Dorchester Invs. v. Peak Trends Trust*, 2002 WL 272404, at *8-9 (S.D.N.Y. Feb 26, 2002) (approving class representatives despite discretationary accounts because it did not appear that they had never followed the affairs of the company or had learned about the investment only after the fact).

"[p]lainttiffs have not been permitted to act as class representative in securities litigation where they did not participate in the investment decision *at issue*." *Id.* (emphasis added). Because the plaintiff in *Caremark* "had no input into the decision to purchase the Caremark Stock and learned of it only after it had occurred," he was precluded from being a class representative. *Id.*

AMSF, like the plaintiffs in *Fry* and *Caremark*, made no decisions whatsoever regarding the purchase of the stock at issue in this case.[139] Instead, AMSF relied exclusively on its money managers during the class period to make any and all decisions related to the purchase or sale of *any* stock. AMSF granted these money managers "full discretionary authority."[140] AMSF therefore never made the most basic decisions about whether or when to purchase or sell its Halliburton stock.[141] In fact, AMSF could not recall how or when it first learned that it owned Halliburton stock,[142] and was not even aware that it owned Halliburton stock until AMSF was informed by its money managers that it had been purchased on AMSF's behalf.[143] Moreover, AMSF did not know why its money managers purchased Halliburton stock,[144] or

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[139] App. 14 (AMSF Dep. 113). AMSF continues to this date to completely delegate authority over its investments to third parties. App. 3, 14 (AMSF Dep. 23, 113).

[140] App. 5, 19 (AMSF Dep. 30, 133).

[141] App. 15-16 (AMSF Dep. 117-18).

[142] App. 6 (AMSF Dep. 47).

[143] App. 4, 6, 16 (AMSF Dep. 26-27, 47-48, 118-19).

[144] App. 16, 17, 20 (AMSF Dep. 118, 124; 167).

what its money managers intended to do with it once it was purchased.[145]

AMSF relied exclusively on its money managers not only to make stock purchase and sale decisions, but also to monitor all of its investments. AMSF admitted that because its "investment strategy is handled completely by consultants," it did not know other basic information about its investments, including whether AMSF employs money managers who buy and sell stock on the same day,[146] or what "general strategy" the money managers follow.[147]

The facts surrounding AMSF's delegation of unfettered discretion to its money managers in connection with its investments are identical to those in both *Fry* and *Caremark*. As a result, AMSF does not meet the typicality requirement of Rule 23(a) and it cannot serve as a class representative. *In re Caremark*, 1996 WL 351182, at * 6.

2. AMSF Is Not an Adequate Representative of the Putative Class.

Throughout this litigation Paula John, AMSF's President and CEO and former law school classmate of AMSF's special counsel, Neil Rothstein,[148] has been the client representative of AMSF. Naturally, Halliburton's counsel expected (as AMSF's counsel

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[145] App. 16, 18 (AMSF Dep. 119, 127).

[146] App. 12-13 (AMSF Dep. 93-94).

[147] App. 13 (AMSF Dep. 95-96).

[148] *See* App. 156 (Roger Parloff, *Lerach Firm Will Fight Client to Stay in Halliburton Case, Fortune*, Dec. 13, 2006, at 2, available at http://legalpad.blogs.fortune.cnn.com/2006/12/13/lerach-firm-will-fight-client-to-stay-in-halliburton-case (last visited Nov. 15, 2007).

had represented) that John would appear for the Rule 30(b)(6) deposition of AMSF. Instead, upon arriving at the deposition, Halliburton learned that AMSF would offer Patrick Byrne, who could not answer a number of questions that were integral to issues related to class certification and AMSF's adequacy as a class representative.[149]

John's absence from the AMSF deposition is indicative of who is actively directing the litigation: AMSF's lawyers, not AMSF. *Berger*, 257 F.3d at 483-84. AMSF also admitted that it had very limited knowledge about the confidential sources upon which part of its complaint relies and could not even confirm whether AMSF had previously been in contact with those sources.[150] Quite simply, it appears as though the idea for the lawsuit, as well as the development of the factual allegations on which it is based, came from counsel, not AMSF. A proposed class representative, even if aware of the facts regarding the lawsuit, is an inadequate representative if he has left it to the attorneys to direct and develop the case. *See Kase v. Salomon Smith Barney, Inc.*, 218 F.R.D. 149 (S.D. Tex. 2003).

CONCLUSION

The Court should deny AMSF's motion for class certification. There is no evidence of loss causation. In fact, AMSF's expert demonstrates that Halliburton's stock price was not inflated due to any alleged misrepresentation. Additionally, the proposed class representatives are neither adequate nor typical of the proposed class.

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[149] App. 7-8, 9 (AMSF Dep. 53, 54, 59).

[150] App. 10-11 (AMSF Dep. 73-76).

EXCERPTS OF DEPOSITION OF JANE NETTESHEIM IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION, DATED OCTOBER 16, 2007

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civ Action No. 3:02-CV-1152-M

ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of Itself and All Others Similarly Situated,
Lead Plaintiff,

vs.

HALLIBURTON COMPANY and DAVID J. LESAR,
Defendants.

DEPOSITION OF JANE NETTESHEIM
New York, New York
Tuesday, October 16, 2007

Reported by:
Adrienne M. Mignano
JOB NO. 198024

[2] October 16, 2007
9:35 a.m.

Deposition of JANE NETTESHEIM, held at the of offices of Boies, Schiller & Flexner, 575 Lexington Avenue, New York, New York, pursuant to Notice,

before Adrienne M. Mignano, a Notary Public of the State of New York.

[3] APPEARANCES:

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[4] IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the respective parties hereto, that the filing, sealing and certification of the within deposition shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial;

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed before any Notary Public with the same force and effect as if signed and sworn to before the Court.

[5] Nettesheim

JANE NETTESHEIM, called as a witness, having been duly sworn by a Notary Public, was examined and testifed as follows:

EXAMINATION BY MR. STERLING:

Q. Tell us your name, please.

A. Jane Denise Nettesheim.

Q. The "H" is silent as you pronounce it?

A. Yes.

Q. I'm sorry. By whom are you employed? A. Stanford Consulting Group.

Q. What is Stanford Consulting Group?

A. It's a consulting firm. We do economics, financial economics, and most of our work is in the area of litigation support.

Q. What percentage of Stanford Consulting Group revenues are related to litigation support?

A. Well over 90 percent.

Q. What is your position with

* * *

[74] find any statements made by Halliburton during the class period which increased in a statistical manner the stock price other than the April 26, 2001 increase in estimates and the July 26, 2001 release of earnings?

MS. BOIES: Can you read that back.

(Record read)

A. That's correct.

Q. And am I also correct that you did not do any analysis of statements made by Halliburton or

anybody acting on behalf of Halliburton before the class period which increased in a statistically significant manner the stock price of Halliburton?

A. I did not look at any statements before the class period.

Q. So as we sit here today, based upon all the work that you have done on this case, the only statements ever made by Halliburton which according to your analysis had an impact positively on the stock price were the April 26, 2001 [75] increase in estimates and the July 26, 2001 earnings announcement?

A. No, that's not correct.

Q. What's incorrect about that?

A. Could you read back the question?

(Record read)

A. I stand by my answer.

Q. And your answer was?

A. That — your question was something about any positive impact, and we have had an extensive discussion about statistically significant positive returns, but not any positive impact.

Q. You lost me, I'm sorry.

A. I did not look at every Halliburton statement during the class period and then look to see whether or not the stock price went up.

Q. Sure. What you did was you looked at the dates in which there was a statistically significant return with a positive or negative, correct?

A. Correct.

[76]Q. And my question, I'll rephrase it, is: Did you find — other than the April 26, 2001 increase in Halliburton's earnings estimates and the July 26, 2001 earnings announcement, did you ever find any statements made by Halliburton which had a statistically significant positive impact on Halliburton stock price?

A. Those were the two days there were significantly — significant positive increases in the stock price, and there were specifically that I have found at this point company announcements.

Now, Exhibit 18 to my report, there are lots of days where the stock price goes up. And there may be Halliburton news.

Q. But not on a statistically significant manner because you only found seven days where there was a statistically significant manner?

A. Correct, but your earlier question referred to a positive effect.

Q. I don't think so. Let me re-ask [77] it just so we're clear.

Other than the April 26, 2001 increase in Halliburton's earnings estimates and the July 26, 2001 announcement by Halliburton of its earnings, it is correct, is it not, that you did not find any statements by Halliburton which had a statistically significant positive impact on Halliburton stock price?

A. Correct, those are the only two days.

MR. STERLING: Let's take a break.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

BY MR. STERLING:

Q. Miss Nettesheim, we've finished going through the seven dates as to which you found a statistically significant positive return. Now I would like to focus on the 24 days when you found a statistically significant negative return,

* * *

[82]Q. Would you agree with me that the press release or news release contains multiple pieces of information about the company?

A. Well, it is generally about the Dresser businesses, but there is other information in the press release, yes.

Q. Including the lowering of earnings guidance for the third quarter of 1999?

A. Yes.

Q. And did you do any statistical or mathematical or econometrical analysis to delineate the stock price movement between the multiple pieces of information in that news release?

A. I determined that there was a statistically significant decline on that day, and determined what the — by looking at the news and all of the information on that day, what the decline was attributed to.

Q. Right.

And in my mind, I draw the distinction between looking at the news [83] and the analysts and doing something statistical or econometric or mathematical.

You have got a statistical background. You can do analysis that lots of people can't. Anybody can look and see what the analysts say. And I'm trying to see, did you do anything of a statistical or mathematical nature to delineate the stock movement between the

different pieces of information that hit the market that day?

A. I'm not sure which pieces of information you're referring to. If you have something specific in mind.

Q. Just to pick out two pieces of information from that press release, there is the sale of the Dresser joint ventures and there is the lower earnings guidance for the next quarter.

A. Those are somewhat related.

Q. How do you know that?

A. I have paragraph 84 of my report indented, quote refers to the "Dresser [84] Equipment Group business segment and its engineering and construction business segment are warning of lower profits. As a result, Halliburton expects a third quarter profit between 11 and 13 cents a share."

Q. Which is different from the sale of the joint venture, correct?

A. I'm not sure that that is correct.

Q. You don't know one way or the other?

A. Well, it's related because in paragraph 85, it says, "Dresser Industries will sell its stake in two joint ventures to Ingersoll Rand for 1.1 billion after poor performance by the businesses hurt third quarter results."

Q. Right.

A. So I believe that's related.

Q. Well, when you have a sale of joint ventures for a disclosed price, the market may think it is a good price or a bad price, for example?

A. It could, yes.

[85]Q. And when the company also says, as it says here, we're warning of lower profits of our other divisions as well, that could be viewed positively or negatively by the market, correct?

MS. BOIES: Objection. Calls for speculation.

A. Depending on the circumstances.

Q. You would agree that just as your paragraph on page 84 reflects, there were multiple pieces of news regarding Halliburton reflected in this news release?

A. There are different sentences referring to different aspects of the information. I see them as related.

Q. And I think we'll save a lot of 19 time if —

MR. STERLING: Strike that.

Q. Would you agree with me that you did not do any statistical or econometric analysis to delineate the movement in the stock that day between different pieces of information about the company that hit the [86] market that day?

A. As I said earlier, I'm not sure which different pieces you're referring to.

Q. Just the different pieces reflected in paragraph 84 in the blocked quote.

A. As I said, there are different — there are a number of sentences in that quote, but I see that information as related.

Q. How do you see the information about the sale of the two joint ventures to Ingersoll Rand for 1.1 billion as being related to the warnings of lower profits in the engineering and construction business segment?

MS. BOIES: Objection. Asked and answered.

A. Well, the earnings warning is due to the lower profits and part of it is the Dresser Equipment, and then there is a description of what is contributing to the earnings warning, the Dresser Equipment [87] Group and the engineering and construction business.

Q. And then you have the sale of the joint venture for 1.1 billion?

A. Yes.

Q. That's a different piece of information, correct?

A. I see it as related to the Dresser Equipment Group and the earnings warning.

Q. How?

A. Well, as I pointed out in paragraph 85, quoted a news article saying there was poor performance in those businesses that hurt the third quarter.

Q. But am I correct that you did no statistical or econometrical analysis to try to delineate the stock movement on October 5th between any different pieces of information that hit the market on that day?

MS. BOIES: I think that she has answered this now three times. The point of differentiation is the word different. You keep saying analysis [88] between the different pieces of information and she is saying I don't see it as being different. And I think that's where we're sort of butting heads.

Q. Do you agree with Caryl's statement?

MS. BOIES: And I could be wrong.

Q. I'm not trying to put you on the spot or anything.

A. Well, I stand by my answer. I'm not sure what different pieces you're referring to.

Q. In any event, whether you think of all of that in the press release, the press release that you saw, as one piece of information or multiple pieces of information, it's true, isn't it, that you didn't do any statistical or mathematical or econometrical analysis to try to delineate the stock movement between the different pieces of information?

A. Well, as I said, I see the information as related, It's the earnings [89] warning, and I measured the company specific return on that day.

Q. As you did with every day?

A. I did do that on every day, yes.

Q. Can you tell us or can you point to us a single day on which you found a statistically significant negative return to the stock in which you then went to the next step and did some statistical or mathematical or econometric analysis to try to delineate the stock movement between different pieces of information on the stock that hit the market that day?

A. I did not quantify it specifically, but there are days where I looked at different pieces of information to determine whether or not the different pieces of information could have been important material on those days.

Q. To be fair, and I really am trying to be fair, I think every time you found a statistically significant movement in the stock price. you looked what analysts and news reports said about it to see what [90] they attributed the movement to, correct?

A. In addition to that, I also looked at models of company valuations.

Q. Done by these analysts?

A. Correct.

Q. And my question is real simple. We all know what the answer is. At no time in your analysis did you ever go to the next step yourself and do any statistical, mathematical or econometric analysis to try to delineate stock movement between different pieces of information that hit the market that day about the stock, correct?

A. I don't think that's entirely correct, no.

Q. Because when you looked at how analysts changed their modeling, you looked to see how they attributed it?

A. The analysts' models incorporated the company's discussion or news release and the change in the company's guidance with respect to different aspects of the businesses.

[91]Q. But those models are going forward estimates, correct?

A. Well, they are based on both current reporting, current guidance and then projections.

Q. Those are not models showing here is what the stock price did historically on such and such a date and here is why I think it did that?

A. Well, they do look at the — the stock price is just a per share value of the company. So the models are looking at valuations of the equity of the company. And when you change certain aspects of the model, you can see where what aspects — how changes with respect to value, different pieces of the company will affect the value of the company as a whole.

Q. Could you have done some type of statistical, mathematical, econometrical analysis to delineate on those days in which you found a significantly statistically price movement upon the [92] different pieces of information that hit the market about the Halliburton stock that day?

A. Yes. I think what you're asking me is something that I was not asked to do.

Q. Have you ever done such an analysis?

A. Yes.

Q. When? In the HomeStore.com case?

A. I don't recall.

Q. In the GenesisIntermedia case?

A. I don't think I did in the GenesisIntermedia case. I'm not sure if I did in the HomeStore case. I have done it in cases, I don't recall specifically, and I have been asked to do other kinds of things.

Q. Walk us through how you go about doing that type of analysis.

A. There could be several — it would depend on the type of information I was looking at, how it was released, the environment in which it was released.

[93]Q. Just generally the methodology?

A. There isn't one general methodology.

Q. How have you done it in the past?

A. I have used discounted cash flow analysis, I have used — I have looked at comparable company analysis.

Q. Have you ever done event studies on the same company to look at other disclosures of similar or

related pieces of news that had a statistically significant impact on the stock price?

A. Can you read that back?

(Record read)

A. I'm sorry, could you rephrase the question?

Q. That didn't come out quite right.

Let's say you have three pieces of information. We'd call it A, B and C. And your analysis shows — and it's all released in the same news report or analyst call or what not, okay?

A. Okay.

Q. And your analysis shows that that

* * *

[110] Halliburton had said, oh, we have this case in Maryland, don't worry about it, we're going to win or anything like that, are you?

A. I don't recall that.

Q. From a loss causation perspective, what, if any, fraudulent statements ever made by the company do you link to the discussion in paragraph 75?

MS. BOIES: Objection. Calls for a legal conclusion.

A. The discussion in paragraph 75 is related to the allegations in the complaint regarding under reserving for the asbestos exposure.

Q. And is there any particular statement that the company ever made that in your mind is shown to be somehow false or fraudulent or misleading based upon "what's discussed in paragraph 75?

MS. BOIES: Objection. Calls for a legal conclusion.

A. As I said in my report, I assumed the allegations in the complaint to be [111] true, and the discussion in paragraph 75 is related to the allegation about the under reserving for the asbestos liability.

Q. What is a reserve?

A. I am not an accountant. I will give you my understanding.

Q. I understand.

A. It is a liability or indication of the size of a potential liability.

Q. It's an estimate, correct?

A. Yes. It may not always be, but I think frequently it is an estimate.

Q. As an estimate, it could be high or low or, oddly enough, be right on the mark, correct?

A. In general, yes.

Q. Is there any particular statement made by the company that you claim that this was, in your phrase, partial disclosure of?

Let me back up.

You refer at several points in your report to partial corrective [112] disclosures; is that correct?

A. I may have used that term.

Q. In fact, if you look at — partial disclosures. If you look at, for example, page 37, APP.039.

A. Are you referring to in paragraph 83?

Q. Yes.

A. Yes, I use that term.

Q. And what in your mind is a partial disclosure as you use the phrase there?

A. Information released to the market that can at least partially correct for alleged misrepresentations and/ or omissions.

Q. The announcement on July 7, 2001 discussed in paragraph 75 —

A. Excuse me, that's December 7, 2001.

Q. I'm sorry.

The announcement on December 7, 2001 as discussed in paragraph 75 is a partial disclosure in your mind of what prior statements made by the company?

[113] MS. BOIES: Just so we're clear, it's paragraph 75 of the appendix, not of the actual —

MR. STERLING: Correct.

A. That relates to, as I said earlier, the allegations about the under reserving of the asbestos liability.

Q. And I'll represent to you, and I'm sure you're aware, Halliburton had been reserving for asbestos exposure for a long period of time. And my question to you is: Which statement in your mind is this a partial corrective disclosure of?

A. I would say generally the statements relating to the reserve for the asbestos liability.

Q. Which one?

MS. BOIES: If you can pin it down to one statement.

MR. STERLING: Caryl's point is a fair one.

Q. Can you attribute it to a specific statement or are you attributing it to the company's asbestos reserves?

[114] A. I think I said earlier I was attributing it generally.

Q. To the company's general statement about asbestos reserves?

A. Yes.

Q. As opposed to any particular statement?

A. Well, there were many statements made in the class period, but I'm not attributing paragraph 75 to a particular statement.

Q. And there were many statements before the class period and you're not attributing to any one of those either, correct?

A. I didn't look at statements before the class period.

Q. On the issue about asbestos reserves, you have, among other things, looked at a lot of analyst reports about Halliburton, correct?

A. Yes.

Q. You understood, did you not, through your work on this case that what [115] Halliburton was doing throughout the class period was booking reserves for asbestos exposure for open or pending claims?

MS. BOIES: Can you read back the question.

MR. STERLING: Let me try it again. That didn't —

Q. You understood from your work on this case, did you not, that what Halliburton was doing with respect to asbestos reserves was booking reserve for its pending or open claims?

A. I don't have anything specifically in mind about that. If you want to point me to something where that is specifically what they said, I didn't think of it in those terms.

Q. Let me ask it this way: You understood, did you not, that throughout the class period, or at no time during the class period did Halliburton suggest to the marketplace that its current asbestos reserve was intended to apply to whatever future exposure the company had to [116] asbestos, no matter how far down the road?

A. As I said earlier, I don't have a specific — I didn't think of it in that way.

Q. Correct, because what the company did, and the company was very clear about this, was their methodology said, whenever we get a new asbestos claim, we look at what our historical net cost of resolving it is and that goes on the books, in so many words?

MS. BOIES: Objection. Is that your testimony of what they have done or are you asking if she agrees with that? I'm not clear that was even a question as much as a statement.

A. I don't know. You would have to show me the company statements to that effect.

Q. You don't recall seeing the company's description of the asbestos reserves and its methodology for it?

A. I recall looking at it generally, but that wasn't something I was looking at [117] specifically so I don't recall specifically what was said.

Q. But you do recall looking at analyst reports, correct?

A. Yes.

Q. And some of those analyst reports commented or opined about the company's asbestos exposure, did they not?

A. Some of them did, yes.

Q. And would you agree with me that all of the analysts who were following Halliburton whose reports you saw at least understood that Halliburton was reserving only for pending or open asbestos claims as opposed to whatever the future universe of asbestos claims may be?

A. You would have to show me the specific analyst reports.

Q. Do you recall ever seeing an analyst report during the class period in which the analyst was professing a belief or an understanding that Halliburton's asbestos reserve was intended to apply for ad infinitum?

[118] A. I don't recall one way or the other.

Q. The bottom line is that the analysts certainly understood that the asbestos reserve was intended to apply to only the pending claims, correct?

MS. BOIES: Objection. Form of the question, and again she already testified that she doesn't recall what the analyst report said, and you're now asking her to draw a conclusion about things that she says she doesn't recall.

Q. As we sit here today with all the analyst reports that you have seen, can you recall a single analyst report during the class period which reflected an understanding from the analyst that he or she thought that the company — that the company's asbestos

reserve was intended to apply to the entire future of any asbestos exposure that the company may have?

A. I don't recall one way or the other.

[119] Q. Working backwards on the negative stock price days, the next to last one is December 4 of '01. If you look at paragraph 71 on page APP.102.

That is an announcement about a bad jury verdict in an asbestos case in Texas, correct?

A. Yes.

Q. And, again, I take it you're not saying that the company ever said we're going to win that case in Texas to the marketplace, or we have nothing to worry about, we're never going to get popped in a bad asbestos verdict, correct?

A. I don't recall that specifically, no.

Q. I take it in your mind you relate this announcement on December 4th to all of the company's prior disclosures about asbestos reserves?

A. That's correct.

Q. Now, let's go back to October 31, working backwards in time. Paragraph 62 on page APP.100. Am I correct on that?

[120] A. Yes.

Q. The disclosure there was about an adverse jury verdict in Mississippi, correct?

A. Yes.

Q. And as with the other disclosures of bad jury verdicts, you're not saying that the company ever said to the marketplace, we're going to win this case in Mississippi, are you, correct?

A. I don't recall anything about what the company said about the Mississippi verdict before that day, or the Mississippi case.

Q. If anything, correct?

A. Correct.

Q. In your mind, this disclosure on October 30th relates back to all the company's prior statements about asbestos reserves, correct?

A. Generally, yes.

Q. Next is August 9th of '01, which is, I believe, paragraph 60 on page APP.099. Is that correct?

[121] A. Yes.

Q. And the company statement there is actually a 10Q, correct?

A. Yes.

Q. And a 10Q has a lot of information in it, does it not, typically?

A. Yes.

Q. It is a quarterly news report or a quarterly financial statement, correct?

A. It's a quarterly financial filing with the SEC.

Q. With multiple pieces of information, correct?

A. Yes.

Q. And I take it, again, you would, in your mind, the asbestos related disclosures in the 10Q released on August 9, '01 relate to all the company's prior statements about asbestos?

A. Well, as I said earlier, I didn't think in terms of matching particular prior statements to these disclosures.

Q. So my statement is correct?

A. In general, yes.

[122] Q. The next one is June 29 of '01, and that's in paragraph 54 on page APP.096.

Do you see that?

A. Yes.

Q. And the specific company statement there was, "The announcement following the close of the market on June 28th that Harbison had requested the company's financial assistance with asbestos claims that Harbison had agreed to assume back in 1992."

A. Yes, I see that.

Q. Had the company ever said that Harbison Walker —

MR. STERLING: Actually, let's mark this as the next exhibit. I'm sorry.

(Nettesheim Exhibit 3, News Release, marked for identification, as of this date.)

BY MR. STERLING:

Q. Is Exhibit number 3 the news release that you reference in paragraph [123] 54?

A. Not exactly. I reference a — the news release Dow Jones News Service, and this appears to be — and that was retrieved from the SEC website. It may be the same, but I don't know that for a fact.

Q. Is it your testimony that sometime — that prior to June 28th, 2001, Halliburton at some point said

that Harbison will never request or need our assistance on any of the asbestos claims they agreed to assume back in 1992?

A. No, that's not my testimony.

Q. Is it your testimony that this was — this announcement, June 20th, 2001, was some announcement that Halliburton was required to make earlier than it did?

A. No, that's not my testimony.

Q. Is it your testimony that the request by Harbison for assistance on the asbestos claim that Harbison agreed to was something that should have been predicted by Halliburton and disclosed to the [124] marketplace prior to June 28, 2001?

A. It's not something I examined so it's not my testimony.

Q. So in your mind, this news release on June 28, 2001, was that a partial disclosure of, or is it, again, all of the company's prior statements about asbestos?

A. It relates to the allegations regarding the under reserving of the asbestos reliability.

Q. How does it relate?

A. It is talking about asbestos claims and the potential asbestos liability of Halliburton.

Q. And that's a sufficient link in your mind?

A. Yes.

Q. And next one is December 22 of 2000. We're working in reverse chronological order here.

I believe that's discussed in paragraph 44 on page APP.091.

A. Yes.

Q. And this is a pre-announcement of [125] earnings and announcement of the unveiling of the restructuring of the engineering and construction units, correct?

A. Yes.

MR. STERLING: Let's mark that as the next one.

(Nettesheim Exhibit 4, Announcement, marked for identification, as of this date.)

BY MR. STERLING:

Q. Is Exhibit 4 the announcement that you reference in paragraph 44?

A. This isn't exactly the form that I have seen it in, and it has the same title, and it looks like a news wire, and I reference the PR news wire.

Q. Would you agree with me that there are certainly multiple pieces of information in that news release?

A. There is information in the news release. I don't know how you want to parse it.

Q. In your mind, is this one piece of information or multiple pieces of [126] information contained in Exhibit number 4?

A. Well, I think it is referring generally to the restructuring and to the charges. It refers to generally the engineering and construction projects.

Q. And it talks about reorganization charges?

A. Yes, that's what I said earlier.

Q. And it talks about the backlog in engineering and construction, correct?

A. There is — well, there is — I mean, generally, it contains information about the engineering and construction business. And it gives you some information about that business.

Q. And it also provides earning guidance, does it not, for the fourth quarter of 2000?

A. Yes, it does.

Q. Would you agree with me that we have multiple pieces of information in Exhibit number 4?

A. I don't know how you would describe multiple pieces of information. [127] There is information about the engineering and construction business, and then there is a description of different aspects of engineering and construction business.

Q. And in your mind — well, as to this news release, we can agree that you did no statistical, mathematical or econometrical analysis to determine which piece of information moved the stock price down that day?

A. Well, I think, as I said in my report, I attribute — I did the statistical analysis which looked at the declines in the stock price on the 21st and 22nd of December, and attributed it to the information regarding the changes with respect to the engineering and construction business.

Q. But my question is: Did you do any statistical or mathematical or econometric analysis to reach that conclusion?

A. Yes. As I said, I looked at the company specific stock returns on that day [128] and a statistical analysis.

Q. We're going beyond — we found a long time ago that you saw a statistically significant negative

price decline. Now I'm asking: Did you do any mathematical, statistical or econometrical analysis after that to determine which piece of information that day drove the stock price?

A. Well, I think looking at all of the news, the analyst reports, looking at the changes in the analyst models.

Q. Looking at news reports is not statistical analysis.

A. Well, I looked at all of the news that I could find at this point. So it wasn't a picking and choosing of the news.

Q. I didn't suggest that it was.

All I'm suggesting is that anybody can look at the news. My question is: What statistical or mathematical or econometrical analysis did you do, if any, to try to delineate which piece of information that day, or pieces of [129] information, impacted the stock price?

A. On this particular day, I don't recall if I looked at the analysts — there were some discounted cash flow analyses, which you have characterized that anybody could read and understand. I'm not sure how many people understand discounted cash flow analysis with the discount rates and growth rates and how they are mathematically applied. But that is among the things that I have discussed, those are things that I would have looked at.

Q. But there is no such analysis by you reflected in your report, correct?

A. Well, I think it is clear in my report what I looked at. You have to show me the analyst report to see whether they attached discounted cash flow analysis

to them. I don't remember which ones did or which ones did not.

Q. As to the negative stock price movement on December 22, 2000, does your report reflect any statistical, [130] mathematical or econometrical analysis performed by you to determine which pieces of information caused the negative stock price?

A. I've described what I have done.

Q. My question was: Does your report reflect any?

A. My report reflects exactly what I have done.

Q. And it doesn't reflect any statistical analysis of the nature that I just described, does it?

MS. BOIES: Objection. Asked and answered.

A. I think it reflects the statistical analysis that I did.

Q. And on this same issue, in your mind, this is a corrective disclosure or partial corrective disclosure of what statements made by Halliburton?

A. This is related to the — what's generally called the unapproved claims or the cost overruns in the engineering and construction units.

[131] Q. And how in your mind is it related to the unapproved claims issue?

A. It's my understanding that those relate to cost overruns.

Q. How?

A. I have that understanding from the complaint.

Q. What's the relationship?

A. From reading the complaint, it's my understanding that the unapproved claims represent cost overruns in projects.

Q. And I take it in your mind if there is a negative stock price movement of a statistically significant amount, and in the day preceding that movement there was some company announcement about fixed price contracts, whatever it may be, that is a sufficient relationship in your mind to make this a corrective disclosure or partial corrective disclosure?

A. In this case, yes.

Q. Looking at the efficient market hypothesis, getting back a little bit to [132] the theory again, if we look at — I'll be concrete about this. On the accounting for unapproved claims, would you agree with me, Miss Nettesheim, that if, in fact, the company disclosed the change in its methodology, and the new methodology in its 1999 10-K, that under the efficient market hypothesis, within a reasonably short period of time, one day, two days, three days, the market is going to understand that?

A. I think that would depend on the circumstances. I'm not an accountant.

Q. What circumstances would factor into that?

A. I think you would have to look at what was disclosed at the time and what was the understanding as to what that meant at the time, if there was an understanding. There could be a variety of things that one would look at.

Q. The company says, our accounting policy for unapproved claims is we book them when we believe they are probable of [133] collection. That disclosure is made on day X. Would you expect that to have any

impact at all on the stock price in a class period that starts six months after X?

A. No, I think the stock price would react in less time than six months.

Q. Within a short period of time whenever X is, correct?

A. To whatever understanding there was to that statement.

Q. Next date working backwards is October 25, 2000, which is paragraphs 32.

MR. STERLING: Let's mark this as the next one, please.

(Nettesheim Exhibit 5, Press Release, marked for identification, as of this date.)

BY MR. STERLING:

Q. Exhibit number 5 is a Halliburton press release dated October 24, 2000, correct?

A. Yes.

Q. These are sometimes called [134] earnings releases?

A. Yes.

Q. And you're aware from your work in this case that it was Halliburton's practice to release its earnings releases following the close of the market on a particular date as opposed to some companies who may do it before a market opens?

A. Yes.

Q. So it would be your understanding that this earnings release came out after the market closed on October 24th of 2000?

A. That is my understanding.

Q. So paragraph 32, which talks about the company's October 24th announcement, in fact, what you're referring to is a lot of information in Exhibit number 5, correct?

A. I'm sorry, I'm just confirming my recollection. I believe the information that I talk about in Exhibit 32 came out in the conference call and not in the press release.

[135] Q. And the press release you're referring to is Exhibit 5, the earnings?

A. The press release that you handed to me?

Q. Yes.

So is this an example of multiple pieces of information hitting the market simultaneously?

A. There is — well, there is the press release which discusses the company as a whole, and there is the conference call, and there is the news and commentary which addresses primarily the restructuring.

Q. And typically the conference call comes right on the heels of the earnings release, correct?

A. That's my understanding.

Q. So in this situation, after the market closed on the 24th, the company announces earnings, and then right after that, they have a conference call?

A. That's my understanding of what generally happened, yes.

[136] Q. So the trading on the 24th doesn't reflect any of that information, but the trading on the 25th reflects all of it, correct? By all that information, I

mean — what came out in the earnings call and in the earnings release?

A. I didn't look at the after market trading on the 24th. I looked at the reported trading on the 25th.

Q. Understood.

But my statement is correct, right?

A. With my explanation, yes.

Q. And you believe that this information in the news release and in the earnings call is a corrected disclosure of what prior statement by the company?

A. Actually, it was the information in the conference call with respect to the restructuring, and that is related to the allegations regarding the unapproved claims or cost overruns and the allegations regarding the lack of synergy from the Dresser merger.

[137] Q. And how is it related to the accounting for unapproved claims?

A. The restructuring, and this was made clearer in the December 21, 22 information, it's related to the operational problems of what I call cost overruns in the engineering and construction business.

Q. I'm sorry, you lost me there. Could you repeat that?

A. Could you read back my answer, please?

(Record read)

Q. Are you satisfied with that answer?

A. Yes.

Q. Can you attribute it to any particular statement by Halliburton?

A. I did not go back and match this partial disclosure with any particular statement.

Q. And how do you relate this, in your mind, partial disclosure with any statements made about Dresser synergies?

[138] A. Well, part of the construction business that was restructured, it's my understanding that part of that business used to be Dresser Industries.

Q. And the basis for your understanding is what?

A. Description of the business, I believe from the 10-Ks.

Q. Can you attribute it to any particular statement the company made about Dresser synergies?

A. No. As I said, I did not go back and match this particular disclosure with a prior specific statement.

Q. Let's go to October 23, 2000, which is paragraph 30 on page APP.085.

Do you see that, ma'am?

A. I'm sorry, would you say that again? I've lost it.

Q. Fair enough.

I'm looking at the October 23, 2000 date in which there was a statistically significant stock price decline and a company statement, correct?

[139] A. Yes.

Q. And that's discussed on page APP.085, specifically paragraph 30, correct?

A. Yes.

Q. And on that date, the specific company announcement was that it's Brown Services unit was a target of a federal grand jury investigation, correct?

A. Yes.

Q. Do you relate that statement to any prior statement made by Halliburton?

A. No, I do not.

Q. So this is not what you call corrective disclosure?
A. That's correct.

Q. Let's go now to June 8, 2000, which is paragraph 28 on page APP.083.

A. Yes.

Q. And this is a date in which your analysis reflects that the Donaldson, Lufkin & Jenrette analyst changed his estimate after meeting with somebody from the company; is that correct?

[140] A. Yes.

Q. Does your report reflect in any way, shape or form what was discussed between the analyst and somebody at the company?

A. Not in my report, no.

Q. Do you claim that the June 8, 2000, whatever it was, was a partial disclosure of any prior statement made by Halliburton?

A. No, I did not.

Q. Let's go now to January 5, 2000, which is our next to last one in reverse chronological order, which is on page APP.078, paragraph 19.

A. Yes.

Q. This is another one where I believe there is no company statements, but there is an analyst changing his or her rating, correct?

A. There are two analysts.

Q. Two analysts, I'm sorry.

A. And one of the analysts refers to a conversation with the company.

[141] Q. And specifically you're referring to the Merrill Lynch analyst, Simpson, who notes reduced expectations for offshore construction results reduced growth estimates for oil field spending for outside North America and less powerful synergies from the Dresser merger than he had envisioned?

A. No, I'm referring specifically to the analyst, Carol Lau, with Brown Brothers Harriman.

Q. I'm sorry, okay.

And anywhere do those analysts report what they were told by the company?

A. I need to look at the Brown Brothers Harriman analyst report to see if there was a specific quote from the company. I don't recall.

Q. Is whatever was said on January 5, 2008 corrective disclosure or partial corrective disclosure in your mind?

A. I characterized it as a partial disclosure.

Q. And a partial disclosure relating [142] to what prior statement relating to the company?

A. What I describe in shorthand the unapproved claims for cost overruns and the lack of synergies from the Dresser merger.

Q. Any particular statements or just those statements generally?

A. When you say particular —

Q. Any particular statement about Dresser synergies or just all statements about Dresser synergies?

A. The prior statements about Dresser synergies.

Q. All of them, right?

A. Yes.

Q. Any particular statements about unapproved claims or all of them?

A. Not a particular statement, but unapproved claims or cost overruns, or in this case, omissions or statements about claims, cost overruns.

Q. Just the company statements generally on those topics, correct?

[143] A. Yes, or omissions, yes.

Q. And then our last one is October 25th of '99, which is discussed on APP.074, paragraph 14.

A. Yes.

Q. I believe we looked at this one in some detail already, have we not?

A. Yes.

MR. STERLING: Let's go off the record for a minute.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

EXAMINATION BY MR. GONZALEZ:

Q. Miss Nettesheim, I have a few quick questions for you.

In your testimony earlier, you identified 11 dates in which you say there was a statistically significant

change in the stock price that was accompanied by a statement with Halliburton.

Do you recall your testimony?

A. I recall generally, I didn't [144] count, as I said earlier.

Q. And Mr. Sterling just went through these dates with you with respect to statements that may have accompanied those dates made by Halliburton?

A. Again, I wasn't counting. I don't know if he missed one or two, but we went through dates.

Q. In your review of the information that was provided to you, whether it was analysts reports, any kind of reports, any information you have looked at, with respect to the October 5, 1999 date, which is paragraph 14 in your appendix, were you able to identify any statement that was made by Dave Lesar that accompanied this partial disclosure on October the 5th, 1999?

A. I looked at it with that in mind. I don't see quoting a statement from him in my report, but I don't recall in any of the news or in the analyst reports that I looked at, and there were several pieces of news and analyst reports, I don't [145] recall.

Q. And do you recall if in the disclosure that was made on October the 5th, 1999 whether you looked at any statement by Dave Lesar, any previous statement that was false and misleading?

A. As I said earlier, I don't recall statements specifically attributed to Mr. Lesar on that date. I don't have here in my report everything that was published on that date, but I don't have anything in the report specifically attributed to him on that date.

Q. The next date you identified was January the 5th, 2000, which is paragraph 19 in your report, in the appendix of your report.

If you look at — that same question, were you able to identify any statement, prior statement made by Dave Lesar in connection with the disclosure of January the 5th, 2000 that you reviewed?

A. I don't recall if the Brown Brothers Harriman report attributed a

* * *

[162] dollar verdict that came down; is that correct?

A. Yes, it is.

Q. Prior to December 4th of 2001, in preparing your report or appendix, did you identify or look at any statements that were made by Dave Lesar about this asbestos case that was pending in Texas that resulted in this 65 million dollar jury verdict?

A. Can you read back the question to me?

(Record read)

A. I don't recall if I saw a statement from Mr. Lesar about this case, about the Texas case fled in Texas.

Q. In preparing this type of report or an appendix, if you identify statements made by a CEO or chairman of the board or somebody at that level, is it your practice or custom to put those statements in your report or appendix?

A. Not necessarily.

Q. Why not?

[163] A. The purpose of the statements that I did put in my report were to summarize and to be informative

as to what was said that day and what was reported on that day. I think it is fairly — I think it is completely clear that I did not include verbatim each and every news report, analyst report in their entirety for these dates.

Q. In preparing — because you were asked — according to your testimony, you were asked to do a loss causation analysis as part of your engagement in this case?

A. Yes.

Q. And as part of loss causation analysis as you understand it, and I don't mean just merely in that sense, are you just crunching numbers or are you looking to prior statements made by officers of the company?

A. In loss causation, I was asked to determine — well, to determine the cause of the decline in the stock price.

Q. In doing that, did you just crunch [164] numbers or did you go back and look at prior statements by the company or officers of the company?

A. It details a large number of steps and analysis that I described. Do you want me to describe all of that again?

Q. I think your testimony on that is on the record.

Is it your practice to look at prior statements made by officers of the company?

A. I looked at all of the news, basically anything that I could find, in order to determine what caused the stock price to decline.

Q. And the reason why, as part of your loss causation analysis, is you're looking at prior

statements by the company or officers of the company to identify that the corrective statements that are being identified in your report relates back to a prior statement that was not accurate; is that correct?

A. Well, as I said earlier, I did not [165] link or match up statement by statement earlier statements with the partial disclosures I discussed.

Q. Did you not do that for purposes of this report?

A. One of the purposes of this report was to analyze loss causation.

Q. But going back to your statement just now, you did not link up any partial disclosure statements with prior statements that were made by the company or officers of the company?

A. Not specifically, no.

Q. And do you normally do that when you do a loss causation analysis?

A. By normally do that, you're referring to do I normally go back and look at statements by executives of the company?

Q. Is it part of your methodology, part of your protocol to go back and look at — look at the disclosure statement, partial disclosure statement, and link it back to prior statements made by the [166] company or its officers?

A. Yes, on occasion I have done that.

Q. On occasion.

Is there a particular reason in terms of your methodology or protocol that you use how to decide when to use it and when not to use it?

A. It depends on the circumstances of the case, the allegations. It depends on what I was asked to do. There is a variety of factors that would enter that. There isn't one and only one way.

Q. And in terms of what you were asked to do in this case, or your approach to how you were asked to analyze this case, you determined in your professional opinion that linking up a partial disclosure statement to prior statements by the company or its officials was not necessary?

A. I was asked to determine the causes or the reasons for the decline in the stock price.

Q. But you made — in your [167] professional opinion, you made the decision not to look at the partial disclosure statement and try to link it back to the previous statement that allegedly was not accurate?

A. Well, the methodology I used was the appropriate methodology of what I was asked to do.

Q. That methodology did not include linking the partial disclosure statement to the prior statement that allegedly was not accurate?

A. Yes, I said earlier I did not link particular statements to the partial disclosure statement.

Q. I'm not questioning your approach. I'm trying to understand the approach that you used.

The next statement you identified in your report as partial disclosure was December 7th 2001. And that's in paragraph 75 of your opinions. And that has to deal with the Maryland verdict, 30 million dollar verdict.

[168] In preparing paragraph 75 of your report, did you look at any particular statements made by Dave Lesar?

A. Prior to December 7th, 2001?

Q. Yes, ma'am.

A. No. As I recall, I did not go back and look at prior statements as I was writing paragraph 75 of the appendix to my report.

Q. In your earlier testimony, you were identifying in terms of methodologies that you use, you referred to the discounted cash flow approach; is that correct?

A. No, that's not correct.

Q. What is a discounted cash flow?

A. It is an analysis that entails projecting cash flows, which are — cash flows are the net inflows and outflows. I assume can apply to many different things, which I assume you're talking about company evaluation, or at least that's what I'm referring to in this case, so it would be a projection of income flows [169] versus outflows, which would be expenses or any other type of outflow. And the net of that each year would be a cash flow for that year, and then apply — in order to project cash flows, that entails taking into account company specific growth rates, inflation, growth rates that you may glean from industry factors or from industry comparables. There are several steps. I'm sure I'm going to leave out some.

The discounted cash flow approach also entails at least one discount rate. There may be one discount rate applied to near term discount or long term cash flows coming up with that discount rate is a — you need to apply analyses of inflation rates, projected inflation rates, beta, which is simplified term, talking

about the relationship between the company's returns and market and industry returns. The discount rate may or may not, but can incorporate risk premium of various times.

And that's not exhaustive, but

* * *

[174] causation?

A. No, there is not.

MR. GONZALEZ: I pass the witness.

EXAMINATION BY MR. STERLING:

Q. If you'll look, please, at Exhibit number 15 to your report. It's appendix page 197.

A. Yes.

Q. Under the summary output at the top of that page.

A. Yes.

Q. It says, multiple R squared.

Does that tend to be R squared or multiple R?

A. That's the R squared, and this is a multiple regression because there is more than one independent variable so it is the R squared.

Q. Thank you.

If you look at page in your report 9, APP.011, paragraph 21. It says, "according to one anthority", and then you [175] have a quote?

A. Yes.

Q. Who is that authority?

A. That was the camera court citing Bromberg.

Q. And Bromberg is not an econometrician or a statistician, is he?

A. That I don't know. The book describes more fully in footnote 10.

Q. If you'll turn to page 38, APP.040. I don't mean to replow old ground, but October 5, 99 stock price decline. We talked about the earnings guidance, the lower than expected profits of the joint ventures, and so forth.

If you'll turn to page 39, the next page, the second full paragraph, it says, "Analysts agree it was a good move and that the earning shortfall will be temporary."

Do you see that?

A. Yes.

Q. So was that aspect, that piece of news, was that considered good news or bad [176] news by the marketplace?

A. I took it to mean that given the problems with the joint ventures, they agreed that it was a better move to sell them than it would have been to keep them.

Q. Looking at paragraph 86 on page 8 APP.041, you quote from a CIBC report, do you not?

A. Yes.

Q. And if you look at the top of the next page, it says, "The company's announcement of weakness across virtually every business line in 3Q, the third quarter, is not surprising given the slower than anticipated oil field recovery. Halliburton is the latest company to confess to this situation."

If what Halliburton is experiencing is an industry wide phenomenon, how do you relate that or link that to any of the allegations in this case?

A. Well, this is not the only thing that Halliburton was experiencing, and I [177] do have an industry index in my analysis which would pick up at least a portion of the industry effect.

Q. But your industry index also — let me back up.

But you also show a number of days in which there was a statistically significant return based upon your industry index, but there was no information or news that you could find that drove that return, correct?

A. That's correct.

Q. Is there anything that you did to try to break out, other than your industry wide index, industry wide phenomena from company specific phenomenon?

A. The industry index was the primary reason of doing that, the regression analysis and industry index.

Q. When you constructed your index, did you try adding or subtracting other companies to see if that improved the expandability of your model?

A. What I did is I — Exhibit 16 to [178] my report, and then I explained this in the appendix to my report. I picked a large number of companies that were components of, let's say, call it pre-made indices that included Halliburton. So then because these companies were in the same index or a number of indices as Halliburton, they were at least considered comparables by the entity that created the index, whether it was FactSet or Bloomberg or some other data source.

I looked at analyst reports and pulled out companies that were considered competitors from the analyst reports, and then individually I determined whether the companies on an individual basis were correlated to Halliburton. And then I made an index of the companies that were correlated with Halliburton during the control period, with the exception of the one company that had the securities litigation pending.

Q. And I understand all of that.

My question is: Once you did [179] that, did you then try to add or subtract other companies to see if that explained — if that increased the explanatory power of your model?

A. No, because I'm including all of the companies that I determined were — well, actually that were considered comparables or competitors. I'm not including companies that were correlated and I wasn't trying to pick and choose here. Starting with as broad a base as I thought was reasonable and then including all of the companies that were statistically correlated.

Q. If you'll turn to page APP.047.

Looking at the carry over paragraph at the top, you're talking about the October 25, 2000 price decline?

A. Yes.

Q. And in your last sentence, it reads, "Thus, a significant portion of the stock price decline on October 25, 2000 was related to the company's booking unapproved claims on fixed price contracts [180] and lack of benefits from the Dresser merger alleged in the complaint."

Did I read that correctly?

A. Yes.

Q. Significant portion, the word significant there, you weren't referring to significant statistics, were you?

A. No.

Q. And the relation, the way you use related there is simply, as you explained before, if it had something to do with, as you perceive it, fixed price contracts or unapproved claims, then it relates back to the prior statements?

A. Cross overruns, yes.

Q. And not to any particular statement, correct?

A. Yes. As I said, I didn't link specific prior statements to disclosure statements.

Q. And looking back at the prior page, paragraph 93, where it says "the company made a partial disclosure concerning the company's booking [181] unapproved claims on fixed price contracts", what specific disclosure are you referring to there?

A. That relates to the — in general, on October 25th, the 24th and 25th disclosures regarding the operational problems in the engineering and construction units and then the —

Q. If I can interrupt you. Was there any specific disclosure about unapproved — booking unapproved claims?

A. Nothing that I recall that used the words unapproved claims. I was about to say, as I said earlier, I also linked this with the December 21st, 22nd disclosure where there were the charges for the cost overruns.

Q. If there is a disclosure of bad news that in any way, shape or form relates to fixed price contracts, then it relates to the allegations about unapproved claims, correct?

A. Yes, in this case I did.

Q. Now, if you will turn with me,

* * *

RECORD AND BRIEF

Supreme Court, U.S.
FILED
JAN 13 2014
OFFICE OF THE CLERK

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX
VOLUME 2 OF 2

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TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries:

United States Court of Appeals for the Fifth Circuit 1

U.S. District Court, Northern District of Texas (Dallas) 17

Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof In The United States District Court Northern District Of Texas Dallas Division Filed September 17, 2007 165

Appendix In Support Of Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof 198

Report Of Jane D. Nettesheim 198

Appendix To Report Of Jane D. Nettesheim: Regression Analysis And Event Study 288

Exhibits To Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof In The United States District Court Northern District Of Texas Dallas Division Filed September 17, 2007:

Exhibit 1 ..... SA1

Exhibit 2 ..... SA7

TABLE OF CONTENTS—Continued

Page

Exhibit 3 ..... SA9

Exhibit 4 ..... SA28

Exhibit 5 ..... SA33

Exhibit 6 ..... SA35

Exhibit 7 ..... SA45

Exhibit 8 ..... SA47

Exhibit 9 ..... SA49

Exhibit 10 ..... SA52

Exhibit 11 ..... SA54

Exhibit 12 ..... SA70

Exhibit 13 ..... SA87

Exhibit 14 ..... SA89

Exhibit 15 ..... SA91

Exhibit 16 ..... SA93

Exhibit 17 ..... SA96

Exhibit 18 ..... SA110

Defendants' Response To Lead Plaintiff's Motion For Class Certification In The United States District Court For The Northern District Of Texas Dallas Division Dated November 16, 2007 346

Excerpts Of Deposition Of Jane Nettesheim In The United States District Court For The Northern District Of Texas Dallas Division, Dated October 16, 2007 400

TABLE OF CONTENTS—Continued

Page

Expert Report Of Lucy P. Allen, In The United States District Court Northern District Of Texas Dallas Division Dated November 16, 2007 446

Excerpts From Appendix To Defendants' Response To Lead Plaintiff's Motion For Class Certification In The United States District Court For The Northern District Of Texas Dallas Division Dated November 16, 2007:

Exhibit 11 ..... SA454

Exhibit 12 ..... SA464

Exhibit 13 ..... SA467

Exhibit 14 ..... SA471

Exhibit 15 ..... SA475

Exhibit 16 ..... SA478

Exhibit 17 ..... SA482

Lead Plaintiff's Reply In Support Of Its Motion For Class Certification In The United States Court For The Northern District Of Texas, Dated December 21, 2007 535

Exhibit To Lead Plaintiff's Reply In Support Of Its Motion For Class Certification In The United States Court For The Northern District Of Texas, Dated December 21, 2007 ..... SA486

Rebuttal Report Of Jane D. Nettesheim, United States District Court, Northern District Of Texas, Dallas Division, Dated December 20, 2007 572

TABLE OF CONTENTS—Continued

Page

Supplemental Expert Report Of Lucy P. Allen, United States District Court, Northern District Of Texas Dallas Division, Dated January 18, 2008 649

Transcript of Motions Hearing, United States District Court, Northern District Of Texas, Dallas Division, Dated March 21, 2008 748

Order Denying Motions To Strike The Report Of Jane Nettesheim And Expert Report Of Lucy Allen, United States District Court, Northern District Of Texas, Dallas Division, Dated March 25, 2008 834

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al.,

Plaintiffs,

v.

HALLIBURTON COMPANY, et al.,

Defendant.

No 3:02-CV-1152-M

EXPERT REPORT OF LUCY P. ALLEN

November 16, 2007

I. SCOPE OF ASSIGNMENT

We were asked by Counsel for Halliburton Co. ("Halliburton") in *Archdiocese of Milwaukee Supporting Fund, Inc., et al. v. Halliburton Company, et al.* to review the Report of Jane D. Nettesheim ("Nettesheim Report") and Lead Plaintiff's Motion for Class Certification and Incorporated Memorandum of Points and Authorities in Support Thereof ("Plaintiff's Motion"). In particular, we were asked to assess Ms. Nettesheim and Plaintiff's analysis of loss causation in the above matter.

II. SUMMARY OF FINDINGS

We found that the Nettesheim Report has not proven loss causation for any of the allegations in this

matter, and that much of the evidence presented in Ms. Nettesheim's report is contrary to the claim of loss causation. Plaintiff's allegations fall into three categories: the integration of Dresser Industries, Inc. ("Dresser"), the booking of unapproved claims, and asbestos reserves.

We found the following:

- **Ms. Nettesheim's event study is methodologically flawed**. It does not adhere to the standards of academic literature, including the academic article she cites on the topic. Her tests of statistical significance are invalid. In addition, Ms. Nettesheim's industry index is inappropriately constructed and her market index is not replicable based on the information provided.
- **Ms. Nettesheim does not prove loss causation for the allegations regarding the integration of Dresser.** The Nettesheim Report inappropriately combines the allegations regarding the integration of Dresser with the allegations regarding unapproved claims. Ms. Nettesheim does not establish causation for the Dresser integration allegations, but rather looks at whether a stock price decline relates to the engineering and construction segment of Halliburton's business and she does so in an inappropriate manner. She fails to establish that the alleged curative disclosures are curative of alleged misrepresentations. Additionally, on each of the alleged curative disclosure dates regarding the integration of Dresser, non-culpable news was released and Ms. Nettesheim fails to account for it.

- **Ms. Nettesheim does not prove loss causation for the allegations regarding the accounting of unapproved claims.** The alleged curative disclosures are not curative of alleged misrepresentations regarding the booking of unapproved claims. Ms. Nettesheim's event study analysis shows that there was no statistically significant price reaction to the actual disclosure of a change in accounting for unapproved claims.
- **Ms. Nettesheim does not prove loss causation for the asbestos reserves allegations.** Ms. Nettesheim's loss causation analysis is not based on an understanding of Plaintiff's allegations. She fails to link the alleged misrepresentations to curative disclosures. In addition, there is no consistency in her choice of alleged curative disclosure dates for the asbestos reserves allegations and her analysis of Halliburton's stock price movements. Further, she fails to control for changes in the asbestos litigation environment, confounding news and the effect of uncertainty on Halliburton's stock price.
- **There is no evidence in Ms. Nettesheim's event study analysis that the alleged misstatements inflated Halliburton's stock price.**

III. QUALIFICATIONS AND REMUNERATION

A. Qualifications

I am a Senior Vice President of NERA Economic Consulting ("NERA"), a firm with about 600 consulting economists who operate out of 22 offices worldwide. I am a member of NERA's Securities and

Finance Practice, which dates from the early 1970s and employs a research staff of about two hundred professionals with economics, finance and mathematics degrees. The practice counts as its clients major securities exchanges, risk managers, principals needing valuation services, and parties in litigation.

I have a B.A. from Stanford University, an M.B.A. with a concentration in Finance and Accounting from Yale University, and M.A. and M. Phil. degrees in Economics, also from Yale University. Prior to joining NERA, I was an Economist for both former President Bush's and President Clinton's Council of Economic Advisers. In my 13 years at NERA, I have been engaged as an economic consultant or expert witness in numerous projects involving securities and financial economics. In the course of this work, I have analyzed the effect of information on the stock prices of over 100 companies. My resume with recent publications and testifying experience is included as Attachment A.

B. Remuneration

NERA is being compensated for time spent by staff members at standard billing rates and for out-of-pocket expenses at cost. NERA currently bills for my time at $585 per hour.

IV. MATERIALS CONSIDERED

In preparing this report, we considered the following materials:

1. Nettesheim Report, dated September 17, 2007, and supporting materials;
2. Deposition of Jane Nettesheim ("Nettesheim Deposition"), dated October 16, 2007;

3. Fourth Consolidated Amended Complaint for Violation of the Securities Exchange Act of 1934 ("Complaint");
4. Lead Plaintiff's Motion for Class Certification and Incorporated Memorandum of Points and Authorities in Support Thereof ("Plaintiff's Motion");
5. Price and trading volume data for Halliburton, industry and market indices, and peer companies from FactSet Research Systems, Inc. and Bloomberg L.P.;
6. Index price data from The Center for Research in Security Prices ("CRSP");
7. Analyst reports covering Halliburton, peer companies and its industry;
8. SEC filings for Halliburton and peer companies;
9. Data on analysts' estimates from I/B/E/S;
10. Press coverage on Halliburton and peer companies from news services including Factiva and Bloomberg L.P.;
11. Court decisions in securities class actions; and
12. Textbooks and academic literature on finance and statistics.

V. SUMMARY OF PLAINTIFF'S CLAIM OF LOSS CAUSATION

According to Plaintiff's Motion and the Nettesheim Report, Ms. Nettesheim finds loss causation for the allegedly false and misleading statements cited in the Complaint. Plaintiff's Motion classifies the allegations into three categories:

1 "[I]mproper booking of unapproved claims as revenue" (herein, unapproved claims);

2 "[K]nowingly inadequate reserves for asbestos liability" (herein, asbestos reserves); and

3 "[S]evere but undisclosed problems associated with the acquisition and integration of Dresser" (herein, integration of Dresser).[1]

The Complaint is consistent with this categorization of allegations, while the Nettesheim Report has only two categories of allegations. Ms. Nettesheim does not distinguish between allegation #1 (unapproved claims) and allegation #3 (integration of Dresser) above, and appears to consider them interchangeable.

Plaintiff claims that Ms. Nettesheim has proven loss causation by finding statistically significant negative price reactions to alleged curative disclosures of the alleged misrepresentations. The Nettesheim Report finds 11 such alleged curative disclosures, 6 of which are not alleged as curative disclosures in the Complaint:

- October 5, 1999 (not in Complaint);
- January 5, 2000 (not in Complaint);
- October 25, 2000;
- December 22, 2000 (not in Complaint);
- June 29, 2001;
- August 9, 2001 (not in Complaint);
- October 31, 2001 (not in Complaint);
- November 1, 2001 (not in Complaint);

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[1] Plaintiff's Motion, p. 3.

- December 4, 2001;
- December 5, 2001; and
- December 7, 2001.[2]

VI. SUMMARY OF NETTESHEIM'S LOSS CAUSATION ANALYSIS

Ms. Nettesheim's analysis of loss causation involved the following three steps:

1. **An event study test of the statistical significance** of Halliburton's stock price movement on each day during the alleged class period;

2. **A review of the news** on each statistically significant day; and

3. **A determination of loss causation**, if the news on a statistically significant negative day was related to the allegations.

To perform the test of statistical significance, Ms. Nettesheim predicts Halliburton's stock price movements on each day of the alleged class period and determines how much the actual movement differs from her predicted movement. The predicted movement is based on the result of a "market model" which estimates the relationship between the daily movements in Halliburton's stock price and the movements in the market and the industry over a control period. Ms. Nettesheim estimates her market model over the control period of one year beginning after the merger between Halliburton and Dresser. The difference between Halliburton's actual stock price movement and the predicted movement is

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[2] Plaintiff's Motion includes a summary at p. 2. Plaintiff's Motion lists the following disclosures: October 24, 2000, December 21, 2000, June 28, 2001 and December 4-7, 2001.

commonly called the excess return, and is referred to by Ms. Nettesheim as the "company-specific return."

Ms. Nettesheim estimates the market model using a general market index and an industry index. For her market index, Ms. Nettesheim allegedly uses a composite index of NYSE/Amex/NASDAQ obtained from CRSP,[3] while her industry index is composed of companies (allegedly mentioned in market commentary on Halliburton) that individually explained Halliburton's stock price movement over the control period. Ms. Nettesheim included all companies in her industry index that she tested (individually vis-a-vis Halliburton) and found to have a statistically significant relationship with Halliburton's stock price over the control period.

For every day of the alleged class period she performs a test of whether the excess return, the amount that Halliburton's stock price moved more than expected given the movement in the market and industry indexes, is statistically significant. She finds 31 statistically significant price movements (24 negative and 7 positive) among the 633 trading days of the alleged class period.

Ms. Nettesheim then reviewed the market commentary in news stories and analyst reports on (or around) each of the 31 statistically significant price movements during the alleged class period.

Based on her review of the news and analyst reports, she makes a determination, without an explanation, for each of the days about whether the news appears to be consistent with the price reaction and whether

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[3] As discussed in Section VII.C, we were not able to identify her market index.

the news is related to either of two categories of allegations. As discussed above, she re-categorized Plaintiff's allegations into:

1 "Booking of Unapproved Claims and Unrealized Benefits from the Dresser Merger;"[4]

and

2 "Company's Exposure to Asbestos Litigation."[5]

She concluded that 4 of the 24 negative price movements were "related" to her first category of allegations (the booking of unapproved claims and unrealized benefits from the Dresser merger) and that 7 were related to her second category (the company's exposure to asbestos litigation). She further concluded that for each of these 11 days there was loss causation.

As discussed in detail below, each step of her loss causation analysis is unreliable and methodologically flawed.

VII. NETTESHEIM'S EVENT STUDY IS METHODOLOGICALLY FLAWED AND HER TESTS OF STATISTICAL SIGNIFICANCE ARE INVALID

Ms. Nettesheim performed an event study as the basis for her claim of having proven loss causation. Her event study, however, is methodologically flawed. Ms. Nettesheim first conducted a hypothesis test (actually, 633 hypothesis tests) to determine whether any of the days during the alleged class period exhibited a statistically significant price reaction. Then, for those days on which she found statistically significant price reactions, she reviewed news and

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[4] Nettesheim Report, p. 37.

[5] Nettesheim Report, p. 55.

analyst commentary to determine whether they contained news related to the allegations.[6] This procedure is methodologically flawed because her tests of statistical significance are invalid, and because her news analysis is not at all systematic.

The valid statistical methodology for conducting a hypothesis test is to *first* state a hypothesis to be tested (e.g., whether the price movement on a specific day is statistically significant), and *then* perform the test. Ms. Nettesheim inverts the order of these steps by performing a hypothesis test for each day during the alleged class period, thereby invalidating her tests.

More specifically, textbooks and academic articles on statistics state that the valid statistical methodology to perform an event study is to first define the period in which the event under study happens and then to perform a test of whether the stock price moved in a statistically significant manner in that period. For example, the academic article that Ms. Nettesheim herself quotes on the use of event studies, by Mitchell and Netter, contradicts her approach and states that selecting the period in which the event under study happens is the first step to be performed:[7]

> There are three basic steps in conducting an event study: (i) define the event window; (ii) calculate abnormal stock price performance around the event; and (iii) test for statistical significance of the abnormal stock price performance. . . . The

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[6] Nettesheim Report, ¶41-44.

[7] Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Cominission," *The Business Lawyer*, 49, pp. 557-558.

> first step in the event study is selecting an event window. The event window is the period when information about the event becomes available to the stock market and thus may affect the relevant company's stock price.

One of the implications of Ms. Nettesheim's inversion of the proper order of the steps in performing an event study is that the hypothesis test loses validity and risks becoming a mere ex-post justification of a particular result. A textbook by Studenmund, *Using Econometrics*, states:[8]

> The first step in hypothesis testing is to state the hypotheses to be tested. This should be done *before* the equation is estimated because hypotheses developed after estimation run the risk of being justifications of particular results rather than tests of the validity of those results. [Emphasis in original]

This methodological error of performing a hypothesis test first and finding a justification for the result ex-post is sometimes referred to as the "Texas sharpshooter fallacy," after the example of a shooter who first shoots at a barn and then draws the target around the part of the barn where most of the bullets have clustered in order to demonstrate his prowess.[9]

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[8] Studenmund, A.H., *Using Econometrics: A Practical Guide*, Pearson Education, Inc., Fifth Edition, 2006, p. 114.

[9] See, for example, Inge F. Goldstein and Martin Goldstein, *How Much Risk? A Guide to Understanding Environmental Health Hazards*, Oxford University Press, 2002. Or, in the popular press, see, Atul Gawande, "The Cancer-Cluster Myth," *The New Yorker*, February 8, 1999, pp. 34-37.

A. Nettesheim's calculations of statistical significance are improper

The number of statistically significant price reactions that Ms. Nettesheim finds using her flawed methodology is no more than the number expected to be found exclusively on the basis of the normal daily variation of the stock price in the absence of news of importance to the market.

Ms. Nettesheim performs her tests of hypothesis at the 95% confidence level.[10] The 95% level means that, if her test is repeated many times, the test is expected to indicate 5 times out of 100 that the price movement on a given date is statistically significant even when there is no news of importance to the market, and the price moves solely due to the normal daily variation in stock prices.

Ms. Nettesheim performs her test 633 times; she performs it once for each day of the alleged class period. The expected number of days one would expect to be statistically significant at the 95% level, if stock price movements reflect only normal daily variation, is 5% of 633, or 31.7 days. Ms. Nettesheim finds that 31 days are statistically significant. Therefore, the number of statistically significant days during the alleged class period is no more than the number one would expect to find, if stock price movements reflect only normal daily variation, rather than some noteworthy event or announcement.

In the "Reference Guide on Statistics," part of the *Reference Manual on Scientific Evidence* published by the Federal Judicial Center, the authors refer to the issue of making several statistical tests on the same

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[10] Nettesheim Report, fn. 9 of the Appendix.

dataset in the glossary under the term, "Multiple Comparisons." The Manual states that it is hardly surprising to find 1 out of 20 (that is, 5%) statistically significant cases when performing the test 20 times even when there is no underlying difference (that is, "under the null") due to the normal variation in the data. The *Manual* states:[11]

> **[M]ultiple comparison.** Making several statistical tests on the same data set. Multiple comparisons complicate the interpretation of a p value. For example, if 20 divisions of a company are examined, and one division is found to have a disparity "significant" at the 0.05 level, the result is not surprising; indeed, it should be expected under the null hypothesis. [p. 166]

Ms. Nettesheim finds 31 days (including her 11 alleged curative disclosures) during the alleged class period to be statistically significant; yet that number is what statistical theory tells us that we should expect to find based exclusively on the normal daily variation in the stock price during her control period. Therefore, her statistical analysis yields no evidence that the stock price declines during the alleged class period are caused by anything other than the normal daily variation in stock price. Furthermore, her statistical analysis yields no evidence that the stock price declines are caused by the correction of any alleged misrepresentations.

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[11] Kaye, David H. and David A. Freedman, "Reference Guide on Statistics", *Reference Manual on Scientific Evidence*, (2000, Federal Judicial Center, Second Edition), pp. 83-178.

B. News days and non-news days have the same distribution of excess returns

Further evidence that Ms. Nettesheim's methodology is unreliable is the fact that her distribution of the excess returns of Halliburton's stock price during the alleged class period is no different on days when she finds news was released than on days when she finds that no news was released.

Ms. Nettesheim does not provide in her report any systematic way to distinguish between the days that she considers news days versus the ones she considers non-news days. This issue is discussed further below, in Section VII.F.

Since we are unable to replicate Ms. Nettesheim's method for determining whether a particular story counts as news, we used two alternative methods of classifying days as news days. The first method considered all days on which Ms. Nettesheim obtained a news story as news days. The second method considered only days with stories from major news sources.[12] Below, we show two charts that compare the excess returns on news days to those on non-news days.

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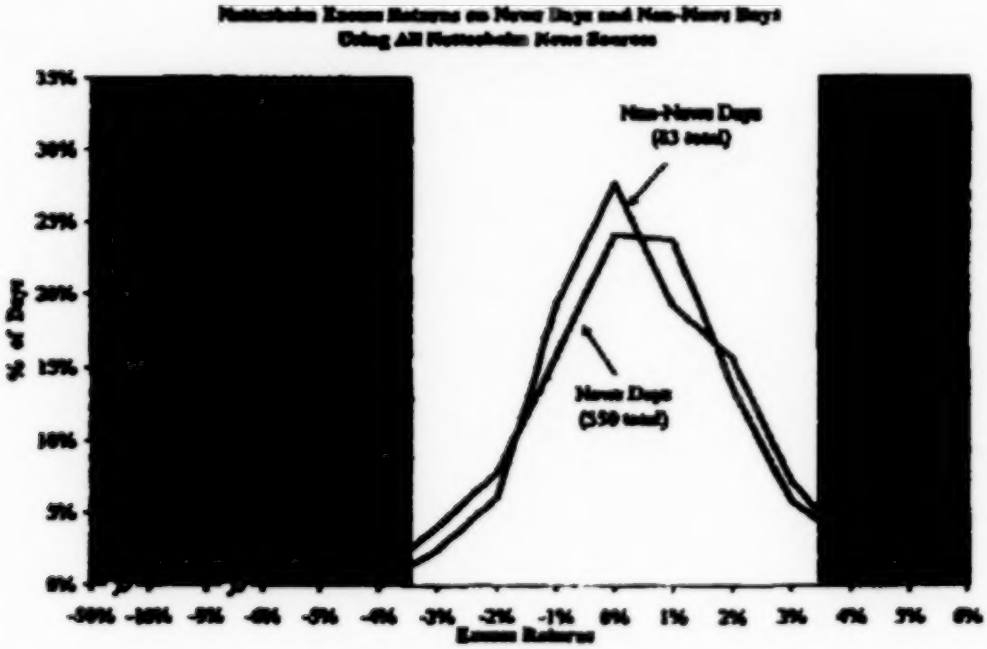
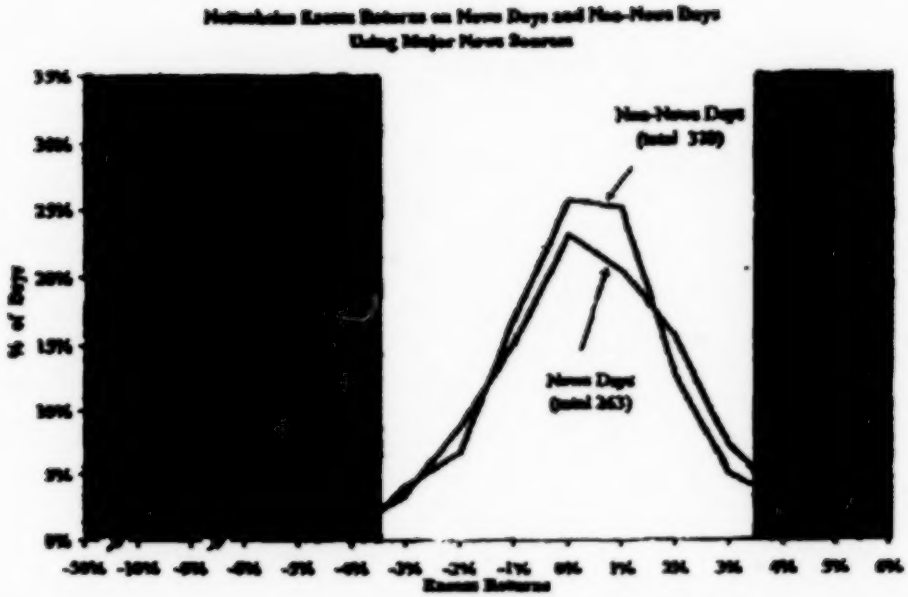
[12] Both versions include news from Factiva that contain "Halliburton" in the headline or lead paragraph, exclude republished news, obituaries, and sports news. Major news sources considered were: The New York Times, The Wall Street Journal, PR Newswire, Reuters News, Dow Jones News Service and Business Wire. Excess returns are from Nettesheim Report, Exhibit 17; standard errors are from Nettesheim Report, Exhibit 15. News that was released after the close of the market was considered to have been released on the next trading day.

Regardless of how news was classified, both methods yield the same result: the excess returns on news days are very similar to the excess returns on non-news days. This is further evidence that Ms. Nettesheim's procedure is unreliable. In other words, Ms. Nettesheim's methodology finds that Halliburton's stock price movements on news days are very similar to those on non-news days.





The charts above depict the results of each of the two methods of classifying news. The gray bands indicate excess returns that correspond to days on which Ms. Nettesheim found statistically significant price movements.

We also performed a formal test to analyze whether the distributious of excess returns are statistically different. We performed a Kolmogorov-Smirnov test for the equality of distributions of excess returns on news days and non-news days.[13] We found no statistically significant difference between the distributions of excess returns on news days versus non-news days for both sets of news sources.

C. We are unable identify Nettesheim's market index

As mentioned above, Ms. Nettesheim claims to have used a general market index obtained from CRSP, a

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[13] For a description of the Kolmogorov-Smirnov test, see, for example, Myles Hollander and Douglas A. Wolfe, *Nonparametric Statistical Methods*, 2nd Edition. John Wiley & Sons, Inc., 1999, pp. 178-179.

data provider. Specifically, Ms. Nettesheim claims to have used a composite index of all stocks traded on the NYSE, Amex and NASDAQ.[14] We licensed from CRSP the data we understood from the Nettesheim Report to be the data she used, but the values were different from those that she shows in the third column of Exhibit 17 of her report. We asked CRSP to identify which index Ms. Nettesheim used based on the data in her report. CRSP was unable to identify the data on that basis or to substantiate the claim that those data were actually obtained from it.

D. Nettesheim's industry index is not constructed properly

Ms. Nettesheim's industry index is not properly constructed. Ms. Nettesheim's industry index is allegedly composed of those companies mentioned in analyst reports on Halliburton that, according to Ms. Nettesheim's statistical tests, explained Halliburton's stock price movement over the control period. In other words, Ms. Nettesheim included all companies in her industry index that she found to have a statistically significant relationship with Halliburton's stock price over the control period. This procedure is flawed.

Ms. Nettesheim's procedure is flawed for several reasons. For example, she attempts to isolate the decline in Halliburton's stock price that is related to allegations regarding asbestos reserves. Yet, she has done nothing to include in her index companies with similar asbestos exposure. Nothing about her procedure for selecting companies involves considering a company's asbestos exposure at all. In her testimony, Ms. Nettesheim admits that she does

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[14] Nettesheim Report, ¶4 of the Appendix.

not know whether the companies in her index have asbestos exposure.

> Q. Did any of the companies in your index have any potential asbestos exposure?
>
> A. For these specific companies, I don't know.
>
> Q. That's not something that you or anybody on your team tried to ascertain?
>
> A. We relied on the indices, including them as comparables, and then analyst reports describing them as comparables. [Nettesheim Deposition, pp. 21-22]

The method used by Ms. Nettesheim for selecting companies for her industry index is based on statistical results rather than a theoretical basis for creating a comparable industry index. According to *A Guide to Econometrics*: "The first and foremost ingredient in a search for the correct set of explanatory variables is economic theory. If economic theory cannot defend the use of a variable as an explanatory variable it should not be included in the set of potential independent variables. Such theorizing should take place before any empirical testing of the appropriateness of potential independent variables; this guards against the adoption of an independent variable just because it happens to 'explain' a significant portion of the variation in the dependent variable in the particular sample at hand."[15]

She claims that her industry index and statistical regression perform unusually well, explaining 77% of the total variance in Halliburton's stock return during

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[15] Peter Kennedy, *A Guide to Econometrics*, Fifth Edition, The MIT Press, 2003, p. 108.

the control period. Given that she pre-selected the companies to include in her index based on their statistical performance in explaining Halliburton's stock price during the control period, the fact that the index performed well during the control period is hardly surprising. The high level of statistical performance does not prove that the index would be a reliable benchmark to control for industry effects during the alleged class period; her index's statistical performance during the control period is something of a self-fulfilling prophecy.

Moreover, this artificially high statistical performance (R-squared) means that the standard error of her regression is artificially low. This problem is known in the statistics literature as overfitting.[16] This means that her test of statistical significance over the alleged class period is more likely to find events that are statistically significant.

E. Nettesheim's findings of statistical significance are neither valid nor robust

We performed Ms. Nettesheim's regression (the regression of Halliburton's returns on the returns of Ms. Nettesheim's market and industry indexes) over an alternative control period. Rather than the period of one year starting *before* the beginning of the alleged class period, the control period used by Ms. Nettesheim, we tested her model over a one-year

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[16] See, for example, Peter Kennedy, *A Guide to Econometrics*, Fifth Edition, 2003, The MIT Press, p. 383; Michael A Babyak, "What You See May Not Be What You Get: A Brief, Nontechnical Introduction to Overfitting in Regression-Type Models," Statistical Corner, *Psychosomatic Medicine*, 66:411-421 (2004).

period starting *after* the end of the class period.[17] We found dramatically different results. We found that the explanatory power of her regression declined from 77% to 37%. That is, her industry index was not nearly as successful in explaining Halliburton's stock price movement over a period where she had not "cherry-picked" the companies based on their statistical results over the same period.

More importantly, this change shows that her results are not robust. Applying the regression results based on this alternative control period, we found that there was no longer any statistically significant price decline on most of Ms. Nettesheim's alleged curative disclosure dates. We find that 9 of her 11 alleged curative disclosure dates are not statistically significant if we apply her methodology and simply change the control period from being a one-year period that starts before the alleged class period to a one-year period that starts after the alleged class period.[18]

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[17] The alternative control period is December 10, 2001 through December 9, 2002. Nettesheim's control period is October 1, 1998 through September 30, 1999. Ms. Nettesheim's control period overlaps with the alleged class period because she did not want to use a control period starting before the merger with Dresser and there was less than one year between the merger and the beginning of the alleged class period. The calculations were based on a market index from CRSP (CRSP NYSE/Amex/NASDAQ Value-Weighted Market Index) that corresponds to Ms. Nettesheim's description of the index she used. In the alternative control period, the industry index is composed of 49 of the 52 companies included in Ms. Nettesheim's index (due to price data availability).

[18] The price reactions on following dates (alleged curative disclosures according to Ms. Nettesheim) are not statistically significant: January 5, 2000, October 25, 2000, December 22,

F. Nettesheim's determination of what is news and the date on which news is released is not systematic or replicable

In her report, Ms. Nettesheim does not detail any systematic way to distinguish between the days she considers news days and those that she considers non-news days. Ms. Nettesheim indicates that on 9 dates out the 31 on which she finds statistically significant price movements there is no company-specific news that explains that price movement.[19] Yet, she does list news stories in her Exhibit 18 for those days. Ms Nettesheim does not provide any justification or method for her determination that those published reports could not explain the price movement on those days. Her judgment cannot be replicated.

Further, Ms. Nettesheim inconsistently attributes the price reaction on some days to news on other days. For example, she has justified her inclusion of the price reaction on December 22, 2000 by referencing news released in the morning of the previous trading day, December 21, 2000. And while Ms. Nettesheim attempts to justify the inclusion of the price reaction on October 31, 2001 by referencing news that she claims was released after market close on October 30, 2001, this news had been released at least as early as October 28, 2001.

2000, June 29, 2001, August 9, 2001, October 31, 2001, November 1, 2001, December 4, 2001 and December 5, 2001.

[19] Nettesheim Report, ¶43, 44. The dates in question are: June 18, 1999, October 15, 1999, February 10, 2000, February 25, 2000, May 19, 2000, October 24, 2000, December 18, 2000, February 12, 2001 and November 6, 2001.

VIII. NETTESHEIM DOES NOT PROVE LOSS CAUSATION FOR THE ALLEGATIONS REGARDING THE INTEGRATION OF DRESSER

Ms. Nettesheim's analysis does not prove loss causation for the allegations regarding the integration of Dresser. Plaintiffs allegation regarding the integration of Dresser is that "severe but undisclosed problems associated with the acquisition and integration of Dresser" inflated Halliburton's stock price.[20] Ms. Nettesheim has not shown that the "severe but undisclosed problems" associated with the Dresser merger inflated Halliburton's stock price or that there was a stock price decline at the time of a curative disclosure of this alleged misrepresentation. In fact, she has not even identified any actual curative disclosures of the alleged misrepresentations regarding the Dresser merger.

A. The Nettesheim Report inappropriately combines the allegations regarding the integration of Dresser with the allegations regarding the unapproved claims

Ms. Nettesheim, rather than analyzing the actual allegations, has lumped together the integration of Dresser allegations with the allegations regarding unapproved claims and interpreted them as anything that relates to the Engineering and Construction business unit ("E&C"), one of Halliburton's two major business segments (the other being Energy Services, or "ES"). The integration of Dresser and the unapproved claims allegations are in fact distinct, and a finding that one set of allegations materially inflated the stock price and was the cause of a loss does not

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[20] Plaintiff's Motion, p. 3.

imply loss causation for the other category of allegations. The unapproved claims relate to an allegedly "insidious accounting trick"[21] while the integration allegations relate to allegedly severe but undisclosed problems associated with the acquisition and integration of Dresser. The Complaint, for example, alleges that the accounting for unapproved claims affected both parts of Halliburton's business, E&C and ES, and "falsely inflated Halliburton's Energy Services ('ES') and Engineering and Construction ('E&C') Groups' reported operating incomes."[22]

B. Nettesheim does not establish causation for the Dresser integration allegations, but rather looks at whether stock price declines relate to E&C

Ms. Nettesheim finds that a curative disclosure is any negative news that relates to E&C, rather than information that in fact corrects alleged misrepresentations. For example, she testified as follows regarding her conclusion that October 25, 2000 was a curative disclosure of the allegations related to unapproved claims and the integration of Dresser:

> Well, I think the analysts are attributing -- there is a real valuation of the company downward, and they are attributing the re-evaluation, the downward portion of the re-evaluation, to the engineering and construction side of the business. [Nettesheim Deposition, p. 70]

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[21] Complaint, ¶13.

[22] Complaint, ¶13.

Moreover, Ms. Nettesheim does not test whether the allegations related to the Dresser integration caused any losses. It is our understanding that the Court requires Plaintiff to show not only that the alleged misstatement was material and moved the stock price, but also that the subsequent revelation of the relevant truth caused a loss.[23] Furthermore, we understand that, according to *Dura*, "to touch upon a loss is not to cause a loss."[24]

In her report, Ms. Nettesheim does not test whether correction of the actual alleged misrepresentation or omission was the cause of a price decline; rather, she starts with a list of "significant" price declines and looks to see whether information related to E&C (for this category of allegations, and asbestos for her other category of allegations) is announced around the date of the price decline.

C. The alleged curative disclosures are not curative of alleged misrepresentations

Ms. Nettesheim does not describe how her alleged curative disclosures are, in fact, curative of the alleged misrepresentations in this case. Not only is there no proven link in her report or analysis between the alleged misrepresentations and the curative disclosures, but Ms. Nettesheim never attempted to make such a link, apparently not considering this a

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[23] *Oscar Private Equity Invesments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. May 16, 2007): "We require proof that the misstatement actually moved the market." . . . "When multiple negative items are announced contemporaneously, mere proximity between the announcement and the stock loss is insufficient to establish loss causation." [p. 7, 21]

[24] *Dura Pharmaceuticals, Inc. et al. v. Broudo, et al.*, 544 U.S. 336 (2005).

necessary step in loss causation analysis. In her deposition, she testified as follows:

> Q. And the reason why, as part of your loss causation analysis, is you're looking at prior statements by the company or officers of the company to identify that the corrective statements that are being identified in your report relates back to a prior statement that was not accurate; is that correct?
>
> A. Well, as I said earlier, I did not link or match up statement by statement earlier statements with the partial disclosures I discussed. [Nettesheim Deposition, pp. 164-165]

Indeed, we are unable to determine, for example, which "severe but undisclosed problems associated with the acquisition and integration of Dresser" were revealed on the alleged disclosure dates. Ms. Nettesheim opines that negative information related to Halliburton's E&C segment is discussed on these dates. We find, however, that negative information related to Halliburton's E&C segment is similarly discussed on other dates during the alleged class period that are not associated by Ms. Nettesheim with the alleged fraud.

For example, on July 26, 2001, a date which Ms. Nettesheim lists as having a positive statistically significant company-specific return,[25] there is negative

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[25] Nettesheim Report, ¶45.

news announced relating to the E&C business of Halliburton:[26]

> By contrast, Halliburton's engineering and construction unit had operating profit of $25 million, down from $30 million last year, and revenue fell to $1.1 billion from $1.3 billion.

According to Johnson Rice & Company following the announcement that day:

> Engineering & Construction . . . operating income of $25 million was below our $32 million estimate. [Johnson Rice & Company L.L.C, July 26, 2001]

Similarly, on July 27, 2000, a date which Ms. Nettesheim lists as having a positive excess return,[27] there is negative news announced relating to the E&C business of Halliburton:[28]

> Halliburton Co., the world's biggest oilfield services company, said on Wednesday second-quarter earnings fell almost 10 percent as a 13 percent increase in energy services revenues was offset by a 29 percent decline in engineering and construction revenues . . . Operating income at the Engineering and Construction division fell 44 percent to $36 million.

According to Salomon Smith Barney following the announcement that day:

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[26] The Wall Street Journal, July 26, 2001, "Results Are Strong At Halliburton Co. and Schlumberger."

[27] Nettesheim Report, Exhibit 17.

[28] Reuters News, July 26, 2000 (after market close), "Halliburton earnings fall as engineering lags."

> The E&C Group reported revenues of just $971 million versus our $1,135 million forecast, representing a 14% shortfall versus our expectations. [Salomon Smith Barney, July 26, 2000]

No systematic method has been applied by Ms. Nettesheim to determine whether news is an alleged curative disclosure or of which alleged misrepresentation this news is curative. In fact, Ms. Nettesheim has identified allegedly curative disclosures that were not identified in the Complaint. She does not describe how she determined which dates are curative, nor can we find any systematic approach that would yield the set of alleged curative disclosures she has identified.

D. Nettesheim does not properly analyze or control for the E&C industry

Ms. Nettesheim allegedly tests whether the stock price declines are related to the E&C segment. As discussed above, this is not the appropriate test of loss causation for the alleged misrepresentations. Nor is her methodology an appropriate test of whether Halliburton's stock price decline is due to company-specific problems in the engineering and construction business.

Ms. Nettesheim mistakenly claims that, if her industry index does not explain Halliburton's stock price movement on a given date, then any negative news related to Halliburton's E&C segment must be a company-specific problem.[29] Her industry index, however, was not designed to test this hypothesis, as her selection criteria are not based on companies

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[29] Nettesheim Report, ¶88-92.

having a substantial E&C segment. The Industry index is composed of 52 companies.

Of the 4 E&C companies detailed in a Merrill Lynch Engineering & Construction industry report analyzing the Halliburton/Dresser merger,[30] only one company, McDermott International, Inc., was included in Ms. Nettesheim's 52-company industry index.

We examined the stock price of Halliburton from the beginning of the alleged class period through Ms. Nettesheim's four alleged curative disclosures related to E&C. We found that, over this period (June 3, 1999 through December 22, 2000), Halliburton's stock price declined 13.25%. We created an index of the stock prices of the E&C companies detailed in the Merrill Lynch industry report, and compared the performance of this E&C index to Halliburton.[31] As can be seen in the graph below, we found that the E&C index underperformed Halliburton's stock from the beginning of the alleged class period through Ms. Nettesheim's alleged curative disclosures related to the E&C segment (ending December 22, 2000). While Halliburton's stock price declined 13.25%, the E&C peer companies declined 39.53%. This indicates that a decline in the E&C business over this time period was not a Halliburton-specific phenomenon.

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[30] Merrill Lynch report dated March 13, 1998.

[31] The index is composed of McDermott International Inc., Foster Wheeler Ltd. and Jacobs Engineering Group Inc. Fluor Corp., although listed in the analyst report, was excluded because of a spin-off during the alleged class period. (As a check, we also created the index including Fluor while excluding the company's returns of the day of the spin-off. The results are virtually the same.)

It should be noted that merely changing Ms. Nettesheim's industry index to an E&C index and testing the same four dates that Ms. Nettesheim claims are alleged curative disclosures would not be a sufficient test of loss causation. The alleged curative disclosures are not the only days on which news regarding E&C issues is released to the market and the allegations in this case are not synonymous with E&C. To analyze loss causation, an understanding of the specific alleged misrepresentations and a causal link to an actual curative disclosure of the alleged misrepresentations is necessary. In addition, one would need to, at a minimum, parse the effect of other potentially confounding news that may be released to the market at the same time.

E. Nettesheim mischaracterizes the under-performance of E&C as due to unrealized benefits from the Dresser merger

Ms. Nettesheim characterizes the under-performance of Halliburton's E&C business in 2000 as being due to unrealized benefits from the Dresser merger.[32] For example, she describes the October 24, 2000 alleged disclosure, in which the company announced the restructuring of the business, as "a partial disclosure concerning the Company's booking unapproved claims . . . and lack of benefits from the Dresser merger."[33]

However, in discussing the E&C segment's problems, analysts and other market participants did not mention any issues related to the merger. Instead, analysts cited concerns not about "operational

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[32] Nettesheim Report, p. 37.

[33] Nettesheim Report, ¶93.

problems," but with unanticipated, cyclical and ongoing industry conditions.

For example, according to an A.G. Edwards & Sons, Inc. report dated October 25, 2000:

> Lower activity levels at Kellogg Brown & Root's (KBR) downstream business continued to have a negative impact on revenues, as projects remain in the planning stage and capital spending remains depressed in the downstream business. In spite of a $6.1 billion backlog at E&C (up from $5.5 billion at the end of 2Q 2000), **the operating environment remains weak** and revenues are expected to decline in 2001. Although maintenance has picked up, large projects continued to be delayed and **consolidation among the major oil companies may cause additional delays.** [Emphasis added]

In a CIBC World Markets report dated October 25, 2000, the analyst notes that:

> **This business is at the trough of its cycle** and there is little work that can be secured in 4Q00 that would begin to impact earnings before 2002. Thus, this business will have to live off its backlog which currently is slightly over $6 billion. We estimate it will complete about half that backlog next year, but at sharply reduced profit margins due to the present overhead designed to support substantially more work than will be done. [Emphasis added]

According to a Dain Rauscher Wessels report dated October 25, 2000:

> **Revenues were down 30% in the quarter and are not expected to recover until late in 2001 and into 2002.** New downstream construction has been hampered by **reduced spending by the majors following their recent mergers. The recently announced merger between Texaco and Chevron is likely to continue this trend."**[34] [Emphasis added]

An article published by *The Oil Daily* on October 26, 2000 quotes Simmons & Co.'s analyst Dan Pickering:

> "The problem is not with the front-end drilling business, which is performing well. The issue is that large oil companies have been relatively slow in making commitments to big development projects in the $1 billion to $2 billion range," Pickering said.
>
> In some cases, he said mergers have distracted companies from moving forward with big developments that would require the sort of construction services offered by Halliburton.

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[34] Since the completion of the merger between Halliburton and Dresser was announced on September 29, 1998, BP Plc acquired Amoco Corp. for $61.7 billion on December 31, 1998, Exxon Corp. acquired Mobil Corp. for $85.2 billion on November 30, 1999, BP Plc acquired Atlantic Richfield for $33.1 billion on April 18, 2000, and Chevron Corp. acquired Texaco Inc. for $45.8 billion on October 9, 2001. Source: Bloomberg L.P. The Complaint does not allege that defendants should have anticipated this industry consolidation.

> In addition, oil companies are now more likely to evaluate and "pre-engineer" complex projects for a longer period of time, having been burned by cost overruns from rushing forward with such projects in recent years.
>
> **From this perspective, Halliburton is not being punished for poor execution from its engineering and construction unit, but rather for its unfortunate exposure to a currently weak market, Pickering said. [Emphasis added]**

Similarly, according to a December 22, 2000 CIBC World Markets research report:

> Despite the rise in oil and natural gas prices, HAL has experienced weak performance in its shallow-water marine construction and downstream E&C businesses. The customer base for E&C is consolidating and financially pressured com-petitors have intensified competition and pricing in the marketplace. As a result, HAL is restructuring its company into two operating segments: the Halliburton Energy Services Group and the Engineering and Construction Group. About $25 million of the $120 million re-structuring charge will be associated with reorganization costs related to severance and facility closures.

The fact that analysts attributed the Engineering & Construction segment's difficulties not to any failure to achieve the benefits of the merger with Dresser, but to industry conditions that were unanticipated at the time of the merger and were of unknown duration demonstrates that the disclosure of these problems is

unrelated to the alleged fraud, and, as such, caused no losses.

E. There was non-culpable news released on the dates of the alleged curative disclosures related to the integration of Dresser

According to Plaintiff's Motion, "the Allegiance court found that, where there are multiple negatives, not all of which are alleged to be culpable, the Lead Plaintiff has the burden of showing that it was the culpable statement(s) that caused a significant amount of the decline in the stock price . . . "[35]

Also according to Plaintiff's Motion, Ms. Nettesheim found that "eleven days corresponded to the release of culpable news, and only one of those days involved multiple pieces of news, some culpable and some not."[36]

However, a review of information released on each of Ms. Nettesheim's four alleged curative disclosure dates regarding the integration of Dresser shows that there was non-culpable news released on each of them.

1. There was non-culpable news released on October 5, 1999

According to Ms. Nettesheim, the stock price decline on October 5, 1999 was due to a warning from Halliburton that its 3Q 1999 earnings would be lower than expected, and that "the Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group."[37]

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[35] Plaintiff's Motion, p. 20.

[36] Plaintiffs' Motion for Class Certification, p. 21.

[37] Nettesheim Report, ¶84.

The analyst reports on which she relies following this announcement, however, are not consistent with the claim that the decline is entirely, or even in large part, due to allegedly culpable information. For example, the analyst at CIBC World Markets stated that the decline in 3Q 1999 expectations was "mostly due to the slower than expected recovery in oilfield activity this summer in the U.S. and the continuing decline in activity internationally."[38] Thus, the analyst attributed Halliburton's 3Q 1999 weakness to industry issues and not the alleged culpable misstatements.

Furthermore, the same analyst report stated that the weakness in 3Q 1999 earnings was not confined to the business units of the Dresser Equipment Group, as Ms. Nettesheim claims. Instead, the analyst found that there was weakness in virtually all areas of the business and further found that the reported weakness was not surprising given the experience of other companies in the industry:

> It also announced that weakness in virtually all areas of its business would result in 3Q EPS declining to between $0.11 to $0.13 vs. current consensus expectations of $0.19 and our estimate of 0.18. [...] The company's announcement of weakness across virtually every business line in 3Q is not surprising, given the slower than anticipated oilfield industry recovery. [CIBC World Markets, October 5, 1999]

Although it is not clear why Ms. Nettesheim considers Halliburton's announcement of the sale of its interest in the joint ventures to be a partial curative disclosure

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[38] See, CIBC World Markets, October 5, 1999.

of culpable information, it does not even appear to have been the reason for the stock price decline on October 5, 1999. Analyst commentary suggests that the market considered the sale to be *positive* news.[39]

> Late yesterday afternoon, HAL announced both positive and negative developments. The positive is that HAL will sell its JV interests in Dresser-Rand IR Dresser Pump to Ingersoll-Rand for $1.1 billion (pretax). [Merrill Lynch, October 5, 1999]

2. There was non-culpable news released on January 5, 2000

Ms. Nettesheim admits that non-culpable news was released on January 5, 2000.[40] She nonetheless states that having reviewed all the news and analyst reports, she does not see news or information that can explain Halliburton's price decline on January 5 other than the reductions in earnings estimates made by two analysts (Carol Lau with Brown Brothers Harriman & Co. and K. Simpson of Merrill Lynch). She claims that, "The reductions in earnings estimates are based at least in part on the problems with the large fixed-price contracts and the lack of benefits from the Dresser

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[39] Note that, although analysts revised earnings expectations downward in part because of the sale of the joint ventures, this was not negative news about the company. Naturally, if the joint venture was expected to generate any future earnings for Halliburton, the sale of the joint venture would eliminate those expected earnings. Merrill Lynch, on the date of this alleged curative disclosure, reduced its future earnings estimates for 2000 and explained the reduction as follows: "About half the cut reflects elimination of the JV earnings sooner than we expected and the rest reflects reduced expectations for overseas oilfield results." [Merrill Lynch, October 5, 1999]

[40] Nettesheim Report, ¶ 88.

merger."[41] She states that the Merrill Lynch analyst reduced his estimates for three reasons – (1) "reduced expectations for offshore construction results"; (2) "a reduced growth estimate for oilfield spending outside North America" and (3) "less powerful synergies from the Dresser merger than [h]e had envisioned.[42]

Ms. Nettesheim claims that reason 1 (reduced expectations for offshore construction results) represents culpable news. Yet, the Merrill Lynch analyst explains the causes for reason 1 as follows:

> The North Sea likely will be very weak in 2000 and this has historically been a stronghold for HAL. Also, awards of major deepwater development projects continue to be delayed. While HAL should benefit from stronger deepwater earnings in 2001, the biggest positive impact on results may not be until 2002. Our reductions in offshore construction are in line with recent estimate cuts for Cal Dive and Coflexip by our oil service colleague Kurt Hallead. Recall that neither Schlumberger nor Baker Hughes, HAL's full-service oilfield competitors, have exposure to the offshore construction business. [Merrill Lynch, January 5, 2000]

The causes for reason 1 (the reduced expectations for offshore construction results) appear to bear no relationship to the alleged "improper booking of unapproved claims" and "severe but undisclosed problems associated with the acquisition and integration of Dresser." The analyst is projecting weak

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[41] Nettesheim Report, ¶ 92.

[42] Nettesheim Report, ¶ 89.

future business from projects in the North Sea, a delay regarding deepwater development projects and reductions in offshore construction that are in line with competitors.

Ms. Nettesheim admits that reason 2 (a reduced growth estimate for oilfield spending outside North America) is non-culpable but claims that the price decline on January 5, 2000 is unlikely to have been caused by it. The logic behind this reasoning is not sound. If the price decline is due to the reduction in the analysts' estimates, and if a key factor driving the reduction, according to the analyst, is reduced oilfield spending, then Ms. Nettesheim's claim is self-contradictory.

3. There was non-culpable news released on October 25, 2000

According to Ms. Nettesheim, on October 25, 2000, Halliburton "disclosed that it would be restructuring its engineering and construction units, causing a statistically significant decline on October 25."[43] She claims that, "The price decline on October 25, 2000, was caused by revelations related to operational problems at the engineering and construction units and, to a lesser extent, some analysts' concerns regarding potential asbestos exposure."[44]

According to Plaintiff's Motion, although multiple pieces of negative information were announced on October 25, all of these pieces are alleged to be culpable.[45] The Motion also claims that, although "not required by *Allegiance*, Nettesheim has opined on the

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[43] Nettesheim Report, ¶ 93.

[44] Nettesheim Report, ¶ 93.

[45] Plaintiff's Motion, p. 21.

significance of each piece of news" associated with the price decline "utilizing the event study, and an empirical analysis."[46]

The only analysis in which Ms. Nettesheim attempted to parse the reasons for the October 25, 2000 stock price decline is a calculation of the percent of the change in analysts' estimates of 2001 operating income that is attributed to E&C versus the rest of Halliburton. In particular, Ms. Nettesheim lists three analyst reports released around October 25, 2000 that provided estimates of expected 2001 operating income for Halliburton's major business segments. She calculates, for each report, the change in estimated operating income for E&C divided by the total change. She finds that the E&C portion ranged (for the three analysts) from 50% to 80% and appears to conclude, without any other analysis, that "The price decline on October 25, 2000, was caused by revelations related to operational problems at the engineering and construction units and, to a lesser extent, some analysts' concerns regarding potential asbestos exposure."[47]

There was non-culpable news released on the day of Ms. Nettesheim's alleged October 25, 2000 curative disclosure. For example, the Dain Rauscher Wessels analyst commented on the weaker than expected international market for the Energy Service Group (ESG) as follows:

> We were also concerned that the expected increase in revenues from international markets continues to be weaker than

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[46] Plaintifi's Motion, p. 22.

[47] Nettesheim Report, ¶ 93

> expected. In the ESG, international revenues were flat sequentially and accounted for only 64% of the total revenue. Inter-national activity has been slowed by decreased spending by the majors, a trend that does not appear likely to reverse until 2001 at the earliest. [Dain Rauscher Wessels, October 25, 2000]

Plaintiff has not shown that this information should have been known at the beginning of the alleged class period, or that it is related to the allegations regarding the integration of Dresser.

4. There was non-culpable news released on December 22, 2000

With regard to Halliburton's stock price movement on December 22, 2000, Ms. Nettesheim claims:[48]

> Halliburton's stock price reaction that day is consistent with the charge for cost overruns at various projects being a surprise and a concern to the market. I have reviewed all of the news and analysts reports available to me at this time from December 21 and 22, 2000, and find that the negative news and sentiment is predominately about the operational problems, delays and cost overruns for large construction projects. As there was no other negative news released that day, all of the price decline on December 22 was caused by the partial disclosures related to the operational problems at the engineering and con-struction units and is related to the Company's booking unapproved

[48] Nettesheim Report, ¶ 112

> claims on fixed-price contracts and lack of benefits from the Dresser merger alleged by Lead Plaintiff.

The announcement on this day, however, included negative information regarding increased competitive pressure, and intensified competition in pricing and labor disturbances in Venezuela and West Africa. Plaintiff has not shown or alleged that this information should have been known at the beginning of the alleged class period, or that it is related to the allegations regarding the integration of Dresser. For example, according to CIBC World Markets:

> The customer base for E&C is consolidating and financially pressured competitors have intensified competition and pricing in the marketplace. As a result, HAL is restructuring its company into two operating segments . . . Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts . . . General industry-wide issues are also impacting the E&C business. Despite high oil and natural gas prices, spending for engineering and construction projects remains depressed. The difficult operating environment has forced some of Halliburton's E&C competition to cut prices and increase competitiveness. [CIBC World Markets, December 22, 2000]

IX. NETTESHEIM DOES NOT PROVE LOSS CAUSATION FOR THE ALLEGATIONS REGARDING THE ACCOUNTING OF UNAPPROVED CLAIMS

Ms. Nettesheim does not prove loss causation for the allegations regarding the accounting of unapproved

claims. Plaintiff alleges that, "Halliburton had secretly changed the way it was accounting for Unapproved Claims on construction contracts and was now recognizing them as revenue when the claims were asserted."[49] Further, they allege that, "By including the unapproved claims in the Company's reported revenue, profit and margins were more favorable than they would have been if the accounting policy had not been changed."[50]

Ms. Nettesheim testified that if there is a disclosure in any way related to fixed-price contracts, then she considered it related to the allegations regarding unapproved claims. In her deposition she testified as follows:

> Q. If there is a disclosure of bad news that in any way, shape or form relates to fixed price contracts, then it relates to the allegations about unapproved claims, correct?
>
> A. Yes, in this case I did. [Nettesheim Deposition, p. 181]

An announcement of information that could have some connection to an alleged misrepresentation is not proof of loss causation. Clearly, not all information related to fixed-price contracts is necessarily related to Plaintiff's allegations regarding booking of unapproved claims.

According to the Court in *Zonagen*, "The accurate information causing the decrease must be related to the false information causing the increase. Otherwise, measuring the price effect that the positive statements

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[49] Complaint, ¶ 42d.

[50] Plaintiff's Motion, p. 5.

had by measuring the price decrease after publication of negative statements would be an exercise in pure speculation."[51]

A. The alleged curative disclosures are not curative of alleged misrepresentations regarding the booking of unapproved claims

Ms. Nettesheim appears to find that the same four dates that were allegedly curative of the Dresser integration allegations are also allegedly curative of the unapproved claims allegations.

> The following events [October 5, 1999, January 5, 2000, October 25, 2000 and December 22, 2000] are examples of information disclosed during the Class Period that brought, in part, investors' perceptions of the Company's financial condition related to its booking of unapproved claims on fixed-price contracts and the benefits from the Dresser merger more in-line with its alleged true condition at that time.[52]

We find that on none of these alleged curative disclosures dates were the alleged misrepresentations regarding unapproved claims revealed.

October 5, 1999:

Although Ms. Nettesheim claims that October 5, 1999 was a curative disclosure of both the allegations regarding unapproved claims and the integration of Dresser, her discussion of this date includes no mention of the unapproved claims allegations.

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[51] *In re Zonagen, Inc. Securities Litigation*, 322 F.Supp.2d 764, S.D.Tex., June 13, 2003 (NO. CIV.A H-98-0693), pp.21-22.

[52] Nettesheim Report, ¶ 83.

According to Ms. Nettesheim, the stock price decline on October 5, 1999 is due to a warning from Halliburton that its 3Q 1999 earnings would be lower than expected, and that, "The Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures and many of the other business units of theDresser Equipment Group."[53]

We find no evidence that October 5, 1999 was a curative disclosure of the unapproved claims allegation.

January 5, 2000

Regarding January 5, 2000, Ms. Nettesheim claims:[54]

> On Wednesday, January 5, 2000, Halliburton made a partial disclosure related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits realized from the Dresser merger as revealed in a conversation with analyst Carol Lau with Brown Brothers Harriman & Co.

Carol Lau's report is attached as Attachment B.[55] According to this report:

> Following a conversation with the company this morning, we are reducing our fourth quarter 1999 and 2000 EPS estimates. For the fourth quarter, we are trimming our estimate ... to reflect lower oilfield services profits. [...] For 2000, we are reducing our

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[53] Nettesheim Report, ¶ 84.

[54] Nettesheim Report, ¶ 88.

[55] Carol Lau issued a research note on the same date, but that also contains no other information regarding unapproved claims.

> EPS projection...as we are now electing to use more conservative forecasts to reflect the lower base point in the fourth quarter for Energy Services and lower profit expectations in Engineering & Construction. [Brown Brothers Harriman & Co., January 5, 2000]

Carol Lau's report on that day reveals absolutely no information regarding the booking of unapproved claims on fixed-price contracts.[56]

October 25, 2000

With regard to October 25, 2000, Ms. Nettesheim states:[57]

> After market close on October 24, 2000, while announcing its third quarter earnings release, the Company made a partial disclosure concerning the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger .... A significant portion of the negative news, as attributed to the Company, in news reports and by analysts, was related to the problems with the engineering and construction units that Lead Plaintiff alleges could have been and should have been revealed earlier. Thus, a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged in the Complaint.

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[56] We can find no indication in the Nettesheim Report or any of the materials referenced by Ms. Nettesheim, what was revealed by Halliburton to Carol Lau in the referenced conversation.

[57] Nettesheim Report, ¶ 93.

Ms. Nettesheim's logic is flawed. Ms. Nettesheim claims that if she finds that a price decline is .related to E&C, then it is a curative disclosure of the company's booking of unapproved claims. There is no basis for her conclusion that E&C, a major segment of Halliburton's business, is synonymous with the allegations regarding unapproved claims. We found no evidence of a curative disclosure of the allegations regarding the booking of unapproved claims on October 25, 2000.

December 22, 2000

With regard to December 22, 2000, Ms. Nettesheim states:[58]

> The charges for cost overruns that were announced in December 2000 make clear that the problems in the engineering and construction were related to the large, fixed-price contracts and, therefore, the negative news on October 24 and 25, 2000, is a partial disclosure related to the Company's booking unapproved claims on fixed-price contracts and the lack of benefits from the Dresser merger alleged in the Complaint.

Ms. Nettesheim claims that if a price decline is related to large fixed-price contracts, then it is a curative disclosure of the allegations regarding booking of unapproved claims. This is another instance where she inappropriately equates two issues that are not at all synonymous. Ms. Nettesheim's analysis only makes sense under the premise that there are no possible problems that can occur with fixed-price contracts other than those related to the

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[58] Nettesheim Report, fn. 61.

booking of unapproved claims. This premise is false, however, because problems with fixed-price contracts can occur independent of how unapproved claims are booked.

Further, while analysts in fact discuss cost overruns, they attribute these overruns to changes in market conditions, specifically to labor disturbances in Venezuela and West Africa. Plaintiff made no allegations about these labor disturbances or how Halliburton could have known about them at the beginning of the alleged class period and failed to disclose them.

> **What's Going Wrong?** Although the E&C division was weak in the first half of 2000, we were surprised by management's earnings warning on the 3Q conference call. There were concerns that HAL might not have the critical mass to generate consistent and predictable profitability in the E&C business. Labor disturb-ances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts. HAL has submitted claims on these costs to clients, but HAL does not believe that all the costs will be recovered. Additionally, relationships with some customers have deteriorated and the cost increase claims on seven other projects have not resolved as expected. General industry-wide issues are also impacting the E&C business. Despite high oil and natural gas prices, spending for engineering and construction projects remains depressed. The difficult operating environment has forced some of Halliburton's E&C competition to cut prices and increase

competitiveness. [CIBC World Markets, December 22, 2000]

B. Risks of cost overruns connected to fixed-price contracts were known by the market before the alleged curative disclosures

Although some of the disclosures alleged by Ms. Nettesheim as being curative relate to fixed-price contracts, we find no indication that they relate to the accounting issue of booking unapproved claims as revenue. The fact that fixed-price contracts were at risk of cost overruns was known by the market even before the beginning of the alleged class period.

> The company will be undertaking large, lump sum fixed price contracts. The potential for cost overruns, and lower earnings from some of this work, will be an ever-present risk. [Prudential Securities, April 7, 1998]

> Engineering and construction is an inherently risky business, as any number of problems can arise when transforming a project idea into a physical reality. . . The segment also began accepting a greater level of project risk by offering gain sharing or fixed price contracts. [Robinson-Humphrey, October 3, 1998]

> The company will be undertaking large, lump-sum fixed-price contracts. The potential for cost overruns is an inherent risk of those businesses. [Prudential Securities, October 7, 1998]

C. Nettesheim's event study analysis shows that there was no statistically significant price reaction to the actual disclosure of the change in accounting for unapproved claims

The four alleged disclosures that Ms. Nettesheim claims are curative of the allegations regarding unapproved claims are not, in fact, curative of the allegations. There is, however, an actual curative disclosure of the accounting of unapproved claims.

On March 14, 2000, the change in Halliburton's accounting practices relating to the booking of revenues related to claims and change orders was disclosed to the market in the company's Form 10-K. This filing included the amounts booked as revenue for claims and change orders for 1998 and 1999.

The Complaint alleges that March 14, 2000 was a partial curative disclosure. Ms. Nettesheim should have used an event study analysis to test the stock price reaction on this date rather than on the four dates on which no curative information is released. While her report does not specifically address this date, Ms. Nettesheim's event study analysis found no statistically significant price reaction on March 14, 2000, an actual curative disclosure of the unapproved claims allegations.

X. NETTESHEIM DOES NOT PROVE LOSS CAUSATION FOR THE ASBESTOS RESERVES ALLEGATIONS

Ms. Nettesheim does not prove loss causation for the allegations relating to asbestos reserves. She does not show that the allegations inflated Halliburton's stock price or that there was a stock price decline due to a curative disclosure of the allegations. Her statistical

results are invalid, as discussed above. She does not link the alleged misrepresentations regarding asbestos reserves to curative disclosures.

A. Nettesheim fails to link the alleged misrepresentations to curative disclosures

1. Nettesheim's loss causation analysis is not based on an understanding of Plaintiff's allegations

Ms. Nettesheim's loss causation analysis does not take into account the specifics of the allegations regarding asbestos reserves. Plaintiff alleges that the asbestos reserves were misleading, and Ms. Nettesheim claims to determine whether dates during the alleged class period were curative of this allegedly misleading information. According to Ms. Nettesheim, however, she does not have an understanding of how Halliburton's asbestos reserves were estimated, nor how the market perceived how the estimation was made.

> Q. Let me ask it this way: You understood, did you not, that throughout the class period, or at no time during the class period did Halliburton suggest to the marketplace that its current asbestos reserve was intended to apply to whatever future exposure the company had to asbestos, no matter how far down the road?
>
> A. As I said earlier, I don't have a specific -I didn't think of it in that way. [Nettesheim Deposition, pp. 115-116]
>
> Q. You don't recall seeing the company's description of the asbestos reserves and its methodology for it?

> A. I recall looking at it generally, but that wasn't something I was looking at specifically so I don't recall specifically what was said.
>
> . . .
>
> Q. And would you agree with me that all of the analysts who were following Halliburton whose reports you saw at least understood that Halliburton was reserving only for pending or open asbestos claims as opposed to whatever the future universe of asbestos claims may be?
>
> A. You would have to show me the specific analyst reports. [Nettesheim Deposition, pp. 116-117]

Without an understanding of what Plaintiff alleges the misrepresentations regarding the asbestos reserves are, what the asbestos reserves represented, and what the market believed the reserves represented, Ms. Nettesheim cannot reliably test whether an announcement about asbestos was a curative disclosure of the alleged misrepresentations regarding asbestos reserves.

2. The alleged curative disclosures are not curative of alleged misrepresentations regarding asbestos reserves

Plaintiff alleges that Halliburton misled investors about the adequacy of its reserves for pending asbestos claims.[59] Ms. Nettesheim provides no evidence or analysis to prove that any of the dates alleged as

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[59] Plaintiff's Motion (p. 6) quotes Halliburton's statements about reserves for pending claims.

partial curative disclosures in the Complaint or in her report are actually curative of Plaintiff's allegations regarding asbestos reserves. Ms. Nettesheim supports her claim of loss causation for the allegations regarding asbestos reserves by listing market commentary generally related to Halliburton's or Dresser's asbestos liability on or about the dates of significant price declines. She provides no evidence that the movement of Halliburton's stock price on those dates is caused by news about reserves for pending asbestos claims, as per Plaintiff's allegations.

Halliburton's reserves were calculated based on pending claims, and did not include estimates of future claims. According to Halliburton's 1999 Form 10-K:

> We have established a reserve estimating our liability for asbestos claims. Our estimate is based on our historical litigation experience, settlements and expected recoveries from insurance carriers . . . . At the end of 1999, there were about 107,650 open claims, including 19,000 for which settlements are pending. This compares with 70,500 open claims at the end of 1998. The accrued liabilities for these claims and corresponding receivables from carriers were as follows:
>
> [Table omitted]
>
> We recognize the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the expected resolution of asbestos related claims. However, based upon our historical experience with similar claims, the time elapsed since Dresser and its former divisions

> or subsidiaries discontinued sale of products containing asbestos, and our understanding of the facts and circumstances that gave rise to such claims, we believe that the pending asbestos claims will be resolved without material effect on our financial position or results of operations.

Ms. Nettesheim admits that in her mind it was sufficient that a news release was related to asbestos for her to claim that that news release was a partial curative disclosure.

> Q. So in your mind, this news release on June 28, 2001, was that a partial disclosure of , or is it, again, all of the company's prior statements about asbestos?
>
> A. It relates to the allegations regarding the under reserving of the asbestos reliability [sic].
>
> Q. How does it relate?
>
> A. It is talking about asbestos claims and the potential asbestos liability of Halliburton.
>
> Q. And that's a sufficient link in your mind?
>
> A. Yes. [Nettesheim Deposition, p. 124]

Ms. Nettesheim alleges seven partial curative disclosures of the alleged misstatements related to asbestos reserves, several of which are not referenced in the Complaint:

- June 29, 2001 (alleged in Complaint as June 28, 2001 and Nettesheim Report);
- August 9, 2001 (alleged in Nettesheim Report);
- October 31, 2001 (alleged in Nettesheim Report);

- November 1, 2001 (alleged in Nettesheim Report);
- December 4, 2001 (alleged in Nettesheim Report for the date and Complaint referencing the "beginning of December");
- December 5, 2004 (alleged in Nettesheim Report for the date and Complaint referencing the "beginning of December"); and
- December 7, 2001 (alleged in Complaint and Nettesheim Report).

According to Ms. Nettesheim, the information disclosed on each of these alleged curative disclosures was as follows:[60]

- June 29, 2001: "Halliburton announced that a former subsidiary of Dresser, Harbison-Walker ('Harbison'), had been requesting the Company's financial assistance with asbestos claims Harbison agreed to assume in 1992 after it was spun off from Dresser. Certain analysts expressed concern over the Company's potential exposure to asbestos liability."
- August 9, 2001: "Halliburton Filed Form 10-Q with the SEC, in which it increased its accrued net liability for known open asbestos claims to $124 million (from $30 million on March 31, 2001, and $29 million on Dec. 31, 2000). Certain analysts responded that the situation was now more complex and uncertainty was increased."
- October 31, 2001: "A jury in Mississippi found Dresser (through Harbison) liable in two of six asbestos cases for total compensatory damages

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[60]Nettesheim Report, ¶ 45.

of $21.3 million. One analyst was surprised by the size of the award."

- November 1, 2001: Ms. Nettesheim states that there is no company-specific news released on this day. She alleges that the price decline may reflect further concern related to the October 31, 2001 news.
- December 4, 2001: "A Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001. The same district court also entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs in the aggregate amount of $35.7 million related to an alleged breach of a purported settlement agreement."
- December 5, 2004: Ms. Nettesheim states that there is no company-specific news released on this day. She alleges that the price decline may reßect further concern related to the December 4, 2001 news.
- December 7, 2001: "A Maryland jury had awarded a $30 million verdict against Dresser in favor of five plaintiffs in an asbestos litigation. Several analysts issued reports that day in response; some downgraded ratings and lowered price targets citing mounting asbestos liabilities."

The information that Ms. Nettesheim alleges is released on each of these dates, although related to asbestos, is not curative of the alleged mis-representations, and Ms. Nettesheim provides no further link other than that the general topic of the announcement is asbestos.

For example, on June 28, 2001, the first alleged curative disclosure regarding the asbestos reserves allegations, Halliburton announced that Harbison-Walker had requested Halliburton's financial assistance with asbestos claims.[61] There is no allegation in the Complaint, or in Ms. Nettesheim's report or testimony, that Halliburton knew or should have known prior to June 28, 2001 that Harbison-Walker would request financial assistance from Halliburton for its asbestos claims. Ms. Nettesheim testified as follows:

> Q. Is it your testimony that sometime --that prior to June 28th, 2001, Halliburton at some point said that Harbison will never request or need our assistance on any of the asbestos claims they agreed to assume back in 1992?
>
> A. No, that's not my testimony.
>
> Q. Is it your testimony that this was -- this announcement, June 20th, 2001 [sic], was some announcement that Halliburton was required to make earlier than it did?
>
> A. No, that's not my testimony.
>
> Q. Is it your testimony that the request by Harbison for assistance on the asbestos claim that Harbison agreed to was something that should have been predicted by Halliburton and disclosed to the marketplace prior to June 28, 2001?

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[61] PR Newswire, June 28, 2001, 4:46PM, "Harbison-Walker Asks Halliburton for Assistance With Asbestos Claims."

A. It's not something I examined so it's not my testimony. [Nettesheim Deposition, pp. 123-124]

The August 9, 2001 alleged curative disclosure occurs on the date on which Halliburton tried its 2Q 2001 Form 10-Q with the SEC, which disclosed, among many other things, an increase in the number of asbestos claims pending and an increase in reserves. However, nearly all of this increase was due to the inclusion of the Harbison-Walker claims, which is not an inclusion that would have been known at the beginning of the alleged class period. Moreover, the actual claim experience in 2Q 2001 was an increase in filings from prior quarters. In 2Q 2001, approximately 28,000 claims were filed, versus approximately 18,000 claims filed in 1Q 2001, and versus an average of approximately 11,000 claims filed per quarter in 2000.[62] These 2Q 2001 claim filings were not in the estimated value of pending claims in prior periods and therefore their inclusion in the current reserve is not curative of the allegations that the value of prior pending claims was misleading.

The stock price declines on five of the alleged curative disclosure dates are all, according to Ms. Nettesheim, related to jury verdicts. These verdicts were considered surprising.

For example, on October 31, 2001, a jury in Lexington, Mississippi awarded compensatory damages of $150 million, a verdict that was unexpected.

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[62] See, Halliburton's Form 10-Q filed May 11, 2001, p.9 and Form 10-Q filed August 9, 2001, p.10.

According to A.G. Edwards:

> This jury award sets new precedents; the size of award is enormous and jury finding was based on shortness of breath and spots on the lung, not actual presence of asbestosis, a form of asbestos-related lung cancer . . . . Size of jury award was unexpected and is likely to have a negative impact on stock price tomorrow . . . . we believe that HAL's current stock price adequately discounts potential asbestos liability risk. [A.G. Edwards, October 31, 2001]

According to Salomon Smith Barney:

> We continue to monitor the situation closely and we recognize the unpredictability and apparent irrationality of the asbestos litigation environ-ment in general. [Salomon Smith Barney, October 31, 2001]

There is no evidence presented by Ms. Nettesheim or Plaintiff of how Halliburton could have foreseen these verdicts at the beginning of the alleged class period.

3. There is no consistency in Nettesheim's choice of curative disclosure dates used to test loss causation for the asbestos reserves allegations

Not only does Ms. Nettesheim use the wrong criteria for selecting alleged curative disclosures (choosing dates when some information related to asbestos is released, rather than dates on which information curative of the alleged misrepresentations is released), she does not even consistently apply her own misguided criteria. There are dates where information

related to asbestos is announced that Ms. Nettesheim does not consider curative disclosures. For example, on April 7, 2000 a Reuters News article stated:[63]

> Highlands Insurance Group Inc and a Texas unit have sued their former parent, Halliburton Co., demanding that Halliburton and its Brown & Root subsidiary cover "millions of dollars" in costs expected from 22,000 asbestos claims.

And on March 21, 2001, a Dow Jones News Service article stated:[64]

> Highlands Insurance Group Inc. (HIC) said a Delaware chancery court ruled in its favor in a case against Halliburton Co. (HAL) regarding fixed-cost insurance policies . . . . Highlands issued fixed premium, guaranteed cost insurance policies to Brown & Root, a unit of Halliburton. Since the mid-1990's, more than 20,000 third-party asbestos claims have been made against Halliburton, which alleged coverage under these policies, Highlands said.

B. Nettesheim fails to control for changes in the asbestos litigation environment

Ms. Nettesheim claims to have isolated the decline in Halliburton's stock price that is related to allegations regarding asbestos reserves. She claims to have done so by having performed an event study that uses a market index and an industry index. Yet, as

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[63] Reuters News, April 7, 2000, "Highlands Insurance sues Halliburton on asbestos claims."

[64] Dow Jones News Service, March 21, 2001, "Highlands Insurance Wins Judgment Vs Halliburton Co."

mentioned above in Section VII.C, she has done nothing to include in her index companies with similar asbestos exposure to Halliburton. In fact, nothing about her procedure for selecting companies involves considering a company's asbestos exposure at all. Ms. Nettesheim testified:

> Q. Did any of the companies in your index have any potential asbestos exposure?
>
> A. For these specific companies, I don't know.
>
> Q. That's not something that you or anybody on your team tried to ascertain?
>
> A. We relied on the indices, including them as comparables, and then analyst reports describing them as comparables. [Nettesheim Deposition, pp. 21-22]

Ms. Nettesheim has not properly parsed the effect of news related to the asbestos litigation environment in general from the effect of news specific to Halliburton's asbestos exposure.

C. The stock prices of other asbestos defendants reacted to Halliburton's alleged curative disclosure, indicating that the disclosure contained information other than about Plaintiff's allegations regarding asbestos reserves

Following the release of news of one of the verdicts against Halliburton, the stock prices of other asbestos defendants declined. This indicates that Halliburton's alleged curative disclosure contained information separate from Plaintiff's alleged misrepresentation about Halliburton's asbestos reserves.

According to a Reuters News article on December 10, 2001:[65]

> Asbestos litigation re-emerged as a s concern for investors last week after oilfield services giant Halliburton Co. said a jury slapped one of its units with $30 million in damages . . . [the verdict] spurred continued anxiety on Monday, driving down shares of a dispute group of other companies facing asbestos claims.

This Reuters News article mentions substantial stock price declines for various companies, including Sealed Air Corp., Georgia-Pacific Corp., Crown, Cork & Seal Co. and Viacom, Inc.[66] We similarly, found that the stock price of these companies fell. The chart below slows the stock price decline from Thursday, December 6, 2001, the day before the verdict was announced, until Monday, December 10, 2001.

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[65] Reuters News, December 10, 2001, "Anxious investors sell stock of asbestos defendants."

[66] Viacom's asbestos claims relate to unit of Westinghouse that Viacom inherited though its merger with CBS.

Price Decline of Other Asbestos Defendants Following Halliburton's Verdicts Announcement

	Date	Sealed Air	Georgia-Pacific	CBS/ Viacom	Crown Holdings
Thursday	12/6/2001	$23.45	$34.45	$37.36	$1.85
Friday	12/7/2001	21.15	29.65	35.52	1.85
Monday	12/10/2001	19.04	28.13	32.34	1.74
	Price Decline	**19%**	**18%**	**13%**	**6%**

Source: Data from FactSet Research Systems, Inc.

D. Alleged curative asbestos disclosures were unexpected news and increased uncertainty

The alleged curative disclosures, rather than being curative of the alleged misrepresentations, consisted of unexpected news; analysts commented on the size of the jury awards being unprecedented, unexpected and unusual.

> This jury award sets new precedents . . . [The] [s]ize of jury award was unexpected and is likely to have a negative impact on stock price tomorrow. [A.G. Edwards, October 31, 2001]

> However, Halliburton's past four asbestos trial court decisions/ settlements have been very unusual and significantly different than those experienced by Halliburton in the past. [CIBC World Markets, December 11, 2001]

E. On the day of one of the alleged curative disclosure, Moody's downgraded Halliburton for reasons separate from Plaintiff's allegations regarding asbestos reserves

On December 7, 2001, the date of one of Ms. Nettesheim's alleged disclosures regarding asbestos reserves, Moody's, a ratings agency, downgraded Halliburton's credit rating outlook. The reasons provided by Moody's for the downgrade were unrelated to Plaintiff's allegations. In particular, Moody's stated that the downgrade reflected concerns over uncertainty about the future of asbestos claims, and the inconsistencies in the size of judgments.

> Moody's confirmed the A1 senior unsecured debt ratings of Halliburton Company and changed the rating outlook from stable to

> negative. The change in rating outlook is in response to a series of recent adverse asbestos-related judgments [sic] against Halliburton and other plaintiffs [sic] and **reflects Moody's concerns about the uncertainty of future asbestos claims, the adequacy of U.S. tort laws to deal with such claims, and the inconsistency in the size of the judgments** [sic]. In addition, Moody's believes recent bankruptcy filings have reduced the number of companies that law firms active in asbestos litigation can target, which could make law firms more aggressive in looking for plaintiffs against companies. [Moody's Investor Service Press Release, December 7, 2001]

Moody's downgrade of Halliburton's credit rating outlook is separate from Plaintiff's allegations regarding asbestos reserves. Ms. Nettesheim's analysis fails to account for the effect of this confounding news.

XI. THERE IS NO EVIDENCE IN NETTESHEIM'S EVENT STUDY THAT THE ALLEGED MISSTATEMENTS INFLATED HALLIBURTON'S STOCK PRICE

Plaintiff alleges that Halliburton made "a series of false and misleading statements that misrepresented the condition and success of Halliburton's business"[67] and that this resulted in "artificial inflation in Halliburton's stock price . . . during the Class Period."[68] We reviewed the Complaint for all dates

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[67] Complaint, ¶ 2.

[68] Complaint, ¶ 3.

during the alleged class period on which Plaintiff alleges that misstatements were made and thereby allegedly inflated Halliburton's stock price.

We then reviewed Ms. Nettesheim's analysis to determine whether, according to her analysis, the alleged misstatement resulted in a statistically significant increase in Halliburton's stock price. As detailed in the table below, we find that, according to Ms. Nettesheim's event study analysis, on only two of 22 dates of alleged misstatements in the Complaint was there a statistically significant stock price increase.

Date	Alleged Misstatement in the Complaint	Alleged Relevant Allegations	Statistically Significant Price Increase According to Nettesheim
7/22/1999	Halliburton reported its 2ndQ 99 results . . . Although these results continued to reflect adverse industry conditions, again the results were better than expected, which Cheney and Lesar told analysts was due to their superior management of Halliburton... [¶109]	All allegations	No
8/13/1999	Halliburton filed its 2Q 9910-Q . . . 'In our opinion, the condensed consolidated financial statements present fairly our financial position as of June 30, 1999 . . . [W]e continue to believe that provisions recorded are adequate to cover the estimated loss from asbestosis litigation.' [¶112,¶113]	All allegations	No

9/13/1999	Lesar said . . . : 'Management originally targeted cost savings and related synergies from the Dresser merger totaling $250 million per annum, but following further headcount reductions and significant facility consolidations, the company is now projecting annual benefits of $500 million.' [¶115]	All allegations	No
10/21/1999	Halliburton reported its 3rdQ 99 results: '. . . Reduced worldwide spending by energy industry customers, which accounted for approximately 85 percent of Halliburton's 1998 revenues, was the principal factor in reduced . . . income.' [117]	All allegations	No
11/15/1999	Halliburton filed its 3Q 99 10-Q . . . '[T]he condensed consolidated financial statements present fairly our financial position as of September 30, 1999 . . . [W]e	All allegations	No

	continue to believe that provisions recorded are adequate to cover the estimated loss from asbestosis litigation. [¶118, ¶119]		
1/27/2000	Halliburton issued a release reporting its 4thQ99 and full year results . . . "Halliburton's . . . extensive worldwide operational infrastructure, . . . position[s] it well for 2000 and beyond," said Dick Cheney. [¶120]	All allegations	No
3/14/2000	Halliburton issued its 99 Annual Report . . . The report contained a letter from Cheney which stated: 'The merger with Dresser Industries is now behind us. Integrating the operations of the two companies . . . [has] been an important part of our transition to the future . . . The potential rewards to our shareholders are vast.' . . . [T]he 99 Annual Report . . . stated: '[W]e believe that the pending	All allegations	No

	asbestos claims will be resolved without material effect on our financial position or results of operations.' [¶122, ¶126]		
4/26/2000	Halliburton reported its 1stQ 00 results . . . The following was stated: 'Cheney: . . . We see our stock as one of the best investment opportunities in the oil service industry . . . . [I]n the short-term, (Halliburton's construction operations) will continue to generate good profits as they work off existing projects. Now is a great time to be a Halliburton shareholder . . .' [129]	All allegations	No
5/15/2000	Halliburton filed its 1stQ 00 10-Q . . . The 10-Q contained the same financial information as in Halliburton's 4/26/00 release . . . [T]he 10-Q . . . stated: '[W]e believe that the pending asbestos claims will be resolved without material effect on our financial position or results of	All allegations	No

	operations . . . [T]he condensed consolidated financial statements present fairly our financial position as of March 31, 2000 . . . ' [130]		
7/26/2000	Halliburton held a conference call . . . During the call . . . 'Cheney: . . . I have got every confidence that Halliburton has a very bright future ahead of it. I think we have done a good deal over the last several years to strengthen the company .... Lesar: . . . Clearly, Halliburton is well positioned . . . [132]	All allegations	No
8/10/2000	Halliburton filed its 2ndQ00 10-Q . . . The 10-Q ... represented: ' . . . the condensed consolidated financial statements present fairly our financial position as of September 30, 2000'. . . [T]he 10-Q . . . stated, "we believe that the pending asbestos claims will be resolved without material effect on our financial	All allegations	No

	position or results of operations." On 9/6/00, Halliburton stock reached its Class Period high of $55.18 per share. [139]		
11/9/2000	Halliburton filed its 3rdQ00 10-Q . . . (The Asbestos 3rdQ00 10-Q . . . represented: "[W]e believe that the pending asbestos claims will be resolved without material effect on our financial position or results of operations."[¶148]	Asbestos reserves	No
1/30/2001	Halliburton issued a release regarding its 4thQ00 results, . . . increasing the $120 million loss charge announced on 12/21/00 by $73 million to $193 million with $157 million being attributed to project losses. As a result, Halliburton suffered a 4thQ00 loss of $21 million. [¶155]	Asbestos reserves	No
3/27/2001	Halliburton issued its 00 Annual Report . . . [T]he 00 Annual Report . . . stated: '[W]e believe that the pending asbestos claims will be resolved without material	Asbestos reserves	No

	effect on our financial position or results of operations.' [¶158, ¶160]		
4/25/2001	Halliburton reported very strong 1stQ 01 results . . . Lesar stated: . . ., A few highlights from the ESG for the quarter include a 43% year over year growth in for the group, operating income, which quadrupled year over year for the Energy Services Group, the highest we have seen since we have the merger with Dresser.' [¶161, ¶162]	Asbestos reserves	Yes
5/11/2001	Halliburton filed its 1stQ01 10-Q . . . [T]he 1stQ 01 10-Q . . . again assured 'that the open asbestos claims asserted against us will be resolved without a material adverse effect on our financial position or results of operations. [¶166]	Asbestos reserves	No
6/28/2001	Halliburton, for the first time, disclosed that a former Dresser subsidiary had asked for asbestos claims management	Asbestos reserves	No

	and financial assistance from Halliburton. [¶170]		
7/25/2001	Halliburton held a conference call for analysts and money managers . . . : 'Lesar: . . . Based on our analysis of Harbison's claims at this point in time and our concern that they may not be able to perform under their obligations, however, we thought it was prudent to accrue $60 million after-tax against the gain on the discontinued operations which, we believe, in our best judgment, is the potential exposure we have for this asbestos litigation . . .' [¶175]	Asbestos reserves	Yes
8/9/2001	Halliburton filed its 2ndQ 01 10-Q . . . The 10-Q repeated Halliburton's earlier reported 2ndQ 01 financial results and also stated . . . that Halliburton had an accrued liability of $124 million and that the known open asbestos claims	Asbestos reserves	No

	asserted against us will be resolved without a material adverse effect on our financial position or results of operations.' [¶178]		
10/4/2001	Foshee spoke at a Deutsche Banc Alex. Brown seminar for analysts and specifically discussed the asbestos situation, but did not disclose the recent huge verdict. [¶183]	Asbestos reserves	No
10/23/2001	Halliburton held a conference call for analysts and money managers, conducted by Lesar and Foshee, Halliburton' s new CFO: `Foshee: . . . There really is not any, anything new to report on Harbison-Walker other than the fact that that new claims, during the quarter naming Dresser as a defendant, were only 1,300. Beyond that, we just don't have enough information yet to start to put detailed numbers together . . . on-things like the	Asbestos reserves	No

	total settlement cost.' . . . 'Lesar: But, I think it's fair to say that there have been no adverse developments at all with respect to the Harbison-Walker situation [O]ur settlement rate continues to be at historical levels . . . . And . . . we keep getting paid by our insurers for those that we do settle. And I think those are three early positive data points that people need to start puffing into their thinking . . . ., [¶185]		
11/8/2001	Halliburton filed its 3rdQ 01 10-Q . . . [T]he 10-Q reported an accrued liability of $125 million and stated: [W]e believe that open asbestos claims will be resolved without a material adverse effect on our financial position or the results of operations.' [¶189]	Asbestos reserves	No

On 20 of the 22 alleged missstatement dates in the Complaint, Ms. Nettesheim's event study results are not consistent with an increase in alleged inflation in Halliburton's stock price. April 26, 2001 and July 26, 2001, the only dates of statistically significant price increases, are also not consistent with alleged inflation entering Halliburton's stock price.

Plaintiff only alleged misstatements regarding asbestos reserves on these two dates. And from these dates on, through the rest of the alleged class period there are no further alleged misstatements or curative disclosures regarding the integration of Dresser and unapproved claims allegations. Therefore, logically, the only allegation that could allegedly inflate the stock price on these dates relates to asbestos reserves. Yet neither of these dates are consistent with a claim of inflation regarding asbestos reserves. On April 25, 2001 we cannot find any news about asbestos at all. On July 26, 2001, Halliburton announced an increase in its asbestos reserves, which, according to Plaintiff's theory, should have lowered Halliburton's stock price, and therefore not the cause of alleged inflation. The likely explanation for the increase in the stock price on both of these dates is positive earnings announcements.[69] The positive earnings announcements cannot be linked to loss causation because there are no subsequent alleged curative disclosures related to any of the allegations other than those regarding asbestos reserves.

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[69] On April 25, 2001, Halliburton issued a press release: "Halliburton Company First Quarter Earnings Increase 219 Percent -Energy Services Group Operating Income Quadruples." On July 25, 2001, Halliburton issued a press release: "Halliburton Company Second Quarter Revenues and Earnings Continue to Soar."

XII. IF NETTESHEIM'S METHODOLOGY IS APPLIED TO A PEER OF HALLIBURTON, IT ILLOGICALLY APPEARS TO YIELD LOSS CAUSATION FOR THE PEER

As further evidence that Ms. Nettesheim's methodology is unreliable, when her methodology is applied to a company different from Halliburton, her methodology appears to yield loss causation for that company as well. As an example, we applied Ms. Nettesheim's methodology to one of Halliburton's peers: McDermott International, Inc. ("McDermott").

We performed the same steps used by Ms. Nettesheim in her analysis of loss causation to McDermott.

Step 1: **An event study test of the statistical significance** of McDermott's stock price movement on each day during the alleged class period (in this matter): we used the same control period and the same market and industry indexes, only replacing McDermott with Halliburton in the industry index, and, like Ms. Nettesheim, tested the statistical significance on each day during the alleged class period. For Halliburton, Ms. Nettesheim found 31 dates during the alleged class period with statistically significant price movements; for McDermott, we found 97 dates with statistically significant price movements. Note that McDermott had more than three times as many statistically significant price movement dates during the alleged class period as Halliburton, which is more than would be expected given the normal daily movement over the control period.

Step 2: **A review of the news** on each statistically significant day. Ms. Nettesheim's methodology is to

simply look for any "information about the engineering and construction business" to justify designating her statistically significant price decline days as curative disclosure days.[70] If we apply Ms. Nettesheim's methodology to McDermott, which is listed as being part of her industry index in Exhibit 16 to her report, we can similarly "justify" loss causation for a number of negative announcements relating to that company. We searched for news announced about one of McDermott's major business units, the Marine Construction Services unit ("Marine Construction"). McDermott's Marine Construction unit parallels some of the functions of Halliburton's E&C unit.[71]

Step 3: **A determination of loss causation** - if the news on a day of a statistically significant negative reaction was related to the "allegations." We found that there are multiple instances of negative news announcements regarding Marine Construction

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[70] For example, she testified as follows regarding her conclusion that December 22, 2000 was a curative disclosure of the allegations related to unapproved claims and the integration of Dresser: "I mean, generally, it contains information about the engineering and construction business. And it gives you some information about that business." [Nettesheim Deposition, p. 126

[71] Halliburton's Form 10-K filed on March 27, 2001 states: "Brown & Root Energy Services provides worldwide engineering and construction services . . . The offshore group integrates capabilities required to plan, engineer, construct, and operate offshore production facilities...Capabilities include the engineering, procurement, and construction of offshore drilling and production platforms. . ."

McDermott's Form 10-K405 filed March 27, 2001 states: "Marine Construction Services. . . This segment's principal activities include the design, engineering, fabrication and installation of offshore drilling and production platforms and other specialized structures ... and procurement activities." [p. 5]

during the alleged class period which had statistically significant negative price reactions according to Ms. Nettesheim's methodology.

There are two tables below. The first table presents Ms. Nettesheim's loss causation results for Halliburton, while the second table presents the application of Ms. Nettesheim's loss causation methodology to McDermott. For Halliburton, the methodology yielded four curative disclosures "proving" loss causation; for McDermott, the methodology yielded five curative disclosures "proving" loss causation.

The following is an excerpt from the Nettesheim Report for her four alleged curative disclosures relating to Halliburton's E&C business.[72]

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[72] Nettesheim Report, ¶45.

Results of Nettersheim Loss Causation Analysis for Halliburton			
Date	**Actual Return**	**Company-Specific Return**	**News**
10/5/1999	-13.2%	-9.0%	The Company warned that it expected its 1999 third-quarter earnings to be in the range of 11 to 13 cents per diluted share. The previous average analyst estimates was 19 cents per share. The Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures of its engineering construction units and many of the other business units of the Dresser Equipment Group.
1/5/2000	-4.4%	-4.3%	Analysts cut their estimates of Halliburton's earnings for 2000 and 2001 following a conversation with the company.
10/25/2000	-11.0%	-6.6%	Halliburton announced that it intended to restructure and shrink its engineering and construction units into a single unit, which prompted certain analysts to cut earnings forecasts.

Results of Nettersheim Loss Causation Analysis for Halliburton			
Date	**Actual Return**	**Company-Specific Return**	**News**
12/22/2000	-2.7%	-3.9%	On December 21, Halliburton pre-announced fourth-quarter earnings and formally unveiled the restructuring of its engineering and construction units and stated that it planned to take a charge of $120 million in the fourth quarter, the bulk of which was due to cost overruns at several overseas projects. On December 22, the overall market was up more than 3.0% such that this was as statistically significant decline.

Similarly, we present a table for McDermott of selected dates with statistically significant price declines listing actual returns, company specific returns, and descriptions of negative news relating to Marine Construction.

Results of Nettesheim Loss Causation Analysis as Applied to McDermott			
Date	**Actual Return**	**Company-Specific Return**	**News**
11/11/1999	-26.7%	-25.0%	The Company released its 1999 second quarter earnings, an Associated Press article stated:[73] "Second-quarter earnings at McDermott International Inc., an energy services company, fell sharply because of a fall in demand for offshore petroleum construction services, the company reported . . . the market for marine construction services probably will not begin to recover before the first quarter of the 2000-2001 fiscal year."

[73] Associated Press Newswires, November 11, 1999, "Slowdown in offshore activity cuts earnings sharply."

Results of Nettesheim Loss Causation Analysis as Applied to McDermott			
Date	**Actual Return**	**Company-Specific Return**	**News**
11/12/1999	-36.4%	-39.6%	Represents further concern about prior day's earnings announcement. An article from Reuters News stated:[74] "Shares of engineering and construction company McDermott International Inc. fell sharply for the second straight day on Friday following the company's report of disappointing quarterly earnings. . . McDermott said the decline in earnings was most marked at its Marine Construction business . . ."

[74] Reuters News, November 12, 1999, "McDermott shares fall sharply."

Results of Nettesheim Loss Causation Analysis as Applied to McDermott			
Date	**Actual Return**	**Company-Specific Return**	**News**
2/22/2000	-11.6%	-10.2%	The Company released its 1999-third quarter earnings, an Associated Press article stated:[75] McDermott lost $23.3 million, or 39 cents per share . . . Analysts surveyed by First Call-Thomson Financial had forecast third-quarter earnings of 17 cents per share . . . McDermott said the reduced revenue primarily came from J. Ray McDermott, its marine construction services unit"

[75] Associated Press Newswires, February 22, 2000, "third-quarter earnings take nosedive."

Results of Nettesheim Loss Causation Analysis as Applied to McDermott			
Date	**Actual Return**	**Company-Specific Return**	**News**
8/2/2000	-6.3%	-7.5%	The Company released its 2000 second-quarter earnings, an Associated Press article stated:[76] "McDermott lost $10 million, or 17 cents per share . . . Analysts surveyed by First Call-Thompson Financial had forecast a second-quarter profit of 6 cents per share . . . McDermott has been suffering losses in its marine construction division."

[76] Associated Press Newswires, August 2, 2000, "Second-quarter loss, new chief executive officer."

Results of Nettesheim Loss Causation Analysis as Applied to McDermott			
Date	**Actual Return**	**Company-Specific Return**	**News**
2/23/2001	-15.6%	-14.1%	The Company released its 2000 fourth-quarter earnings, a Business Wire article stated:[77] "McDermott International Inc. (NSE" MDR), today reported a net loss of $25.5 million, or $0.42 a diluted share, for the fourth quarter of 2000" and a Dow Jones News Service article stated:[78] "Warning of continued low marine construction volume, McDermott said its first quarter earnings are likely to be below the breakeven level that analysts are currently expecting."

[77] Business Wire, February 23, 2001, "McDermott International Reports Fourth Quarter and Year-End Earnings for December 2000."

[78] Dow Jones News Service, February 23, 2001, "McDermott International 4Q Losses 42c/Shr On Chgs Vs 39c."

The fact that Ms. Nettesheim's methodology yields loss causation when applied to another company is further evidence of the method's unreliability. Based on Ms. Nettesheim's methodology for testing loss causation, one could conclude loss causation for McDermott, including, for example, for allegations regarding unapproved claims. (While the McDermott disclosures above do not mention unapproved claims, neither did the Halliburton disclosures that Ms. Nettesheim claims were curative.) Such a conclusion is clearly unreasonable given that there are no allegations that McDermott made any misrepresentations regarding unapproved claims. A test is not reliable if, regardless of the underlying condition under study, it yields a positive result.

XIII. SUMMARY

Ms. Nettesheim has not proven loss causation. The Nettesheim Report does not show a causal link between any of the alleged misstatements and Plaintiff's alleged economic loss. The event study used to test loss causation is methodologically flawed. It is based on tests of statistical significance that are invalid and do not produce reliable or robust results.

Ms. Nettesheim has no systematic or reliable method of identifying curative disclosures and testing loss causation. There is non-culpable news released on the dates of her alleged curative disclosures, and she performs no analysis to determine whether Halliburton's stock price decline on the dates of her alleged curative disclosures is due to non-culpable news.

To analyze loss causation, an understanding of the specific alleged misrepresentations and a proper linking to an actual curative disclosure of the alleged

misrepresentations is necessary. In addition, one would need to, at a minimum, parse out the effect of other potentially confounding news that is released to the market at the same time.

Not only does Ms. Nettesheim's analysis not support the finding of loss causation, the evidence presented in her report indicates the contrary:

- According to her event study, there is no significant stock price increase that can be attributed to any of the alleged misstatements.
- The total number of statistically significant price reactions during the alleged class period is no more than expected given the normal daily variation of the stock price.
- Her results are not robust to small changes in the methodology, e.g., if the control period changes, most of the alleged curative disclosures are no longer statistically significant.
- On the only curative disclosure actually linked to an alleged misrepresentation (the disclosure of the accounting for unapproved claims in the 1999 Form 10-K), there is no statistically significant price reaction.

/s/_____

Lucy P. Allen

SUPPLEMENTAL APPENDIX

EXCERPTS FROM APPENDIX TO DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION DATED NOVEMBER 16, 2007:

Exhibit 11 ..... SA454

Exhibit 12 ..... SA464

Exhibit 13 ..... SA467

Exhibit 14 ..... SA471

Exhibit 15 ..... SA475

Exhibit 16 ..... SA478

Exhibit 17 ..... SA482

LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of itself and All Others Similarly Situated,
Lead Plaintiff,

v.

HALLIBURTON COMPANY, et al.,
Defendants.

LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION

Respectfully submitted,

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Additional counsel appear on signature page

[Tables Intentionally Omitted]

As demonstrated in Plaintiff's Motion for Class Certification, Plaintiff has established each of the requisites for class certification. Plaintiff Archdiocese of Milwaukee Supporting Fund ("AMS Fund or Plaintiff") has shown that it, along with Col. Ben Allen Murphey ("Col. Murphey"), are adequate class representatives whose claims are typical of the class. Moreover, Plaintiff has made the requisite showing of market efficiency (which Defendants do not dispute) and loss causation, and thus is entitled to prevail upon the fraud-on-the-market theory for purposes of class certification.

I. PLAINTIFF HAS SATISFIED THE REQUIREMENT OF RULE 23(b)(2).

Defendants do not dispute that Plaintiff has satisfied the numerosity, commonality, and adequacy of counsel requirements of Rule 23(b)(2), and have focused instead on the typicality and adequacy of AMS Fund and Col. Murphey. Defendants' attacks are without merit, and the Court should certify both AMS Fund and Col. Murphey as representatives of the class.

A. AMS Fund Is an Adequate Class Representative Whose Claims Are Typical of the Class.

In attacking the adequacy and typicality of AMS Fund, Defendants argue that AMS Fund's delegation of its investment decisions to a money manager and the fact that an officer other than Paula John appeared for the 30(b)(6) deposition make the AMS Fund an atypical and/or inadequate Class Representative. In support of the first attack, Defendants cite two district court cases from the Seventh Circuit that are not even followed in their own circuit. For the latter argument, they cite no authority at all.

1. The Delegation of Investment Decisions Does Not Make AMS Fund Atypical or Inadequate

Defendants cite *Fry v. UAL Corp.*, 136 F.R.D. 626 (N.D. Ill. 1991), and *In re Caremark International, Inc. Securities Litigation*, No. 94 C 4751, 1996 WL 351182, at *6 (N.D. Ill. June 24, 1996) for the proposition that "a certain minimal level of participation by the plaintiff in the relevant stock transaction must be demonstrated." *Id.* at 635. Relying solely on *Fry* and *Caremark*, Defendants argue that AMS Fund is not adequate or typical because it was AMS Fund's money manager who made the decision to purchase the Halliburton stock. However, neither *Fry* nor *Caremark* is followed in its own circuit, let alone other circuits, and should not be followed here. For example, the court in *In re Neopharm, Inc. Securities Litigation*, 225 F.R.D. 563 (N.D. Ill. 2004), stated that, "to the extent *Caremark* can be read to hold that those who rely on others to make investment decisions are unfit to serve as class representatives, this court would disagree." *Id.* at 567.[1] *Neopharm* went on to recognize that institutional investors such as AMS Fund, are exactly the type of class representative ***Congress intended*** to oversee securities actions under the PSLRA. *Neopharm*, 225 F.R.D. at 567 (*quoting In re Cendant Corp. Litig.*, 264 F.3d 201, 243-44 (3d Cir. 2001)).[2]

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[1] *See also, Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 1999 WL 543209, at *6 (N.D. Ill. July 23, 1999).

[2] Courts in other circuits have also declined to adopt *Fry* and *Caremark*, instead holding, like *Neopharm*, that institutional investors who delegate investment decisions not only meet the adequacy and typicality requirements, but are precisely the type of representatives envisioned by the PSLRA. *In re Vicuron Pharm., Inc. Sec. Litig.*, 233 F.R.D. 421, 429 (E.D. Pa. 2006).

Defendants cite no other cases from any circuit that have followed *Fry* or *Caremark*, and this Court should not be the first.

2. AMS Fund's Designation of An Officer Other Than the CEO As Its Corporate Representative Does Not Render AMS Fund Inadequate.

Defendants argue that AMS Fund is not an adequate representative, because the absence of AMS Fund's CEO, Paula John, from the Rule 30(b)(6) deposition means that AMS Fund's counsel is actually directing the litigation. This leap of logic aside, Defendants cite no case for the proposition that a specific corporate officer must attend the Rule 30(b)(6) deposition in order to be adequate. The law is to the contrary.

Courts have, with virtual uniformity, found that the adequacy requirement is met even if an individual other than the top executive attends the Rule 30(b)(6) deposition, even if that individual has a more limited knowledge of the litigation. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 287 (S.D.N.Y. 2003). Patrick Byrne, who serves as Vice President, CFO and Treasurer of AMS Fund (Deposition of Patrick Byrne, "Byrne Dep. 17:11- 18:24, Pl. App. at 081-088), is a senior officer of Plaintiff and has sufficient knowledge of the litigation to serve as an adequate corporate representative for a Rule 30(b)(6) deposition, and Defendants have not challenged the adequacy of his deposition responses.

As discussed in Plaintiffs' Motion, AMS Fund's claims are typical of those of the class and it will adequately protect the interests of absent class members. *See Berger v. Compaq Computer Corp.*, 257

F.3d 475, 482 (5th Cir. 2001).[3] Accordingly, AMS Fund should be certified as a class representative.

B. Col. Murphey Is an Adequate Class Representative Whose Claims Are Typical of the Class.

Defendants' sole attack on the adequacy and typicality of Col. Murphey as a class representative is the timing and frequency of his trades of Halliburton stock. However, even if this Court accepts Defendants' characterization of Col. Murphey as a "day trader," this does not preclude a finding that he satisfies the typicality requirement.[4] Multiple courts have found that "day traders" satisfy Rule 23's typicality requirements because "where false information and misleading omissions pollute the market, all types of investors are injured." *In re Royal Ahold N.V. Securities and ERISA Litigation*, 219 F.R.D. 343, 354 (D. Md. 2003).[5]

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[3] As this Court has previously recognized, AMS Fund has played an active role in and controlled this litigation; has zealously represented the class when Defendants offered an inadequate settlement, objected to its approval, and worked with counsel to defeat it; and when former lead counsel attempted to exert control over the litigation to the exclusion of the AMS Fund, Lead Plaintiff successfully sought to have that counsel replaced. Byrne Dep. at 81:1-24, Pl. App. at 089. Finally, AMS Fund remains in frequent contact with current Lead Counsel, and is actively consulted on the strategy and prosecution of this matter. As this Court has previously found, AMS Fund satisfies all the elements set forth in the *Berger* decision.

[4] Col. Murphey does not fit the description of a "day trader" provided by other courts. Col. Murphey did not make dozens of trades in a single day, or close out his positions at the end of each day, and he certainly was not trying to make a career out of buying and selling stock. *Taubenfeld v. Career Educ. Corp.*, No. 03 C 8884, 2004 WL 554810, at *3 (N.D. Ill. Mar. 19, 2004).

[5] See also *Aviva Partners, LLC v. Navarre Corp.*, No. Civ. 05-1151 PAMRLE [MDL], 2005 WL 3782255, at *3 (D. Minn. Dec.

That Col. Murphey profited from some of his trades of Halliburton stock does not make him atypical, as he also retained a large block of shares at the end of the class period that he previously purchased at near class period highs. That the value of those shares is greater today than at the purchase date is irrelevant since Col. Murphey's losses must be measured during the class period and not by the current price of Halliburton stock. *See Ong ex rel. Ong v. Sears, Roebuck & Co.*, 459 F. Supp. 2d 729, 751 (N.D. Ill. 2006). Col. Murphey purchased Halliburton stock ***after*** the Defendants made material misrepresentations that artificially inflated the stock price, and he suffered losses when the falsity of those statements was revealed. *See also* § II.A.1. below. Accordingly, his claims are typical of those of the class.

Col. Murphey is an adequate lead plaintiff under *Berger,* and his knowledge of and control over this litigation are exactly what one would expect from a non-lawyer class representative. *See Berger,* 257 F.3d at 482.[6] Accordingly, Col. Murphey should be certified as a class representative.

13, 2005) (proposed lead plaintiff was not atypical due to her status as a day trader).

[6] Col. Murphey testified that both before and after he purchased Halliburton stock, he was an active researcher of Halliburton stock who relied on publicly available information and company statements to guide his investments in the Company. Murphey Dep. at 55:2-56:10; 94:11-95:2, Pl. App. 080-081.01. He testified that he understands the reasons for this litigation (37:21-25, Pl. App. 077); has a general understanding of the allegations (44:8-20, 123:10-128:25, Pl. App. 079, 083, 084); that it was his decision to sue Halliburton (62:5-63:6, Pl. App. 081); and that he thoroughly reviews all the documents and filings that are part of this case (39:2-13, 117:3-122:6, Pl. App. 078, 082.01). Finally, Col. Murphey's testimony clearly shows that he

II. LEAD PLAINTIFF HAS SATISFIED THE REQUIREMENTS OF RULE 23(b)(3)

Certification under Rule 23(b)(3) requires a plaintiff to establish that issues common to the class will predominate over issues affecting any individual class member, and that a class action is superior to other available methods of adjudication. Defendants do not challenge that the class action mechanism is the superior vehicle for resolving the securities fraud claims alleged by Plaintiff in the Complaint. Defendants' sole challenge is that Plaintiff has failed to establish entitlement to rely on the fraud-on-the-market presumption, and therefore, that individual issues of reliance will predominate. Defendants are wrong.[7]

A. Defendants Overstate Plaintiffs' Class Certification Burden.

Pursuant to the Fifth Circuit's recent decision in *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261 (5th Cir. 2007), and as discussed in *Ryan v.*

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will zealously represent the interests of the class. When asked hat being a class representative meant to him, he responded: "Well, I hope to be the eyes, ears, and mouth for those that aren't here, and be or take as much information as I can and interpret it or those that aren't here and do the best I can for them." (131:24-132:4, Pl. App. 084.01).

[7] Defendant David J. Lesar ("Lesar") cites no authority for his position that the class cannot be certified against him under these circumstances. Indeed, the authority is to the contrary. Courts in this circuit routinely certify securities fraud class actions against corporations and their officers collectively. *See e.g., Feder v. Elec. Data Syst. Corp.*, 429 F.3d 125 (5th Cir. 2005) (affirming certification of class action by securities purchaser against corporation and its former CEO and CFO). Moreover, as shown below, the relevant misrepresentations were either authorized by Lesar, or made directly by him.

Flowserve Corp., 245 F.R.D. 560 (N.D. Tex. 2007), in order to prevail upon the fraud-on-the-market presumption, a Plaintiff must now establish loss causation.[8] While *Allegiance* raised the bar for class certification, it does not raise it to the extent that Defendants suggest.

1. The Impact of Defendants' Fraud Is Demonstrated Through Showing a Material Price Decline Following Partial Disclosure of the Fraud.

Defendants argue that to show loss causation Plaintiff must show a statistically significant price increase following a misrepresentation.[9] However, both *Greenberg v. Crossroad Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004), and *Allegiance* are clear that to

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[8] Defendants' Response does not dispute that the stock of Halliburton trades on an efficient market. An efficient market is by definition one in which "it is assumed that all public information concerning a company is known to the market and reflected in the market price of the Company's stock." *Greenberg Crossroads Systems, Inc.*, 364 F.3d 657, 661, n.6 (5th Cir. 2004) (*citing Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975)).

[9] For instance, Defendants state:

> "AMS [Fund's] own expert, however, affirmatively disproved the most basic element of securities fraud – inflation of the stock price. For example, she could not identify any instances before April 2001 when Halliburton's stock price increase in connection with a Company announcement in a way significantly different from an index of similar companies."

Def.'s Resp. at 4. *See also*, Def.'s Resp. at 11, (plaintiff failed to prove loss causation because it did not show that Halliburton statements had a positive impact on Halliburton's stock price); Def.'s Resp. at 12, ("to show loss causation plaintiffs must show an increase in stock price immediately following the release of positive information.").

show price inflation due to a misrepresentation, it is not necessary to show a statistically significant increase in the stock price in response to the false statement. Rather, *Greenberg*, relying on *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 414, (5th Cir. 2001), specifically noted that to show that the misrepresentations or omissions affected the stock price, a plaintiff can show **either** an increase in price following the allegedly false statement ***or*** "a corresponding decrease in price following the revelation of the misleading nature of these statements." *Id.* at 665. In *Allegiance,* the Fifth Circuit advanced the timing of the requirement to show loss causation from the summary judgment stage to the class certification stage, but reiterated that loss causation can be established by showing a decline in the stock price after disclosure of the truth. *Allegiance,* 487 F.3d at 266. Plaintiff has satisfied this burden.[10]

2. Defendants' Fraud Is Demonstrated by Relating the Alleged Fraud to the Corrective Disclosures.

Relying on *Greenberg* and *Flowserve*, Defendants argue that in order to establish loss causation on a price decline, a plaintiff must specifically "pinpoint" "particular statements" that a disclosure corrected. Def.'s Resp. at 14. However, these decisions are clear that the corrective disclosure need only be "related" to the alleged fraud:

> To raise an inference through a decline in stock price that an earlier false, positive statement actually affected a stock's price, the plaintiffs

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[10] Attached at Plaintiff's Appendix at __ - __ are summaries of Defendants' misrepresentations, the partial disclosures and the resulting impact on Halliburton's stock price.

> must show that the false statement causing the increase was ***related*** to the statement causing the decrease.

Greenberg, 364 F.3d at 665; *see also, Flowserve,* 245 F.R.D. at 569. In other words, the decline must be related to "the tenets of plaintiffs' alleged fraud." *Flowserve,* 245 F.R.D. at 572. Plaintiff has satisfied this standard. Plaintiff's expert, Jane Nettesheim, testified that she read the Complaint and identified the alleged misrepresentations and omissions, and clearly "related" each of the corrective disclosure "to the tenets of Plaintiff's alleged fraud."

3. Plaintiffs' Evidence Complies With the Requirements of the Fifth Circuit.

Defendants take an overly restrictive view of the evidence that *Allegiance* permits a plaintiff to use to show loss causation. The *Allegiance* court noted that such proof could come in the form of an event study, and explicitly left open the possibility of other "options, subject to scrutiny in the first instance by opposing experts and the district courts." *Allegianc,* 487 F.3d at 265, n.22. This holding is consistent with *Greenberg*'s recognition that in some circumstances, even when both culpable and non-culpable disclosures are present, it is sufficiently evident that the stock was driven down by the culpable disclosure such that no empirical analysis is required at all. *Greenberg,* 364 F.3d at 668-69. In addition, *Allegiance* suggested that analysts' opinions may be sufficient evidence of the cause of a stock decline when their underlying data is also analyzed.[12] *Allegiance,* 487 F.3d at 271.

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[12] Specifically, the *Greenberg* court held: "We do not insist upon event studies to establish loss causation, helpful though they may be. We hold only that the opinion of these analysts

Here, where there was both culpable and non-culpable news, Ms. Nettesheim did not just rely on analyst's conclusions to allocate the cause of a decline, but also reviewed their models and underlying data, and conducted the "post-mortem" that the *Allegiance* court suggested could be sufficient. Nettesheim Rep. ¶ 81.

4. Loss Causation Need Only Be Established By a Preponderance of the Evidence, Not Beyond a Reasonable Doubt.

Defendants make unsubstantiated factual assertions, with the apparent implication that Plaintiff must disprove these facts in order to obtain class certification.[13] That, however, is not the burden imposed by *Greenberg* or *Allegiance*. Under *Allegiance*, the plaintiff need only prove loss causation by a preponderance of the evidence. *Allegiance*, 487 F.3d

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without reference to any post-mortem data they have reviewed or conducted is insufficient here." Defendants' expert similarly acknowledged that reviewing analyst reports "gives a perspective of what the analyst might have considered important or new or different" information. Allen Dep. at 41:4-9.

[13] Indeed the bulk of Defendants' "background" section is comprised of merit-based factual assertions that are independent of Plaintiff's showing of loss causation, and thus inappropriate for resolution on a Motion for Class Certification. *Allegiance*, 487 F.3d at 267. For example, without a scintilla of evidence, Defendants assert (at 6) that "the major fixed-price construction projects on which the Company accrued unapproved claims were not part of the Company's Engineering Construction Group. For that reason, disclosures related generally to engineering and construction, or E&C do not necessarily relate, as [AMS Fund] and Nettesheim suggest to the unapproved claims allegations." Defendants provide absolutely no factual support for this assertion, and it and other such factual assertions should be disregarded by the Court.

at 269. Thus, "the district court must consider all evidence, both for and against loss causation . . .," weigh the evidence, and determine whether it is more likely than not that the partial disclosure caused the decline in the company's stock price. *Id.* at 266. Under this standard, once a moving party meets its initial burden, the non-moving party must produce evidence to the contrary, and if the non-moving party fails to do so, the moving party must prevail. *Id.* at 265; *Flowserve*, 245 F.R.D. at 569 n.12; *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

Significantly, while Defendants rely heavily on the *Flowserve* decision, in that case defendants produced affirmative evidence controverting loss causation. The *Flowserve* court found that Defendants' detailed "event studies and review of analyst commentary" to be "particularly persuasive." *Flowserve*, 245 F.R.D at 576. In contrast, Defendants here have failed to produce any such evidence. Instead, Defendants have simply attempted to discredit Plaintiff's evidence. As described by Ms. Allen, her job was not to assess whether there was loss causation in this case, but rather her "entire analysis is an analysis of [Ms. Nettesheim's] analysis." Allen Dep. at 79:5-19, Pl. App. 096. This "analysis of [an] analysis" is a far cry from the detailed event studies and review of analyst commentary that the *Flowserve* court found "particularly persuasive." Because Defendants failed to produce any controverting evidence, should Defendants' Motion to Strike fail, as it should, Plaintiff's evidence is sufficient to carry Plaintiff's burden to establish loss causation.[14]

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[14] Plaintiff hereby incorporates by reference Plaintiff's Opposition to Defendants' Motion to Strike the Expert Report of Jane

5. Plaintiff Is Not Required to Plead Each Corrective Disclosure in its Complaint.

Defendants complain that three of the material corrective disclosures that Plaintiff has used to demonstrate that the earlier fraudulent misrepresentations affected the market are not identified in the Complaint. Def.'s Resp. at 123-24. However, no such requirement exists. In *Nathenson*, the Fifth Circuit explained that plaintiffs must specify ***the statements contended to be fraudulent***, the speaker, when and where the statements were made, and why they were fraudulent. *Nathenson*, 267 F.3d at 412. Defendants cite no authority that requires a complaint to list the corrective disclosures, and Plaintiff knows of none.

6. Defendants Are Not Required to Confess to the Fraud in Order for Their Misrepresentation to Be Actionable.

In their most far-reaching mischaracterizations of the law, Defendants argue that in order for a corrective disclosure to "reveal" the fraud, the defendants must "admit," or confess, to having committed fraud. Specifically, Defendants contend that Ms. Nettesheim's entire analysis is "invalid" because it is based on corrective disclosures in which "the company had not admitted to prior misrepresentations or to fraud." Def.'s Resp. at 24, n.58. In other words, according to Defendants, absent a confession, a securities class action could never be certified. Not surprisingly, Defendants cite no authority for this remarkable assertion of law.

Nettesheim and Plaintiff's Motion to Strike the Expert Report of Lucy Allen.

B. Plaintiff Has Established Loss Causation as to the Fraud Alleged in the Complaint. Plaintiff submitted the Nettesheim Report in support of its Motion for Class Certification as evidence of loss causation. As set forth in that report, Ms. Nettesheim properly performed the loss causation analysis required by the Fifth Circuit.[15]

1. Nettesheim's Methodology is Proper and Supports Her Loss Causation Conclusion.

Ms. Nettesheim did not, as Defendants imply, bypass the *Allegiance* analysis and find that every significant decline in the price of Halliburton stock was due to a "corrective disclosure." Def.'s Res. at 18-20. Indeed, she attributed several instances of significant decline to market or industry factors and did not consider them to be corrective disclosures.[16] Even when the news was company-specific, Ms. Nettesheim did not in all instances find that the decline was a "corrective disclosure" that related to the allegations of the complaint. For example, on October 27, 1999, Ms. Nettesheim identified a material decline of 3.5% in Halliburton's stock price.

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[15] Starting on page one, where Defendants assert that "Nettesheim repeatedly admits that she did not conduct the type of inquiry the Fifth Circuit requires" (for which they do not even attempt to reference Ms Nettesheim's testimony, citing only their Motion to Strike), Defendants repeatedly mischaracterize, and often blatantly misstate, Ms. Nettesheim's testimony. *See also*, Defendants' Res. at 11-13 (falsely claiming that Ms. Nettesheim linked the corrective disclosures to only two prior misrepresentations, and that she did not analyze the portion of stock decline that was attributable to the correction of Halliburton's prior disclosures); *id.* at 14-15 (same).

[16] *See, e.g.*, Nettesheim Rep. ¶ 44 (finding no Halliburton news on June 18, 1999, Oct. 15, 1999, Feb. 25, 2000, May 19, 2000, or Nov. 6, 2001).

Nettesheim Rep. ¶ 45. Ms. Nettesheim concluded that this decline was due to lowered estimates by an analyst, and was not related to the allegations in the Complaint. *Id.* Thus, she did not consider it to be a corrective disclosure.[17] While the plaintiff's expert in *Flowserve* may have attempted to relate such broad company-specific news to the "tenets" of the complaint, Ms. Nettesheim did not do so here.

For days with multiple pieces of news, Ms. Nettesheim undertook an analysis to separate the negative culpable news from non-culpable news that might have affected the stock price. Ms. Nettesheim controlled for price movements attributable to news affecting both the market as a whole and the industry in which Halliburton operated.[18] Thus, the *Flowserve* court's criticism that the plaintiff there did not filter out the effects of market and industry news is not applicable here. *Flowserve*, 245 F.R.D. at 577.

Then, where appropriate, Ms. Nettesheim controlled for other company-specific negative news on days where there was both culpable and non-culpable news. Specifically, Ms. Nettesheim reviewed available analyst models and reports, as well as Halliburton's own statements, parsed out the negative price

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[17] Similarly, Nettesheim did not find loss causation on October 23, 2000, when the company announced that one of its divisions was the subject of a grand jury investigation, and the Company's stock price fell a statistically significant 3.5% on the following day. Nettesheim Rep. ¶ 45.

[18] For example, the "lower than expected . . . spending by major oil companies," which Defendants designate as other negative news on October 24, 2000, was industry news, and the effect of that news on Halliburton stock is factored out of Halliburton price movements through Nettesheim's industry's index. Nettesheim Rep. ¶ 90.

movement, and opined on which pieces of news had a significant impact on the price movement.[19] Defendants' position that Ms. Nettesheim was required to do something more is contrary to the *Allegiance* decision, which held that analysts' opinions, combined with reference to a "post mortem" analysis of their data and information, can be sufficient to allocate the cause of a price decline. *Allegiance,* 487 F.3d at 271.

In short, consistent with the requirements of the Fifth Circuit, Ms. Nettesheim related each of the corrective disclosures to Plaintiff's allegations of fraudulent misstatements; performed a regression analysis to eliminate movements due to market or industry news; and, where appropriate, analyzed the news and data and determined whether the culpable news had a significant effect on the price of Halliburton stock – none of which was done by the *Flowserve* Plaintiffs. Accordingly, as discussed below, for each of the class period misrepresentations and omissions alleged in the Complaint, Plaintiff has shown loss causation under *Greenberg, Allegiance,* and *Flowserve.*

2. Halliburton's Misrepresentations Regarding the Dresser Acquisition and Large Fixed-Price Contracts Affected the Market.

Plaintiff has demonstrated loss causation as to Halliburton's fraudulent misrepresentations regarding the Dresser acquisition and large fixed-price contracts. Set forth below are each of the partial

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[19] Contrary to Defendants' implication, Plaintiff is not required to allocate precise percentages of cause for class certification. *Allegiance,* 487 F.3d at 270.

corrective disclosures, and the fraudulent misrepresentations to which they relate.

a) The Market's Reaction to Halliburton's Partial Corrective Disclosure on October 4, 1999 Demonstrates Loss Causation.

On July 22, 1999, Halliburton conducted a conference call with analysts during which Cheney said, among other things, that Halliburton's "aggressive cost reduction program and restructuring activities" allowed Halliburton "to remain profitable," and that Halliburton's management remained "optimistic." FCAC ¶ 109. On the same day, Halliburton also promised analysts that "sequential quarterly results should continue to improve with significant improvement in 2000." FCAC ¶ 110.

As expected and intended by the Company, an analyst who participated in the July 22 call reported back to the market.[20] In discussing the progress of the Dresser integration, Dain Rauscher Wessels stated that the Dresser integration was "on or ahead of schedule" and that management expected the annualized cost savings from the acquisition to be approximately $500 million.[21] FCAC ¶¶ 110. This estimate doubled the $250 million annual benefit the Company had previously represented would result from the acquisition. *Id.* These statements were reaffirmed on September 13, 1999, in a presentation that Lesar made to the Dain Rauscher Wessels Energy Conference. FCAC ¶ 115.

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[20] As Defendants' expert Lucy Allen acknowledges, conference calls with analysts was the way the company communicated with the market. Allen Dep., at 36: l-19; 39:l-4, Pl. App. 093, 094.

[21] Halliburton completed the $7 billion acquisition of Dresser on September 29, 1998.

During neither the July conference call nor the September presentation, did Halliburton mention the significant problems with the Dresser integration, the poor performance of the Dresser joint ventures and subsidiaries, or the significant cost overruns and unapproved claims, all of which were undermining Halliburton's earnings. Nor did the Company disclose that it had changed its method of accounting for unapproved claims, allowing the company to book unapproved claims as revenue, which would not have been allowed under the prior method, thus allowing the company to "remain profitable" and support Cheney's "optimistic" outlook. In addition, because the new accounting would allow future bookings of unapproved (and uncollectible) claims, the Company could forecast "significant improvement in 2000."

Defendants argue that the July and September statements, and indeed every class period statement that relates to Dresser, were merely confirmatory. Def.'s Resp. at 5. To the contrary, a comparison of these statements to pre-class period statements reveals that these statements conveyed new information about the progress of the Dresser integration and did not simply confirm pre-class period statements. On March 1, 1999 (highlighted by Defendants), Halliburton stated that it should attain a $500 million savings by the end of the year through a *combination* of savings from the Dresser integration *and* from the "downturn." FCAC ¶ 93. In contrast, in July and September, Halliburton stated that the Dresser merger *alone* would create a $500 million annual cost savings. FCAC ¶¶ 110, 115.[22]

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[22] In addition, in March, Halliburton tentatively stated that the savings "should" result, but in July and September stated

Furthermore, the July statement provided assurance about the progress of the integration of Dresser, which was not discussed in March. *Id.*

After the market closed on October 4, 1999, Halliburton unexpectedly warned that its 1999 third-quarter earnings would be less than the previous estimates. Nettesheim Rep. ¶¶ 84-87. Halliburton attributed the reduction, in large part, to the lower than expected profits of the Dresser joint ventures and several of the other business units of the Dresser Equipment Group.[23] This news revealed the falsity of Halliburton's previously glowing statements about the substantial benefit Halliburton would receive from the Dresser acquisition, and the progress of the integration of Dresser.[24]

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with assurance that management "expected" and "projected" the savings to result. FCAC ¶¶ 93, 110, 115.

[23] That the Complaint, as discussed above, the fact that these corrective disclosures were not identified in the Complaint is irrelevant.

[24] Defendants' contention (at 23) that the October 4, 1999 news does not relate to Dresser is inexplicable. While the Lau report may not use the term "Dresser merger," it notes reduced earnings due to performance of "Dresser Equipment." Moreover, Ms. Nettesheim does not limit her analysis only to the Lau report, a fact ignored by Defendants, but also analyzes a Merrill Lynch report. The Merrill Lynch report attributes the reduced earnings forecasts in part to "less powerful synergies from the *Dresser merger* than expected." (Nettesheim Rep. ¶ 89) (emphasis added). Defendants also take a restrictive view of Plaintiffs' Complaint to argue that Plaintiffs did not make any allegations relating to the Dresser Equipment Group. However, the Complaint clearly alleges that Defendants were experiencing serious, undisclosed problems with the integration of Dresser, and misrepresented the success and benefits of the Dresser merger. This would clearly include issues relating to the integration and

The market reacted swiftly to the news, resulting in a company-specific stock decline of 9%.[25] *Id.* ¶ 84. Based on the data and information provided by Halliburton, the fact that Halliburton attributed the earnings decline to poor performance by the Dresser subsidiaries, and the lack of other significant news, Ms. Nettesheim concluded:

> a significant portion of the stock price decline on October 5, 1999, was caused by information that partially corrected and related to prior misstatements and omissions regarding the success and benefits of the Dresser merger, and the Company's related operational problems, as alleged in the Complaint.

Nettesheim Rep. ¶ 87.[26] Accordingly, Plaintiff has established loss causation as to the July and September 1999 statements.

b) The Market's Reaction to Halliburton's Partial Corrective Disclosure on January 5, 2000 Demonstrates Loss Causation.

On January 5, 2000, based on conversations with the Company, Brown Brothers Harriman & Co and

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success of Dresser Equipment Group, its subsidiaries and the joint ventures that Dresser owned.

[25] Defendants do not dispute that there was a statistically significant decline in the price of Halliburton stock.

[26] The fact that Halliburton simultaneously announced that it was selling Dresser's struggling joint ventures does not obviate the market's negative reaction to the news about Dresser, or undercut the loss causation analysis. Nettesheim Rep. ¶¶ 84-87. If anything, the news of the sale of the joint ventures, which Defendants characterize (at 20 and 23) as "positive," simply demonstrates that the market reaction to the news about Dresser would otherwise have been *worse*.

Merrill Lynch cut their estimates of Halliburton's annual earnings for years 2000 and 2001. Nettesheim Rep. ¶¶ 88-92. This reduction was based on "less powerful synergies from the Dresser merger" than expected, as well as "reduced expectations for offshore construction results." *Id.* ¶ 89. Halliburton's resulting company-specific stock decline was 4.38%, again a statistically significant decline. *Id.* ¶ 88.

While the news on January 5, 2000 included both culpable and non-culpable statements, Ms. Nettesheim properly distinguished between them under the standard set forth in *Allegiance*, 487 F.3d at 271. Ms. Nettesheim controlled for the industry news through her industry index, thus eliminating from the decline that portion of the news related to the decline in oil field spending. Nettesheim Rep. ¶¶ 88-92. Ms. Nettesheim then related a portion of the remainder of the news from that day to the allegations of Plaintiff's Complaint. Looking behind the analysts' conclusions to the underlying data, Ms. Nettesheim concluded that "a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger." *Id.* ¶ 92. Accordingly, the January 2000 stock decline further supports Plaintiff's loss causation analysis as to the July and September misrepresentations.

c) The Market's Reaction to Halliburton's Partial Corrective Disclosure on October 24 and December 21, 2000 Demonstrates Loss Causation.

Halliburton's 1999 Annual Report, released in April 2000, included a letter from Cheney informing

investors that "[t]he merger with Dresser Industries is now behind us. The potential rewards to our shareholders are vast." FCAC ¶ 122. In fact, as alleged in the complaint, at the time this statement was made, the integration of Dresser was fraught with problems, which were far from "behind" the company. FCAC ¶ 128. The statements about Dresser in the 1999 Annual Report conveyed new information to the market; they did not merely confirm prior statements, as claimed by Defendants. Def.'s Rep. at 5. Halliburton had not previously stated that the Dresser integration was "behind us," or that the shareholders would be "vastly" rewarded. These were key representations, particularly in light of the partial disclosure of Dresser problems that had surprised the market just months earlier.

The 1999 Annual Report also contained misrepresentations about Halliburton's large fixed-price contracts and accounting practices. Halliburton stated that the "group's engineering excellence and construction experience make it possible to take on end-to-end projects of any size in the world . . ." FCAC ¶ 123. Regarding how Halliburton would account for the earnings on such projects (or lack thereof), the Report stated:

> All known or anticipated losses on contracts are provided for currently. Claims and change orders which are in the process of being negotiated with customers for extra work or changes in the scope of work are included in revenue when collection is deemed probable.

FCAC ¶ 124. In fact, Halliburton was, and had been over the past six quarters, recording millions of dollars of claims as revenue. FCAC ¶ 128. While the notes to the financial statements disclosed that

unbilled receivables included $89 million in unapproved claims for 1998 and $98 million for 1999, the Company represented that those amounts were "probable" of collection, when in fact Defendants knew that they were not probable of collection, the Company was experiencing increasing difficulties in collecting on unapproved claims, and they were not capable of accurately estimating what amount could ultimately be collected. FCAC ¶¶ 127-128.

On April 26, 2000, Halliburton compounded its deception by releasing its first quarter 2000 results, which were falsely inflated by Halliburton's improper accounting practices. FCAC ¶¶ 129, 140. On a conference call on the same day, Cheney reported on Halliburton's profits on existing construction projects without disclosing the numerous projects that were suffering from severe cost overruns, and that significant portions of that revenue were from unapproved claims that were not "probable" of collection. FCAC ¶¶ 129, 140.

By October 2000, Halliburton could no longer hide the problems with the Dresser acquisition and integration; the cost overruns on the large end-to-end projects that the Company previously stated its "engineering excellence and construction experience" enabled them to manage; or the increasing difficulties in collecting on the unapproved claims those cost overruns gave rise to. On October 24, 2000, on a conference call to discuss Halliburton's third quarter 2000 earnings, Lesar shocked analysts by revealing that due to serious operational problems, management inefficiencies and excessive costs in its construction operations, the Company planned to undertake a massive restructuring. FCAC ¶¶ 144, 146.

As expected and intended, analysts reported the restructuring to the market, and the market responded. FCAC ¶¶ 145-146. On October 25, 2000, Halliburton's company-specific stock decline was 6.6%, a statistically significant decline. Nettesheim Rep. ¶ 93. After undertaking a comprehensive analysis of the analyst reports, including the underlying data and the models, Nettesheim concluded that at least 50% to 80%, a significant portion, of the stock price decline on October 25, 2000, was related to Plaintiff's allegations regarding "the Company's booking of unapproved claims on fixed-price contracts and lack of benefits from the Dresser mergers that are alleged by Lead Plaintiff." Nettesheim Rep. ¶ 105.

On December 21, 2000, Halliburton formally unveiled the restructuring plan, and again surprised the market by disclosing that it planned to take a charge of $120 million in the fourth quarter. Nettesheim Rep. ¶ 106; FCAC ¶¶ 150-152. The press release stated that $95 million of the $120 million charge (or 79%) related to cost overruns on "project specific matters." Nettesheim Rep. ¶ 111; Def.'s App. at 114-116. Halliburton explained that it had "incurred significant additional costs" on several large fixed-fee projects, and that management did not believe that all its claims for all the additional costs would be recovered. Def.'s App. at 114-116. Halliburton further explained that its claims on seven other projects had not been resolved. FCAC ¶ 150; Nettesheim Rep. ¶ 106; Def.'s App. at 114-116. The press release alerted the market that the Company was experiencing massive cost overruns and losses, and that the Company had been booking revenue on those contracts when collection was far from "probable."

On December 22, 2000, Halliburton's resulting company-specific stock decline was 3.9 %, a statistically significant decline. Nettesheim Rep. ¶ 109. There was no other news on that date, and Ms. Nettesheim related the disclosures, and the resulting price decline, to Plaintiff's allegations regarding the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger." Nettesheim Rep. ¶ 112.[27]

3. Halliburton's Misrepresentations Regarding Asbestos Liabilities Affected the Market.

Plaintiff has demonstrated loss causation as to Halliburton's fraudulent misrepresentatives regarding its asbestos liability. Set forth below are each of the partial corrective disclosures, and the fraudulent misrepresentations to which they relate.

a) The Market's Reaction to Halliburton's Partial Corrective Disclosure on June 28, 2001 Demonstrates Loss Causation.

On November 15, 1999, Halliburton released its third quarter 1999 10-Q. In discussing asbestos litigation, the Company represented that it continued "to believe that provisions recorded are adequate to

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[27] Ms. Nettesheim's conclusion regarding the October and December partial corrective disclosures is well-founded. Ms. Nettesheim noted that analysts were stunned (Nettesheim Rep. ¶ 107), because the news of the restructuring directly conflicted with Halliburton's prior class period assurances, that "[t]he merger with Dresser Industries is now behind us," and "[t]he potential rewards to our shareholders are vast," (FCAC ¶ 122), as well as Halliburton's class period assurances regarding its large fixed-price contracts, such as its false statements that "[a]ll known or anticipated losses on contracts are provided for currently," that revenue for extra work or scope changes is only booked "when collection is deemed probable." FCAC ¶ 124.

cover the *estimated loss from asbestosis litigation.*" FCAC ¶ 113.[28] At that time, Halliburton had reserves of a mere $13 million. FCAC ¶ 119. Similar representations about the adequacy of its merger reserves were made over the following several quarters as the amount of the reserves were slowly increased. FCAC ¶¶ 115, 119, 120.

On January 31, 2001, Mark Kellstrom of Jefferies reported that Halliburton's "management reiterated that ***the prospective asbestos liabilities had not changed*** materially from the third quarter and *should have minimal adverse impact on the company going forward.*" FCAC ¶ 157. On April 25, 2001, Halliburton reported an outstanding quarter, reporting $0.25 per share. At that time, Halliburton increased its reserve for asbestos liability to a mere $29 million. FCAC ¶ 160. On May 11, 2001, Halliburton increased its asbestos reserves just an additional $1 million to $30 million. FCAC ¶ 166. Each quarter, Halliburton assured the market that its asbestos reserves were "adequate" and would not adversely impact the Company.

As alleged in the Complaint, these statements were false and misleading because Halliburton had not adequately reserved for its potential asbestos liabilities for future as well as current claims, and should have known that the ultimate resolution of its asbestos claims would materially adversely impact Halliburton's balance sheet. FCAC ¶ 168. Moreover,

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[28] Defendants' position that the Company's representations regarding asbestos were limited to "pending claims" is belied by the language of misrepresentations and the allegations of the Complaint. The Complaint alleges that among other things, Halliburton knowingly misrepresented its aggregate asbestos exposures, not just its exposure for pending claims.

as a result of Halliburton's failure to properly reserve for its asbestos liabilities, Halliburton violated SFAS No. 5, and overstated its earnings for the entire class period. FCAC ¶¶ 237-238.

On June 28, 2001, in a conference call with analysts, Lesar and Morris stated that the "worse case scenario" would be exposure, after insurance, of $50 to $60 million – not the $30 million that they had reported to be "adequate" the preceding month. This was the market's first inkling that Halliburton had a serious and deteriorating asbestos situation. Nettesheim Rep. ¶ 115, FCAC ¶ 170. As expected and intended, analysts reported on their discussions with Lesar and Morris. This partial disclosure caused a statistically significantly decline of 4.6% in the price of Halliburton stock. Nettesheim Rep. ¶ 114-118. Moreover, Ms. Nettesheim could find no other news that would have resulted in the price decline. *Id.* Accordingly, Plaintiff has established loss causation as to the January, April and May misrepresentations.

Defendants do not dispute that there was a statistically significant decline in the price of Halliburton stock and that there was no other news that could have caused that decline, key elements of loss causation. Instead, citing only its own self-serving press release, Defendants assert the purely merits-based argument that they did not know of the potential asbestos exposure prior to making the announcement. Def.'s Resp. at 29-30. Such assertions go directly to the merits of the Plaintiff's claims, are not fundamental to resolution of the loss causation issue,

and are inappropriate for resolution on class certification. *Allegiance*, 487 F.3d at 266-67.[29]

b) The Market's Reaction to Halliburton's Partial Corrective Disclosure on August 9, 2001 Demonstrates Loss Causation.

On July 25, 2001, Lesar and Morris held a conference call during which they boasted "another strong quarter" and stated that, based on their analysis of the Harbison claims, Halliburton thought it would be "prudent to accrue $60 million" to cover "potential exposure" for asbestos litigation. FCAC ¶ 175. Based on this call, as expected and intended by Halliburton, the analysts conveyed to the market that "the Company" believed that it had its asbestos situation "under control and that the financial impact should not be material to the financial health of the company." FCAC ¶¶ 176-77. That analyst also reported that "Mr. Lesar indicated that Halliburton maintains a significant amount of insurance that should cover the majority of any ***future claims or increases in the settlement rates.***" FCAC ¶ 177.

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[29] The *Allegiance* court held that a merit-based inquiry was appropriate only in so far as it was necessary to resolve the loss causation issue. Defendants' unsupported factual assertions stray from the loss causation issue and go straight to the heart of Plaintiff's case. If such issues were to be resolved on class certification, substantial discovery would have been required. However, *Allegiance* specifically noted that "[l]ittle discovery from defendants is demanded by the fraud-on-the-market regimen." Rather, *Allegiance* directs plaintiffs and defendants to draw their "proof . . . from public data and public filings, as in this case." Defendants' repeated reliance on unsupported factual information which could only be tested through substantial discovery, flies in the face of this *Allegiance* directive. *Allegiance*, 487 F.3d at 267.

On August 9, 2001, Halliburton filed its second quarter 2001 10-Q in which it increased reserves for asbestos liability to $124 million – over twice the $60 million that, only two weeks prior, the Company had assured investors would be adequate. FCAC ¶ 178, Nettesheim Rep. ¶ 119. The market then became alerted to the fact that the Company's asbestos situation was not in fact "under control," and the price of Halliburton stock reacted immediately with a one day statistically significant decline of 5.2%. As explained by Ms. Nettesheim, this statement was "related to Halliburton's misstatements and omissions-specifically those concerning the significance of Halliburton's exposure to asbestos liabilities." There was no other news that could explain a company-specific stock price decline that day. Nettesheim Rep. ¶¶ 120-121. Accordingly, Plaintiff has established loss causation as to the January, April, May and July misrepresentations.

Defendants do not proffer any evidence to rebut Plaintiff's showing of loss causation. Defendants do not dispute that there was a statistically significant decline in the price of Halliburton stock or cite any other news that could have caused a company specific decline of 5.2%. Defendants only response to Plaintiff's showing of loss causation is the inappropriate merits based argument that "Halliburton's increase of its asbestos reserves . . . reflects a change [] *sic* Halliburton's estimation of its liability on pending claims, and is no evidence of a corrective disclosure." Def.'s Resp. at 30-31.

c) The Market's Reaction to Halliburton's Partial Corrective Disclosure on October 30, 2001 Demonstrates Loss Causation.

On August 22, 2001, based on extensive discussions with Lesar and Foshee, Kieburtz of Salomon Smith Barney issued a comprehensive report on Halliburton, which, as expected and intended by Halliburton, conveyed to the market that "based upon available information, asbestos exposure concerns appear to be overblown." FCAC ¶ 180. Similarly, quoting Lesar, *Platt's* stated on September 4, 2001 that Halliburton had a "substantial amount of [insurance] coverage," and that the asbestos claims were a "manageable problem." FCAC ¶ 181.

On September 12, 2001, four days after the *Platt's* article, Halliburton learned that a jury had returned a $130 million verdict against it, yet Halliburton continued to conceal its potential for asbestos exposure and the effect that exposure would (and did) have on the Company. FCAC ¶ 182. On October 4, 2001, Foshee, on behalf of the Company, spoke at a Deutsche Banc Alex Brown seminar, and although "the presentation focused on better delineating and clarifying Halliburton's asbestos liabilities," Foshee did not disclose the $130 million verdict entered against it the prior month. On October 5, 2007, as expected and intended, an analyst who attended the seminar reported that the market is "significantly over-discounting" the risks of asbestos liabilities. FCAC ¶ 183.

On October 23, 2001, Halliburton announced its third quarter 2001 results, boasting that they were "outstanding" and "record" breaking. At a conference call that same day, Foshee, on behalf of the Company stated that there was not "anything new to report on

the Harbison-Walker." Lesar confirmed that ***"there have been no adverse developments at all with respect to the Harbison-Walker situation . . ."*** Neither Foshee nor Lesar made any mention of the $130 million verdict. FCAC ¶¶ 184-185.

Relying on the information provided by the Company, the analysts conveyed to the market that Halliburton's asbestos exposure was more of "a nuisance than a real risk to shareholder value" (Morgan Stanley); that "Management provided further assurances that current reserves are adequate to cover ***projected asbestos liabilities***" (Jefferies & Co); and that "the bottom line seems to be that Halliburton has minimal exposure" (CIBC World Markets). FCAC ¶¶ 186-188. Had Halliburton disclosed the $130 million verdict, Halliburton's asbestos exposure would not have been characterized as "a nuisance" or "minimal."

After the market closed on October 30, 2001, Halliburton announced that on October 26, 2001, a second Texas jury had returned a verdict of $150 million, of which Halliburton was liable for $21.3 million. Nettesheim Rep. ¶ 122. In response to this disclosure, on October 31, 2001, Halliburton's stock price had a company-specific, statistically significant decline of 4.9%, and on November 1, 2001, experienced a company-specific, statistically significant decline of 3.7%.[30] As explained by Ms. Nettesheim, this statement was "related to Halliburton's misstatements and omissions-specifically those concerning the significance of Halliburton's exposure to asbestos

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[30] As stated by Defendants' expert, a two-day event window, and even a five day event window may be appropriate absent an intervening material event. Allen Dep. at 141:17-23, 143:22-144:4, Pl. App. 106-107.

liabilities." There was no other news that could explain a company-specific stock price decline that day. Nettesheim Rep. ¶¶ 122, 124. Accordingly, Plaintiff has established loss causation as to the January, April, May, July, August, September and October misrepresentations.

Again, Defendants do not dispute that the declines of October 31 and November 1 were company specific, statistically significant declines that were not caused by any other news an important element of loss causation. Nor do Defendants provide evidence to rebut Plaintiff's showing of loss causation. Rather, they simply argue that Ms. Nettesheim "could not explain when or why Halliburton should have disclosed this information earlier." However, when Defendants' knew, or should have known, and should have reserved for potential large verdicts, goes to the merits of Plaintiff's claims, is not essential to the loss causation analysis, and thus, is not appropriate for resolution on a Motion for Class Certification. *Allegiance*, 487 F.3d at 267. Moreover, Plaintiff alleged that Halliburton concealed its true asbestos liability, and accordingly the likelihood of such adverse verdicts in these or similar cases.

d) The Market's Reaction to Halliburton's Partial Corrective Disclosure on December 7, 2001 Demonstrate Loss Causation.

On November 8, 2001, Halliburton filed it third quarter 2001 10-Q, which again stated that asbestos claims would be resolved without material adverse effect on Halliburton's financial position or the results of operations. FCAC ¶ 189. Thereafter, based on a conversation with the Company, Kieburtz of Salomon Smith Barney reported that the recent disclosures were the result a change in policy, not a

deterioration of the asbestos situation, and concluded that "the market has fully discounted a very conservative (i.e., large) estimation of asbestos liability in the stock price." FCAC ¶¶ 188-189.

On December 4, 2001, Defendants' filed a Form 8-K which, in note 5, mentioned the recent Texas verdicts. The price of Halliburton stock began to decline from a close on December 3, 2001 of $22.06 to a close of $20.85 on December 6, 2001. Then, on December 7, 2001, the Company issued a release detailing all of the recent asbestos verdicts and making clear to the market that the $125 million in reserves, previously represented as "adequate," "prudent," and "conservative," were grossly inadequate and that the Company's asbestos exposure, previously represented to be "minimal," "a nuisance," and "manageable" was anything but. The market reacted quickly and decidedly to this disclosure. The price of Halliburton stock collapsed from the December 6 close of $20.85 to as low as $10.94, and closed on December 7 at $12.00, a company-specific decline of 42.7%.[31]

The December price declines were "directly related" to the disclosures regarding [Halliburton's] asbestos exposure," and there was no other news that could explain the company-specific stock price decline that day. Nettesheim Rep. ¶ 132. Accordingly, as required

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[31] Even absent any other evidence, the company specific loss of 42% experienced on December 7, 2001, when there was only the one piece of news regarding asbestos exposure, sufficiently shows loss causation such that "no evidence or analysis" is required. *Greenberg*, 364 F.3d at 669, (disclosure that revenue would be 66% below estimates sufficient to establish loss causation notwithstanding simultaneous release of non-culpable news without any "evidence or analysis").

by Fifth Circuit precedent, Plaintiff has established loss causation as to the January, April, May, July, August, September and October misrepresentations. Defendants' only response to Plaintiff's showing of loss causation is that Ms. Nettesheim "could not explain when or why Halliburton should have disclosed this information earlier," and that in any event the disclosure of the jury verdicts "corrects nothing." These issues, mischaracterize Plaintiff's claims, relate to the merits of Plaintiff's claims and not the showing of loss causation, and are not appropriate for resolution on a Motion for Class Certification.

CONCLUSION

Plaintiff has established loss causation as to the misrepresentations and omissions alleged in the Complaint under Fifth Circuit law. Defendants have presented no evidence that contradicts that showing, and indeed, as to the allegations relating to asbestos liabilities, Defendants have in essence conceded loss causation, relying solely on the merit-based position that the Company did not know its statements were false. Because Plaintiffs have established loss causation and that the proposed class representatives are typical and will adequately represent the class, Plaintiff's Motion should in all respects be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

EXHIBIT TO LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF TEXAS.....SA486

REBUTTAL REPORT OF JANE D. NETTESHEIM, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, DATED DECEMBER 20, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Master Docket No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al.,
On Behalf of Itself and All Others Similarly Situated,
Lead Plaintiff,

vs.

HALLIBURTON COMPANY, et al.,
Defendants.

CLASS ACTION

This Document Relates To:
ALL ACTIONS.

REBUTTAL REPORT OF JANE D. NETTESHEIM

December 20, 2007

Table of Contents

[TABLE INTENTIONALLY OMITTED]

I, JANE D. NETTESHEIM, declare:

I. Background

1. I am a financial economist and vice president of Stanford Consulting Group, Inc. ("SCG"), which provides research, consulting, and expert services in financial economics and related areas to clients, including government agencies, corporations, and law firms. I have a B.A. in biology from the University of Colorado and an M.B.A. from the University of Hawaii, and I completed the coursework in the Ph.D. program in finance at the London Business School, University of London. My curriculum vitae and the list of the expert testimony I have provided by deposition or at trial are attached as Exhibit 1. The fees charged for this project are the standard hourly rates of employees of SCG. My current hourly rate is $475.

2. Previously in this matter, I submitted the Report of Jane D. Nettesheim, dated September 17, 2007 (the "Nettesheim Report"). In the Nettesheim Report I opined that the market for the common stock of Halliburton Company, Inc. ("Halliburton" or the "Company")[1] was efficient during the period June 3, 1999 through December 7, 2001, inclusive (the "Class Period"). Also in the Nettesheim Report, I conducted an analysis of materiality and loss causation pertaining to the alleged misrepresentations and omissions in this matter, and concluded that the misrepresentations and omissions caused Halliburton's stock price to be inflated during the Class Period as

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[1] Herein, "Halliburton stock" refers to the common stock of Halliburton.

evidenced by the partial corrective disclosures during the Class Period. Those corrective disclosures revealed information about Halliburton's financial condition, which Lead Plaintiff alleges in the Fourth Consolidated Amended Complaint (the "Complaint"), was previously misrepresented and/or omitted by Defendants, and which I determined caused the price of Halliburton's stock to decline.[2]

3. I now have been asked by Counsel to respond to Defendants' Joint Motion to Strike the Report of Jane Nettesheim, dated November 16, 2007 ("Defendants' Motion") and the Expert Report of Lucy P. Allen, dated November 16, 2007 (the "Allen Report").[3]

4. The opinions offered in this Rebuttal Report are subject to refinement or revision based on continuing analysis of the documents and materials listed below, as well as new or additional information which may be provided to or obtained by me in the course of this matter. I expect to review additional information and documents, including information and documents that may become available through discovery and the reports and depositions of other expert witnesses.

II. Bases for Opinions

5. My opinions expressed in this Rebuttal Report are based upon my review and analysis of documents and information relevant to this matter and also my

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[2] Because discovery is just beginning in this action, the analysis in this Rebuttal Report and in the Nettesheim Report is preliminary and based on the public information available to me at this time. I assume that the allegations outlined in the Complaint are true.

[3] I have also included in this Rebuttal Report certain related opinions on the deposition testimony of Lucy Allen, December 3, 2007 (the "Allen Deposition").

professional knowledge and experience. Exhibit 2 lists the materials I have obtained from Counsel or other identified sources to date. The materials I have relied upon in forming my opinions in this Rebuttal Report are identified in this report and its Exhibits. Such documents and information are typically relied upon by financial experts in securities class actions or by financial economists in their research. I reserve the right to modify or supplement my opinions expressed herein in the event that further information becomes available to me.

III. Summary of Opinions

6. The criticisms contained in Defendants' Motion and the Allen Report primarily pertain to my event study analysis and my analysis of loss causation in this matter. In this Rebuttal Report, I address each of the issues raised by Defendants and Ms. Allen. Following is a summary of my conclusions:

- Contrary to Defendants' assertions, the event study methodology used in the Nettesheim Report is appropriate and fully consistent with the standards of my profession:
  - It is the same method I have employed in other securities cases, it has been accepted by the courts, and it is recognized in relevant literature.
  - My industry index captures the effect of industry trends on Halliburton. Defendants fail to demonstrate that the industry index used in the Nettesheim Report is not appropriate (nor do they suggest a meaningful alternative).

- The fact that approximately 5% of the days during the Class Period are statistically significant is not relevant to determining loss causation—whether there are more than or less than 5% of days with statistically significant stock price changes does not contribute to or detract from the statistical significance of those days.
- Ms. Allen erroneously claims I purported to distinguish between news and non-news days. Ms. Allen's assertion that Halliburton's stock price reaction on "news days" is no different that its reaction of "non-news days" is unfounded because, among other reasons, her classification of news days and non-news days is flawed and her statements regarding fundamental concepts of statistical significance are erroneous.
- Ms. Allen misleadingly claims that my market index analysis is not replicable when the alleged discrepancies are not only immaterial, but, in fact, de minimis, and are the result, not of an error in my analysis, but rather a change by a third party data provider of the price of some stocks other than Halliburton during the Class Period.
- The control period used in the Nettesheim Report is more "robust" than that suggested by Ms. Allen, and is better suited for identifying dates of significant stock price movements during the Class Period.

• Loss causation has been established for each of the allegations in this matter.

- Ms. Allen mischaracterizes my methodology.

- The Nettesheim Report addresses each of the three categories of allegations identified by Defendants.
- The misrepresentations and omissions have been adequately tied to the curative disclosures.
- Each of the news items proffered by Defendants as being non-culpable on dates of curative disclosures is misleading, immaterial to company-specific movement in Halliburton's stock, and/or unrepresentative of the overall market consensus.

- Contrary to Defendants' contentions, loss causation is demonstrated by the decline in Halliburton's stock price upon the partial corrective disclosures during the Class Period. The absence of statistically significant stock price increases upon each date of a misrepresentation or omission is not unexpected and does not undermine my conclusion that Halliburton's stock price was inflated during the Class Period.
- Ms. Allen's analysis of loss causation for Halliburton peer McDermott International, Inc. ("McDermott") is misleading, erroneous and irrelevant. Without any reasonable assumptions regarding allegations concerning McDermott, she has no basis for her conclusions regarding loss causation.

IV. Opinions

A. The Event Study Methodology Used in the Nettesheim Report is Supported and Reliable

7. In the Nettesheim Report, I conducted an event study analysis and demonstrated that the market for Halliburton stock was efficient during the Class

Period.[4] Certain aspects of the event study were also useful for the purpose of establishing loss causation in this matter.[5] Defendants and/or Ms. Allen[6] argue that my event study methodology "suffers" from the following "methodological flaws:"

- Defendants contend that my methodology is "fundamentally backwards" and "does not adhere to the standards of academic literature;"
- Defendants contend that my industry peer group is "improperly constructed;"
- Defendants contend that my test for market efficiency "does not use any statistical, consistent, or recognizable method properly to identify either what [I] categorize as company news or the release dates of that 'news';"[7]
- Ms. Allen contends that the number of statistically significant days is "no more than the number expected" thus, "yields no evidence that the stock price declines during the alleged class period are caused by anything other than the normal daily variation in stock price;"[8]

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[4] Nettesheim Report, Section VI.E. (entitled "*Cammer/Unger/Bell* Factor 5: Empirical Facts Showing a Cause-and-Effect Relationship between Unexpected Corporate Events or Financial Releases and an Immediate Response in the Stock Price") and Appendix (entitled "Regression Analysis and Event Study").

[5] Nettesheim Report, ¶79.

[6] Herein, arguments presented by Ms. Allen may be referred to generally as Defendants' arguments.

[7] Defendants' Motion, p. 4.

[8] Allen Report, p. 8-9.

- Ms. Allen contends that "news days" and "non-news days" have the same distribution of excess returns;[9]
- Ms. Allen claims she was unable to replicate my market index;[10]
- Ms. Allen contends my findings are not "robust" based on her analysis of an "alternative" control period.[11]

In what follows, I describe why Defendants' and Ms. Allen's arguments are flawed, misleading and irrelevant; and that my event study analysis is a reliable basis for my conclusion that the market for Halliburton stock was efficient and for establishing loss causation.

i. The Event Study Methodology Used in the Nettesheim Report Has Been Accepted by the Courts

8. Defendants contend that my event study methodology is "fundamentally backwards" and "does not adhere to the standards of academic literature." They allege that I "first" identify dates during the Class Period with statistically significant stock price movements and "only then" did I look for disclosures on those specific days.[12] This assessment of my analysis is wrong. Defendants have misleadingly characterized the *results* of the event study analysis presented in the Nettesheim Report as the sum total of the *process* used to arrive at the results and conclusions in the Nettesheim Report. Moreover, Defendants fail to

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[9] Allen Report, p. 9.

[10] Allen Report, p. 11.

[11] Allen Report, p. 13.

[12] Defendants' Motion, p. 4; Allen Report, pp. 5-6, 10.

acknowledge that the event study analysis serves two purposes in the Nettesheim Report: (1) to analyze whether the market for Halliburton stock was efficient during the Class Period, and (2) as a tool for assessing loss causation—the results of the event study analysis are appropriately applied to each of these objectives.

The Event Study Process:

9. The event study process I employed began with a review of the Complaint to obtain an understanding of the allegations in the litigation and to identify dates with alleged partial disclosures.[13] I reviewed news articles and analyst reports related to the allegations in the Complaint, especially around the alleged partial corrective disclosures. I also reviewed Halliburton's stock price to see, in a general sense, how it reacted on dates of alleged partial corrective disclosures. After this initial analysis of the allegations, news and information related to the allegations and a general

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[13] Nettesheim Deposition, pp. 16:14-17:2:

Q. When you were retained in this case, how did you begin your work on the loss causation part of the engage meant?

A. Well, at the very beginning, I read the complaint.

Q. What did you do after that?

A. Then I asked to have information and data gathered, for example, stock prices, data on market indices or a market index, data on competitor companies. I also had news reports, news headlines, analyst reports and those titles. I asked for those things to be gathered.

I noted in footnote 3 of the Nettesheim Report that I assumed that the allegations in the Complaint were true; thus it is clear that my analysis is based on the allegations in the Complaint and not on a narrow review of news and information published only on statistically significant residual return dates as Defendants suggest.

review of Halliburton's stock price during the Class Period, I proceeded to do additional analyses relevant to the determination of the efficiency of the market for Halliburton stock and loss causation.[14]

The Event Study—Demonstrating Market Efficiency:

10. Market efficiency can properly be evaluated by means of event study analysis which analyzes all dates during the Class Period. Discussion of specific dates in the Nettesheim Report generally is limited to dates with statistically significant stock price changes (after netting out market and industry effects) because in litigation, dates on which material new information was released generally are the dates of interest. My analysis demonstrates that "[i]n general, large significant changes in Halliburton's stock price are associated with material, new and unexpected information about the Company."[15] This result supports my conclusion that the market for Halliburton stock was efficient, a conclusion Defendants do not challenge.[16]

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[14] Nettesheim Deposition, p. 18:8-19:

> Q. So how did you begin trying to ascertain the loss causation aspects of this case?
>
> A. After collecting the data, then we did statistical analyses which entailed forming an industry index, and after several steps, went through to form the industry index and did a regression analysis to determine the relationship between Halliburton and the stock returns and returns on a market index, industry index.

[15] Nettesheim Report, ¶42.

[16] I note that my analysis of the efficiency of the market for Halliburton stock included ten "factors" other than *Cammer* Factor 5 (Empirical Facts Showing a Cause-and-Effect Relationship between Unexpected Corporate Events or Financial Releases and an Immediate Response in the Stock Price), none of

11. Defendants wrongly assert that my methodology "does not remotely resemble those event studies endorsed by courts . . ."[17] While the cases cited by Defendants[18] indicate that an event study is required, the courts provide no further prescription as to how the event study should be done. The event study methodology I have employed in this matter is the same methodology I have employed in other securities

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which, to my knowledge, Defendants have contested. Namely, (1) *Cammer / Unger / Bell* Factor 1: Weekly Trading Volume; (2) *Cammer / Unger / Bell* Factor 2: The Number of Securities Analysts Following and Reporting on Halliburton; (3) *Cammer / Unger / Bell* Factor 3: The Number of Market Makers in Halliburton's Stock; (4) *Cammer / Unger / Bell* Factor 4: Whether Halliburton was Eligible to File SEC Form S-3; (5) *Unger / Bell* Factor 6: Market Capitalization; (6) *Unger / Bell* Factor 7: Bid/Ask Spread; (7) Unger/Bell Factor 8: Public Float; (8) Factor 9: Listing Exchange; (9) Factor 10: Institutional Ownership and Trading; and (10) Factor 11: Dissemination of News. (Nettesheim Report, Section VI.)

[17] Defendants' Motion, p. 2.

[18] *Id.*, p. 2:

> *See, e.g., In re Apollo Group Inc. Sec. Litig.*, 509 F. Supp. 2d 837, 844 (D. Ariz. 2007) ("The tool most often used by experts to isolate the economic losses caused by the alleged fraud is the 'event study.'"); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1181 (N.D. Cal. 1993) ("Use of an event study or similar analysis is necessary more accurately to [sic] isolate the influences of information specific to [the company] which defendants allegedly have distorted.").

litigation,[19] and it has been accepted by the courts.[20] This methodology also has been described in the relevant literature, for example:

> An event study is a statistical regression analysis that examines the effect of an event on a dependent variable, such as a corporation's stock price. This approach assumes that the price and value of the security move together except during days when disclosures of company-specific information influence the price of the stock. The analyst then looks at the days when the stock moves differently

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[19] I used the same event study methodology, in which I provided a report during the class certification phase of the litigation and the class was certified, in the *In Re Homestore, Inc. Securities Litigation*, United States District Court for the Central District of California, Western Division, Master File No. 01-CV-11115 RSWL CWx, and the *In Re Vivendi Universal, S.A. Securities Litigation*, United States District Court, Southern District of New York, 02 Civ. 5571 (RJH) (HBP).

[20] For example, the same event study methodology was used by another expert in the *In Re WorldCom, Inc. Securities Litigation*, United States District Court, Southern District of New York, 02 Civ. 3288 (DLC). (The class was certified and the case proceeded to trial; the final settlement was reached during trial and therefore there was no verdict). Also, in the *In Re Enron Corporation Securities Litigation*, United States District Court, Southern District of Texas, Houston Division, Civil Action No. H-0103624 (Consolidated). (The class was certified by the district court but later reversed on appeal because in that particular case, "secondary actors (such as the investment banks involved in this case [which were the remaining defendants]) who act in concert with issuers of publicly-traded securities in schemes to defraud the investing public cannot be held liable as primary violators of Section 10(b) or Rule 10b-5.")

> than anticipated solely based upon market and industry factors—so-called days of "abnormal returns." The analyst then determines whether those abnormal returns are due to fraud or non-fraud related factors.[21]

The same article continues:

> The event study first would be used to eliminate all market and industry-related factors and determine those dates of "abnormal returns" when the stock price moved differently than would be expected. The analyst would then look at the disclosures on those days of abnormal returns and ascertain whether there was any information that reached the market that related to some aspect of the fraud. To the extent that no information related to the fraud had any impact on the share price through an abnormal return, there would be insufficient linkage between the fraud and the share price and loss causation would not be shown. On the other hand, the existence of an abnormal return in conjunction with the release of information to the market that arguably is fraud-related should, in conjunction with a showing that the market price was inflated, be sufficient to let a trier of fact determine whether in fact the loss was caused by the fraud.[22]

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[21] Eisenhofer, Jay W., Geoffrey C. Jarvis and James R. Banko, "Securities Fraud, Stock Price Valuation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation," 59, *Business Lawyer*, pp. 1425-1426, August 2004.

[22] *Ibid*, p. 1445.

Another article states:

> When a dispute or litigation requires an analysis of security price changes in response to a news disclosure, it is often appropriate to distinguish two related questions: (1) Does the price history establish that the disclosure caused any price reaction at all?, and (2) if so, what was the size and direction of the net price reaction to the disclosure alone, after accounting for the effects of other factors operating at the same time? This chapter describes a statistical approach, often referred as an *event study*, for analyzing these questions. (Emphasis in original.)
>
> In its most common form, an event study involves a statistical regression analysis of a time series of security returns, with the objective of identifying and measuring firm specific effects of identifiable information releases (events).[23]

That article continues:

> The event study originated in academic research, so the conventional design features and assumptions of event studies fit academic research questions. They may not, however, fit litigation-based questions. . . . [T]he analyst must develop approaches that fit the legal setting.

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[23] Marais, M. Laurentius and Katherine Schipper, "Event Study Methods: Detecting and Measuring the Security Price Effects of Disclosures and Interventions," in *Litigation Services Handbook, The Role of the Financial Expert*, Third Edition, 2004 Cumulative Supplement, edited by Roman L. Weil, Michael J. Wagner and Peter B. Frank, p. 17A-2.

> Event studies may serve both to establish whether any effect occurred and to quantify the effect, if any, including the margin of error of the measured effect. In the former purpose, the question of *statistical significance* of firm-specific returns (abnormal returns or prediction errors) becomes fundamental. For the latter purpose, the magnitude of such returns becomes the basic input to the measurement calculation, and one can use statistical significance as an indicator of the confidence interval around the point estimate of the effect.[24]

The Event Study—Demonstrating Loss Causation:

12 Defendants contend that my methodology is "fundamentally backwards" because I purportedly first identified dates during the Class Period with statistically significant stock price movements and "only then did [I] look for any disclosures on those specific days."[25] Contrary to Defendants' assertions, I did not limit my analysis of events to those dates with statistically significant stock price changes. Although I examined dates on which alleged disclosures were made,[26] I did not limit my analysis to only those dates because I was asked to examine loss causation, *i.e.*, analyze Halliburton's stock price decline and determine whether any of the declines related to partial corrective disclosures of the misrepresentations and omissions alleged in the Complaint.[27] In fact, my

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[24] *Ibid.* p. 17A-18-19.

[25] Defendants' Motion, p. 4.

[26] Nettesheim Report, ¶81.

[27] Nettesheim Report, ¶3; Nettesheim Deposition, pp. 43:25-44:5:

discussion of loss causation in the Nettesheim Report includes events that occurred on dates without statistically significant stock price movements (such as the events of December 21, 2000 and December 6, 2001).[28]

13. While a statistically significant stock price movement is not a prerequisite for an event to be considered material and/or relevant to loss causation,[29] in litigation, dates with large stock price changes generally are the dates that are of interest. A commonly used method for determining on which dates there were large stock price changes due to company-specific news (rather than market and/or industry news) is the regression and analysis that identifies dates with

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A. In the loss causation section, I was focusing on the combination of the determinants of the decline in the price and those declines that related to the allegations in the complaint.

[28] Nettesheim Report, ¶127.

[29] Nettesheim Report, ¶73. Also:

> The Court [in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S.438 (1976)] held that a fact is material if there is a "'substantial likelihood' that a reasonable investor would consider it important in his or her decision making." . . . The Court explained that, to fulfill the materiality requirement, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." . . . In other words, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information."
>
> *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003).

statistically significant price changes. This is the method I used.

14. Defendants erroneously claim that I did "not perform the first required step [in an event study]—identifying events or dates on which allegedly corrective disclosures by Halliburton reached the market."[30] On the contrary, I reviewed the Complaint, information related to the alleged partial corrective disclosures, and looked at Halliburton stock prices for the very purpose of identifying such dates. I discussed certain dates that were alleged in the Complaint as partial corrective disclosures, specifically: October 24-25, 2000; December 21-22, 2000; June 28-29, 2001; and December 7, 2001.

15. I also identified other dates of possible partial corrective disclosures because I examined the news and information that was available to me about Halliburton during the Class Period. The purpose of the loss causation analysis is to determine whether the alleged fraud caused the loss. Thus, the discussion in the Nettesheim Report (although not my analysis) was logically limited to dates with large downward stock price movements that were associated with information and news about Halliburton that were partial corrective disclosures of the alleged fraud.

16. Defendants refer to the "Texas sharpshooter fallacy" and misleadingly imply that I attribute all of the significant declines in the stock price to the fraud. This statement is untrue as I attributed only 11 dates out of the 22 dates with statistically significant stock price declines to partial corrective disclosures.

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[30] Defendants' Motion, p. 4.

17. Thus for all of the reasons described above, my event study methodology and results are relevant and reliable.

ii. The Industry Index Used in the Nettesheim Report Sufficiently Represents Halliburton's Peer Group

18. Defendants claim that the industry index in the Nettesheim Report was not properly constructed; they cite to cases where a properly constructed industry index is described.[31] Defendants cite to *Carpe v. Aquila*

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[31] Defendants' Motion, pp. 5-8. I note that despite her criticisms of my industry index, in her deposition testimony, Ms. Allen suggests that a valid analysis of loss causation may be conducted without any industry index or market index:

> Q. If you going [*sic*] to do what you are refer to as a real event study or statistical analysis, would you want to control both for movement in the market generally and for movement in the industry?
>
> A. I think it depends, so oftentimes if you're controlling for movement in the industry, the industry itself is affected by the market so you really are effectively controlling for movement in both the market and the industry, I don't think it's a big difference, I think it's fine to separately put in a market index and I also thinks [sic] it's appropriate to not put in a market index and it's okay to use sort of a peer or industry index. There are always exceptions and you want to be mindful of in fact what is going on and look to see if there was something else important at the time. So you can't sort of blindly follow a set of paths and not look at other information that's out there.
>
> Q. Would you always want to have an industry index if you were going to do what you refer to as a real event study or a statistical analysis?
>
> A. I think can you do a statistical analysis without an industry index.

for the proposition that an event study should compare "the stock's price to the market as a whole or a selected index of similar businesses," which is exactly what I did. I compared Halliburton's stock price returns to a market index comprised of all stocks' returns on the New York Stock Exchange, American Stock Exchange, and the NASDAQ, which is the most broad-based index for the U.S. stock market. I also compared Halliburton stock price returns to an industry index of more than 50 companies that were characterized by market participants as in similar businesses as Halliburton.

> Q. Can you distinguish between a statistical analysis and what you refer to as an event study?
>
> A. I think an event study is a kind of statistical analysis.
>
> Q. So you can do an event study appropriately without having a market index is that what you're saying?
>
> A. I think can you do one without a market index and I think can you do one without an industry index. (Allen Deposition, pp. 152:11-153:13.)

A NERA Economic Consulting (the firm at which Ms. Allen works) paper by Tabak, David. I, and Frederick C. Dunbar, "Materiality and Magnitude: Event Studies in the Courtroom," in Litigation Services Handbook, The Role of the Financial Expert, Third Edition, 2001, edited by Roman L. Weil, Michael J. Wagner and Peter B. Frank, footnote 19 states:

> While some crude event studies are performed without adjusting for market effects, the literature nearly uniformly argues that a market adjustment is desirable. Moreover, there is relevant case law, such as *In Re Executive Telecard Ltd. Securities Litigation*, which states that in measuring stock price declines, one must eliminate "that portion of the price decline that is the result of forces unrelated to the wrong."

19. Defendants also cite to *In re Executive Telecard, Ltd. Securities Litigation* for the proposition that the industry index should be "a more precisely correlated portfolio of securities."[32] Again, this is exactly what I did. Defendants misleadingly and erroneously claim that my industry index did not "represent and 'correlate' to the industry in which [Halliburton] actually operates."[33] They are either purposely disingenuous or did not read the Nettesheim Report where I explained in detail how the industry index I used was created, using the type of methodology Defendants cite as appropriate. Defendants may disagree with some of the companies that were or were not included in the industry index, but regardless, the industry index represents the industry in which Halliburton operated and the residual returns on the industry index were correlated with Halliburton stock price returns.

The industry index represents the industry in which Halliburton operated:

20. I considered a company for the industry index if the company was considered by market participants[34] to be comparable to Halliburton. I used eight industry indices that included Halliburton and that were created by data providers (*e.g.*, Standard & Poor's,

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[32] Defendants' Motion, p. 6.

[33] Defendants' Motion, p. 7.

[34] Market participants refer to contemporaneous analysts and data providers during the Class Period. Data providers include entities that create industry indices from various companies that are in the same or similar industries and include entities such as Bloomberg, FactSet, and Standard & Poor's. These data providers are regularly used by economists, academics, investors and many others.

FactSet, Bloomberg); if a company was included in at least four of the eight indices, I considered it for inclusion in the industry index. Companies identified in analyst reports during the Class Period as comparables or competitors of Halliburton were considered for the industry index as well.[35] Ultimately, I considered 72 companies for the industry index and included 52 companies.[36]

21. Bloomberg has a service that identifies all of the indices in which a particular company is included. Halliburton is included in industry indices related to oil and gas or energy services and equipment. There is no index described as engineering and construction that includes Halliburton. The relevant industry indices I used to obtain companies that were comparable to Halliburton were oil and gas and energy services and equipment industry indices.[37] Thus, my search for comparable companies for the industry index was appropriate and comprehensive.

The residual returns on the industry index[38] *were correlated with Halliburton stock price returns:*

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[35] Nettesheim Report, Appendix ¶5.

[36] Nettesheim Report, Exhibit 16. Of the 72 companies considered, I excluded companies if their residual stock price returns were not statistically significantly correlated to Halliburton's stock price return, if the company was subject to securities litigation during the control period or the Class Period, or if there was no stock price data available during the control period or the Class Period.

[37] Nettesheim Report, Appendix ¶5, Appendix footnote 6.

[38] Because a market index also was used in the regression analysis, the industry returns net of market effects, *i.e.*, industry index residual returns, were used.

22. Of the 72 companies considered for the industry index, I used only those companies whose stock price returns had some explanatory power with respect to Halliburton's stock price returns (*i.e.*, each company's residual stock price returns were correlated with Halliburton's stock price returns). If a particular company's stock price returns had no explanatory power with respect to Halliburton's stock price returns, then there is no reason to include it in the industry index or in the final regression analysis—including such variables will not assist in identifying company-specific stock price movements.[39]

23. Defendants allege that I "pre-selected companies" for my industry index.[40] This statement is misleading and erroneous. First, Defendants claim that my industry index was not correlated with Halliburton (see paragraph 19 above), then they assert that including competitor and comparable companies in an industry index based on whether they have a

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[39] I have examined the impact of including the non-significant companies in the industry index by adding to my industry index the five non-significant companies, and the one company (Seitel) that was excluded from my index because it was subject to a class action securities litigation that alleged fraud during part of the Class Period. The r^2 is 77% in the Nettesheim Report, compared to 77% using the new index that includes these six companies. The standard error is 0.01725 in the Nettesheim Report, compared to 0.01739 using the new index. The beta coefficient on the industry residual is 1.03 in the Nettesheim Report, compared to 1.06 using the new index. Each of the curative disclosures that have statistically significant stock price declines in the Nettesheim Report, also have statistically significant stock price declines using the new index; and there is no material difference in the company-specific returns on each of these dates of curative disclosures.

[40] Allen Report, p. 13.

statistically significant correlation with Halliburton is "cherry-picking." In examining loss causation, the regression analysis is used to determine the portion of Halliburton stock price returns that are due to the market and industry returns with the remaining portion of the return due to company-specific events. The methodology I followed does that and is appropriate and correct in this case.[41]

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[41] *See, e.g.*, Tabak, David I., and Frederick C. Dunbar, "Materiality and Magnitude: Event Studies in the Courtroom," in Litigation Services Handbook, The Role of the Financial Expert, Third Edition, 2001, edited by Roman L. Weil, Michael J. Wagner and Peter B. Frank, p. 19.8, which indicates that statistical significance is one of the important considerations when constructing an index:

> The second consideration in selecting an index relates to how the company's stock price movements relate to those of the index during the estimation window. When the estimation regression is run, one of the statistics generated is the adjusted R-squared. This statistic measures the strength of the relationship between the variable being explained (the company's stock price movements) and the combined set of independent variables (the market and industry indices) that are being used to do the explaining. The higher this statistic, the stronger the relationship. Another relevant statistic is the t-statistic associated with each independent variable; this statistic measures the strength of the individual independent variable's correlation with the company's stock price. The farther the t-statistic is from zero, the stronger the relationship. While one should not use either the adjusted R-squared or t-statistics as a blind measure for the comparison of the explanatory power of different indices, an expert should be prepared to provide these statistics. Moreover, if the expert chooses one index with less statistical explanatory power than a second index, he or she should be prepared to defend this choice.

24. Defendants and Ms. Allen contend that my industry index "is not constructed properly" because it "does not adequately account for the negative E&C trend experienced industry-wide or the effects of the asbestos litigation."[42] Ms. Allen ignores the fact that my industry index does include, in addition to McDermott (which Ms. Allen concedes is an E&C company), several companies that have E&C business segments.[43] Ms. Allen's definition of the E&C industry is based on only three companies identified in one analyst report issued over one year prior to the start

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[42] Defendants' Motion, p. 8.

[43] For example, according to Reuters (www.reuters.com/finance/stocks, "Full Company Description"), the following companies, which are included in the industry index in the Nettesheim Report, have engineering and construction business segments: *Helix Energy Solutions Group* "provides services in support of offshore oil and natural gas infrastructure projects involving the construction and maintenance of pipelines, production platforms, risers and subsea production systems in the Gulf of Mexico;" *Global Industries Ltd.* "is an offshore construction company offering a range of marine construction and support services in the United States Gulf of Mexico, Latin America . . . ;" *Nabors Industries Ltd.* "offers a range of ancillary well-site services, including engineering, transportation, construction, maintenance, well logging, directional drilling, rig instrumentation, data collection and other support services in selected domestic and international markets;" *Cameron International Corp.*, "the V&M segment also provides aftermarket services, including original equipment manufacturer (OEM) parts, repair, field service, asset management and remanufactured product to customers. V&M's primary customers include oil and gas majors, independent producers, engineering and construction companies, pipeline operators, drilling contractors and major chemical, petrochemical and refining companies;" and *TransCoastal Marine Services* "is a marine construction company with worldwide operations onshore, in the transition zone and offshore . . . ."

of the Class Period.[44] Unlike Ms. Allen, I did not limit my search for comparable companies to a single analyst's report published more than one year prior to the start of the Class Period.

25. One of the E&C companies suggested by Ms. Allen was included in the industry index used in the Nettesheim Report. Inclusion of the other two purported E&C industry peers suggested by Defendants in my industry index does not materially alter my results. The residual stock price returns of those two purported E&C peers were not statistically significantly correlated with Halliburton stock price returns when tested during the control period, *i.e.*, the two purported peer companies do not have explanatory power with respect to Halliburton stock price returns.[45]

26. Defendants also claim that I ignored the downturn in the "entire" E&C industry from June 3, 1999 to December 20, 2000, by not including two of the three companies in my industry index. Actually, one of the two companies not included in the industry index (Jacobs Engineering) experienced an upturn.[46] That

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[44] These three companies are McDermott International Inc. (which was included in my industry index), Foster Wheeler Ltd. ("Foster Wheeler") and Jacobs Engineering Group Inc. ("Jacobs Engineering").

[45] The control period in the Nettesheim Report and used here is October 1, 1998 through September 30, 1999. As in the Nettesheim Report, each company's stock price returns, net of market returns, which are the residual returns, were used in the test of whether the company's stock price returns explained Halliburton stock price returns.

[46] That one of the three companies experienced an upturn disproves Defendants' statement that "the entire E&C industry experienced negative trends." Defendants' Motion, p. 8.

one of the three companies experienced an upturn disproves Defendants' statement that "the entire E&C industry experienced negative trends."[47] The third company, McDermott, was included in my industry index and did experience a downtown from June 3, 1999 to December 20, 2000. Thus, I did incorporate a representative company that experienced a downturn in the industry index. The inclusion of two other companies, one of which was up and one of which was down, would have no material impact on the overall industry index used in the Nettesheim Report. Even with those two companies, the regression analysis shows that all the partial corrective disclosure dates for the failed Dresser merger and the long-term, fixed price contract are still statistically significant.[48]

27. Ms. Allen further argues that over the period June 3, 1999 through December 22, 2000 (the beginning of the Class Period through the latest curative disclosure related to the Dresser integration),

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[47] Defendants' Motion, p. 8.

[48] I have examined the impact of including the two E&C companies proffered by Ms. Allen in my analysis. The r^2 is 77% in the Nettesheim Report, compared to 73% including these two companies. The standard error is 0.01725 in the Nettesheim Report, compared to 0.01859 including these two companies. The beta coefficient on the industry residual is 1.03 in the Nettesheim Report, compared to 1.19 including these two companies. Each of the four curative disclosures pertaining to allegations related to the integration of Dresser or the accounting for unapproved claims that have statistically significant stock price declines in the Nettesheim Report, also have statistically significant stock price declines when adding these two companies to the analysis. The residual returns on these dates of curative disclosures, October 5, 1999 January 5, 2000, October 25, 2000 and December 22, 2000, are 9.0%, 4.3%, 6.6% and 3.9% in the Nettesheim Report, compared to 9.0%, 4.2%, 6.2% and 4.2%, respectively.

an equal-weighted index comprised of three purported E&C companies, dropped 39.53%, while Halliburton dropped 13.25%. She concludes that this is evidence that "the decline in the E&C business over this time period was not a Halliburton-specific phenomenon."[49] Even assuming these stocks were fully representative of the E&C industry, it is inappropriate for Ms. Allen to critique my analysis of loss causation by simply comparing the stock price of these companies to Halliburton's stock price over this entire period. My analysis of loss causation in regards to the allegations pertaining to the Dresser integration and accounting for unapproved claims focuses on four specific dates of curative disclosures. The stock price of the three E&C companies proffered by Ms. Allen did not drop or dropped significantly less than Halliburton's stock price on those corrective disclosure dates (see chart below). The only company of the three to experience a net decline over these four corrective disclosure dates is McDermott, which is included in my industry index:[50]

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[49] Allen Report, p. 19.

[50] I also examined the impact of using the three E&C companies proffered by Ms. Allen as the industry index. In the Nettesheim Report, Halliburton stock's residual returns on the four corrective disclosure dates (October 5, 1999, January 5, October 25, and December 12, 2000) are: -9.0%, -4.3%, -6.6% and -3.9%, respectively. Keeping all else equal, Halliburton stock's residual returns using the three E&C companies proffered by Ms. Allen as the industry index are: -13.2%, -4.4%, -8.6% and -6.3%, respectively. In other words, using the E&C companies proffered by Ms. Allen as the industry index results in greater company-specific declines on the dates of curative disclosures than the index used in the Nettesheim Report.

Date of Corrective Disclosure Regarding Dresser Integration and/or Unapproved Claims	Actual Stock Price Return on Date of Corrective Disclosures			
	Foster Wheeler	Jacobs Engineering	McDermott	Halliburton
October 5, 1999	-0.53%	2.45%	-4.27%	-13.21%
January 5, 2000	-0.69%	0.59%	3.57%	-4.38%
October 25, 2000	-2.68%	-3.02%	-8.07%	-10.96%
December 12, 2000	7.69%	2.18%	4.00%	-2.70%
Net 4 day Change	3.53%	2.12%	-5.21%	-28.11%

It is inappropriate to include "asbestos" companies in the industry index:

28. Defendants fail to identify any company that was not included in the Nettesheim industry index that would better "reflect the asbestos litigation." The allegations in the Complaint regarding asbestos concern company-specific problems for Halliburton. The allegations are that Halliburton should have determined and disclosed a reasonable estimate for its asbestos liability, including from conduct dating back many years. In this case, Plaintiffs do not allege that the issue of asbestos litigation and liability was an industry-wide problem that was misrepresented to Plaintiffs; rather Plaintiffs allege that Halliburton misrepresented its own liability.

iii. Stock Prices Move in Response to Information

29. As the Nettesheim Report clearly states, stock prices move in response to information:

> A security price movement of any size can be material. Statistical significance measures the relative size of the security's price adjustment to the new information, i.e., statistical significance only indicates that the price change was among the largest price changes over a period of time. Information that does not cause a very large price adjustment, i.e., one that is not statistically significant, also can be material. Price changes are caused by information; the market is not a collection of whimsical expressions of an irrational force. Price changes may appear random because new information arrives randomly, i.e., we

> cannot predict the future. Nevertheless, those price changes have causes.[51]

30. Defendants claim that the analysis in the Nettesheim Report "assumes that 5% of the time, a 'statistically significant' movement will occur for no identifiable reason purely as a function of the normal fluctuation in stock prices."[52] This is an egregious mischaracterization of the Nettesheim Report and is fundamentally incorrect. As Mitchell and Netter point out,

> Information allegedly used in fraudulent activity that is important enough to affect security prices when publicly released provides compelling evidence that a reasonable investor would consider the information important in making an investment decision.[53]

31. Statistical significance of residual (company-specific) returns helps to identify those instances when the change in the stock price is relatively large, indicating that the new information materially changed the mix of information available to the public, and the stock movement was not caused by market and industry effects.

32. In statistics, a result is called statistically significant if it is unlikely to have occurred by chance. The significance level of a test is the probability of making a decision to reject the null hypothesis when the null hypothesis is actually true (*i.e.*, to make a

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[51] Nettesheim Report, ¶73.

[52] Defendants' Motion p. 5.

[53] Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," *Business Lawyer*, 49, February 1994, p. 549.

decision that the residual return was not due to chance when it actually was due to chance). In this case, we posit that on each day of the Class Period, Halliburton's stock price return will be equal to its predicted stock price return.[54] If Halliburton's stock price return is different from its predicted return,[55] the test determines whether this difference is large enough that it is unlikely to have occurred by chance. The level of significance used in the Nettesheim Report was 5% (which corresponds to a 95% confidence level). If the probability is less than 5% that the difference is due to chance, then the null hypothesis is rejected, i.e., we are more than 95% confident that the difference (the residual return) is not due to chance. This means that the relatively large residual return cannot be explained by market and industry effects and is due to other events, i.e., company-specific events.

33. Ms. Allen contends that the number of statistically significant days is "no more than the number expected" and thus, "yields no evidence that the stock price declines during the alleged class period are caused by anything other than the normal daily variation in stock price."[56] This statement is misleading and erroneous.

34. Ms. Allen's assertion that one would expect 5% of the days during the Class Period to be significant would only be true if the control period is the same as

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[54] The predicted return is based on the regression analysis specified in the control period, i.e., Halliburton's predicted stock price return given the market return and industry index return.

[55] This difference between the actual stock price return and the predicted stock price return goes by a variety of names: "company-specific return," "excess return," "residual return," "abnormal return."

[56] Allen Report, p. 8-9.

the Class Period.[57] The control period used in my event study analysis is a one-year period from October 1, 1998 through September 30, 1999. The fact that approximately 5% of the days during the Class Period are statistically significant is not relevant—whether there are more than or less than 5% of days with statistically significant stock price changes does not contribute to or detract from the statistical significance of those days.

35. Moreover, these are company-specific returns—not merely "normal daily variation in stock price." Statistical significance in an event study indicates that the change in the stock price was almost certainly not due to market and/or industry effects only and that it is more probable than not that the residual return was caused by company-specific information.

36. This method for identifying statistically significant stock price movements has been the predominant method used by myself and other financial economists during the many years which I have been involved in securities litigation.

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[57] In this case, most of the Class Period lies outside the control period. If the relationship between Halliburton stock price returns and market and industry residual returns changed substantially between the Class and control period or the volatility of Halliburton stock changed substantially between those periods, then the number of statistically significant stock price returns would not necessarily be 5% of the number of days in the Class Period. As discussed below, the alternative control period proffered by Ms. Allen occurs after Halliburton had restructured its E&C businesses, and after Halliburton had made a number of significant partial disclosures regarding its asbestos liability. These factors may have altered the relationship between Halliburton stock price returns and market and industry residual returns, and/or increased the volatility of Halliburton stock—thus explaining why she finds only two significant dates during the Class Period.

iv. Analysis of Halliburton's Stock Price Reaction to News Events is "Consistent" and Based on Statistical Techniques

37. In the Nettesheim Report, I provide a comprehensive discussion of the news released around days of statistically significant stock price movements and I provide my conclusion as to what news caused the stock price movement for each of those dates.[58] However, Defendants misleadingly state "there is no method to [my] classification of news days and non-news day."[59] It is not possible to obtain at this time all of the news that was available to market participants during the Class Period; for example, I know that I have do not have First Call reports or all of the analyst reports that were published during the Class Period. Furthermore, there very likely are other types of relevant information about Halliburton that was of interest and available to market participants during the Class Period that we will never know existed. Thus, to segregate days during the Class Period into "news days" and "non-news days" is a meaningless exercise at this time. Certainly, we can determine that particular days had news about Halliburton, but for those days that Defendants would label as "non-news days" it may be the case that at this time we merely are unable to find news about Halliburton.

38. Defendants erroneously assert that I misclassify the news on two events dates, December 22, 2000 and October 31, 2001. For the December 22, 2000 date, I am not relying on news released on December 21, 2000, as Defendants suggest. Rather, I am relying on additional analyst commentary from December 22,

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[58] Nettesheim Report, ¶¶43-45.

[59] Defendants' Motion, p. 9.

2000 related to the restructuring charge announced on December 21, 2000.[60]

39. Defendants claim without any documentary support that the news I cite for October 31, 2001, "was released at least as early as October 28, 2001 (a day on which I do not find a statistically significant price change)."[61] The important news on October 31, 2001 (published after market close on October 30), are reports about the jury verdict against Halliburton in an asbestos trial in Mississippi. Although the verdict was rendered on Friday, October 26, I could not find a news report on the verdict before October 30.

40. On the days of significant movement in Halliburton's stock price for which no news or analyst coverage has been found to date, it is not necessarily the case that there was no important or material "news." Even so, material news pertaining to Halliburton was released on most of the days for which there was statistically significant movement in Halliburton's stock price. Certainly, on the dates when Plaintiff contends that there were partial disclosures of the fraud, there were large stock price changes and many news articles and analysts' reports.

v. The Analysis of News Related to Market Efficiency and Loss Causation in the Nettesheim Report is Appropriate

41. Defendants mischaracterize the analysis I undertook in the Market Efficiency (specifically with respect to *Cammer/Unger/Bell* Factor 5) and Loss Causation sections of the Nettesheim Report.

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[60] Nettesheim Report, ¶106-112, and Exhibit 6, p. 5.

[61] Defendants' Motion, p. 10; Allen Report, p. 15. October 28, 2001 is a Sunday and there is no stock price return for that date.

Defendants point to nine dates on which the news available to me at this time does not explain the price movement, and then Defendants point to articles in Exhibit 18 to the Nettesheim Report on those dates as evidence of news regarding Halliburton.[62]

42. In the Nettesheim Report, I noted that on four of the nine days Halliburton's stock price return was relatively small. Therefore, it is not surprising that I could find no news. The company-specific returns were statistically significant only because there were large market and/or industry index returns on those dates. While Halliburton stock price returns were correlated with returns on market and industry residual indices, they were not perfectly correlated—thus, it is not unexpected that Halliburton's stock price did not move with the market and/or industry on certain dates.

43. For the other five dates, the news available to me at this time does not explain the relatively large price movement in Halliburton stock.[63] I did not say there was nothing in print about Halliburton on those dates, as Defendants suggest, only that the news available at this time did not explain the relatively large stock price movements. News articles commonly repeat information already known by the market. The fact that there was an article published with the word "Halliburton" in it on a day I conclude there was no news that accounts for the relatively large change in the stock price return does not contradict my

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[62] Defendants' Motion, p. 9; Allen Report, p. 14. Exhibit 18 to the Nettesheim Report is a list of news articles for each day of the Class Period that contains the word "Halliburton" in the title or lead paragraph.

[63] The five dates are: June 18, 1999, October 15, 1999, February 25, 2000, May 19, 2000, and November 6, 2001. (Nettesheim Report, ¶44.)

conclusions. One must conduct an evaluation of the content of such news (as I have done).

44. The news articles that Defendants point to as evidence of news about Halliburton for the five dates for which I conclude the news is not sufficient to explain the relatively large stock price returns are as follows (company-specific return is in parentheses):

- June 18, 1999 (-4.1%): the article is merely a company profile report that summarizes information about a Halliburton subsidiary, *e.g.*, contact information, employees, turnover, assets.
- October 15, 1999 (-3.6%): the article repeated the earnings warning that Halliburton issued several days earlier. (The other article in Exhibit 18 for October 15, 1999, is about "Janet Halliburton" in the lead paragraph and is not about Halliburton Company.)
- February 25, 2000 (-3.6%): the article merely provides the date that Halliburton stock goes ex-dividend[64] and the amount of the dividend, neither of which could be new information as Halliburton paid regular dividends.
- May 19, 2000 (3.9%): the three articles refer to: (1) Brovig buying Halliburton's remaining 48% stake in Green Seas holding company for $6 million (this very small transaction is not mentioned elsewhere and appears relatively unimportant); (2) an oil rig off the Niger Delta where Halliburton is a contractor; and (3) Mr.

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[64] The day before a company goes "ex-dividend" represents the last day in which investors can purchase the company's stock and still collect the firm's next declared dividend payment.

Cheney heading Mr. Bush's vice presidential selection committee.

- November 6, 2001 (-3.5%): MaverickTrader.Com announced stocks with price action in accord with rating; for Halliburton the rating was Underperform (there was no analysis and this type of cryptic report does not appear to be important or material, compared to, for example, reports by analysts from CIBC World Markets or Dain Rauscher Wessels, both of which wrote more comprehensive reports on Halliburton during the Class Period[65]).

45. None of the news articles on the five dates discussed above explain the relatively large company-specific stock price returns on those dates, and Ms. Allen does not claim otherwise.

46. In contrast to my approach, Ms. Allen's method for classifying dates as "News" and "Non-News" is arbitrary and is not based on *any* examination of the content of the news. Ms. Allen contends that the excess (or company-specific) returns on what she classifies as "News Days" and "Non-News Days" are "very similar" and thus that my "procedure is unreliable."[66] However, Ms. Allen's classification of days as "New Days" and "Non-News Days" is speculative. She fails to conduct any analysis of the content of the news released on days she categorizes as "News Days" to determine if the news was "new news" or merely reiteration of events already known by the market. Nor does she evaluate the significance of the news released on "News Days." Thus, it is hardly surprising that she did

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[65] *See, e.g.*, Nettesheim Report, ¶86.

[66] Allen Report, p. 10.

not find a difference in the company-specific return on days she classified as "News" and "Non-News" days.

vi. The Market Index Used in the Nettesheim Report is Replicable

47. Ms. Allen claims that she was unable to identify my market index.[67] As explained in what follows, the difference between my market index and the one she was able to create are extremely small, and the differences in the two series of returns are so minor as to be meaningless and irrelevant, as Ms. Allen knew. The results are the same regardless of which series of market returns are used. Her criticism without acknowledgement in her report that these differences are minor at most is specious and implies errors and problems with the data and my analysis that do not exist. Since she implied that there were problems with my market index, it would have been appropriate for her to specify in the Allen Report the extent of those problems and how large the differences in the data were. There was no indication in the Allen Report about the magnitude of the implied problem.

48. I have confirmed that the market index data used in the Nettesheim Report for the trading days in

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[67] Allen Report, p. 11. In her deposition (p. 169:4-15), Ms. Allen misleadingly suggests that, contrary to what I state in my report, I may not have used a market index:

> A. Yes, well, [Ms. Nettesheim] claims to use a market index. We were not able to find that market index. She claims it comes from Chris [sic: CRSP], we talked to [CRSP] but they don't think it came from them so—and she claims to use an industry index, I'm not sure what industry it is that it is an index of so it's not clear to me it's a market index or where it's from, it's not clear what industry it is an industry index of so I'm not sure I agree that she used a market or industry index.

the Class Period is accurate. In the Nettesheim Report, I used a New York Stock Exchange/American Stock Exchange/NASDAQ ("NAN") market index that Stanford Consulting Group obtained a few years ago from CRSP, a data provider (since the Class Period ends in 2001, there was no need to obtain more recent data). When Ms. Allen stated that she could not replicate the market index, we re-ordered the NAN market index from CRSP. The reordered CRSP market index has returns that are almost exactly the same as the market index returns in the Nettesheim Report.[68] There is virtually no difference in the regression analysis using the re-ordered market index.

49. I have replicated the regression analysis in the Nettesheim Report using the CRSP market returns data that Ms. Allen relied upon and that was produced by defense counsel in this action subsequent to the issuance of her report. The differences between the returns that Ms. Allen used and the returns on the market index used in the Nettesheim Report are very small and meaningless. I replicated the regression analysis in the Nettesheim Report using Ms. Allen's market returns and the results are virtually identical.[69]

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[68] On 619 days out of 633 days (there are 633 trading days from June 3, 1999 to December 7, 2001) the absolute values of the differences in the two series of returns are less than 0.01%; the returns are different by more than 0.01% and less than 0.02% (two-hundredths of one percent) on only 13 days out of 633 days and by 0.06% on one day out of 633 days. When I inquired about this difference, an analyst at CRSP said that over the years, they have made very minor edits to the data.

[69] The r^2 is 77% and the standard error is 0.01725 in both cases, and the statistically significant dates in the Class Period are exactly the same.

vii. The Control Period in the Nettesheim Report is Representative and Robust

50. Ms. Allen contends that my findings are not "robust" based on her analysis of an alternative control period—a one-year period that begins after the Class Period.[70] She is incorrect, my findings are "robust," as demonstrated below, and it is her alternative control period that is arbitrary and irrelevant.

51. It is important to select a control period that is representative of the company during the Class Period and with as little impact as possible from the fraud in determining the normalized relationship between a company's stock price returns and the returns on a market index and an industry index.[71] The control period I used is more highly correlated and representative of Halliburton stock price returns during the Class Period than the control period proposed by Ms. Allen.

52. The control period I used was the one-year period October 1, 1998 through September 30, 1999 (the 1998-1999 control period). The final day of the control period was only five days prior to October 5, 1999, the first date discussed in the Loss Causation section of the Nettesheim Report regarding a partial corrective disclosure of the lack of benefits from the Dresser merger.[72] Thus, the control period is immediately prior to the first partial corrective disclosure and is a better choice of a control period than the control period advocated by Ms. Allen which is after the end

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[70] Allen Report, p. 13. She uses a one-year period from December 10, 2001 through December 9, 2002.

[71] Nettesheim Report, Appendix, ¶3.

[72] Nettesheim Report, ¶84-87.

of the Class Period and after Halliburton had restructured its E&C businesses, and as explained below, after Halliburton had made a number of significant partial disclosures regarding its asbestos liability.

53. I also examined the effect of choosing other control periods prior to other important disclosures during the Class Period. The results using these other control periods are very similar to the results in the Nettesheim Report (and different than Ms. Allen's results), demonstrating that the control period in the Nettesheim Report is "robust." For example, a control period of October 1, 1999 through September 30, 2000 (the 1999-2000 control period), produces a very similar result to the control period used in the Nettesheim Report. The 1999-2000 control period, while after the first disclosure regarding Dresser, is prior to the partial corrective disclosures in October 2000 that are discussed in the Complaint as the first major corrective disclosures regarding the operational problems with fixed price contracts in Halliburton's E&C businesses. The r^2 and standard error for the 1999-2000 control period are 76% and 0.01729, respectively (compared to an r^2 and standard error of 77% and 0.01725 in the 1998-1999 control period). There is the same number of statistically significant residual returns, 31, as from the 1998-1999 control period. The significant dates differ slightly.[73]

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[73] The following dates are significant for the 1998-1999 control period in the Nettesheim Report but were not significant using the 1999-2000 control period: October 27, 1999; January 12, 2000; February 25, 2000; October 23, 2000; November 1, 2001; November 6, 2001. Of these dates, November 1, 2001 is the only date I consider to be a curative disclosure with a significant stock price decline.

54. A control period of June 1, 2000 through May 31, 2001 (the 2000-2001 control period), produces a very similar result as the control period used in the Nettesheim Report. The r^2 and standard error for the 2000-2001 control period are 71% and 0.01575, respectively (compared to an r^2 and standard error of 77% and 0.01725 using the 1998-1999 control period). All of the significant dates using the 1998-1999 control period are statistically significant using the 2000-2001 control period.[74] The 2000-2001 control period is prior to the partial corrective disclosure in June 2001 discussed in the Complaint as the first major corrective disclosure regarding Halliburton's potential asbestos liability.

55. Ms. Allen's proposed control period is from December 10, 2001 through December 9, 2002 (the Allen control period). During this time period, which is the one-year period following the end of the Class Period, material disclosures regarding the Company's asbestos litigation continued.[75] Also, certain Dresser subsidiaries obtained as part of the Dresser merger had been sold by then and Halliburton had been restructured such that it was a different company from what it was prior to the Class Period and different from what investors had expected at the start of the Class Period. These factors make Ms. Allen's control period less suitable than the control period used in the Nettesheim Report as a basis for an analysis of market efficiency and loss causation during the Class Period. These factors, which are unique to Ms. Allen's control period, may explain why Ms. Allen's results differ from my results and are consistent with my conclusion that

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[74] There are 19 additional significant dates using the 2000-2001 control period.

[75] *See, e.g.*, Complaint, ¶50-51.

it is Ms. Allen's analysis that is not "robust."[76] In fact, Ms. Allen concedes her alternative control period is not a better control period than the one I use.[77]

56. Using Ms. Allen's proposed control period, Halliburton stock price returns are not "explained" well by market and industry returns, which results in a higher standard error in the residual returns during this later time period. Ms. Allen imposes this relatively high standard error measure on the residual returns during the Class Period, which, in turn, means that few dates in the Class Period have a statistically significant stock price movement. Her approach is strained and unnecessary because, as I have demonstrated above, Halliburton stock price returns were "explained" well by market and industry returns.[78]

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[76] I also note that Ms. Allen fails to suggest any industry index, let alone one that would produce similar "robust" results using the proposed alternative control periods. (Allen Deposition, p. 170:19-23.)

[77] Allen Deposition, pp. 211:25-212:8:

> Q. And did you believe that the one year control period after the class period ended was a better control period than the control period that Ms. Nettesheim used?
>
> A. No, so the reason I did it wasn't because I thought that was a better period. I thought that that was a way to illustrate that her results are not robust . . .

[78] Moreover, as stated in the Nettesheim Report, a statistically significant stock price movement is not a prerequisite for an event to be considered material and/or relevant to loss causation. (Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," The Business Lawyer, 49, 545, Nettesheim Report, ¶73.)

B. Loss Causation Has Been Demonstrated for the Allegations in this Matter

57. Plaintiffs allege misrepresentations regarding (1) the integration of Dresser, (2) accounting of unapproved claims, and (3) asbestos liability.[79] In her report, Ms. Allen claims that I fail to establish loss causation for each of these three allegations for various unwarranted reasons.[80] Defendants further argue that my analysis of loss causation is flawed because I have "not provided the required empirical showing that some percentage of the stock price drop was attributable to the corrective disclosure." In what follows, I explain why Defendants' and Ms. Allen's arguments are flawed and that my analysis of loss causation shows that the partial disclosures related to the each of the three categories of allegations during the Class Period caused the price of Halliburton stock to decline, thus demonstrating loss causation.

i. Integration of Dresser

58. Ms. Allen puts forth the following arguments in order to dispute my analysis of loss causation for the allegations pertaining to the integration of Dresser:

- Ms. Allen states that I "inappropriately combine[] the allegations regarding the integration of Dresser with the allegations regarding the unapproved claims;"[81]

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[79] Lead Plaintiff's Motion for Class Certification and Incorporated Memorandum of Points and Authorities in Support Thereof, dated September 17, 2007 ("Lead Plaintiff's Motion") p. 3.

[80] I note that Ms. Allen concedes that she has not conducted her own analysis of loss causation and is not opining as to whether there is loss causation in this matter. (Allen Report, p. 1; Allen Deposition, p. 83:18-22.)

[81] Allen Report, p. 15.

- Ms. Allen states that I wrongly look at whether stock price declines relate to E&C[82] and that I mischaracterize the underperformance of E&C as due to unrealized benefits from the Dresser merger;[83]
- Ms. Allen states that the alleged curative disclosures are not curative of alleged misrepresentations;[84]
- Ms. Allen states that I do not properly control for the E&C industry;[85]
- Ms. Allen states that there was non-culpable news on dates I determine are dates of curative disclosures.[86]

Each of these arguments is addressed below.

Allegations Regarding the Dresser Integration and Accounting for Unapproved Claims:

59. Ms. Allen argues that I "inappropriately combine[] the allegations regarding the integration of Dresser with the allegations regarding the unapproved claims."[87] The fact that I discuss the allegations related to the Dresser integration and the allegations related to Halliburton's accounting for unapproved claims in the same section of the Nettesheim Report is inconsequential. I recognize both of these allegations in the Nettesheim Report, and I demonstrate loss causation for each of these allegations. I conclude that disclosures on January 5, 2000, October 24-25, 2000

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[82] Allen Report, p. 16.

[83] Allen Report, p. 20.

[84] Allen Report, p. 17.

[85] Allen Report, p. 18.

[86] Allen Report, p. 22.

[87] Allen Report, p. 15.

and December 21-22, 2000 pertain to allegations related to both the Dresser integration and accounting for unapproved claims.[88],[89] I conclude that disclosures on October 5, 1999 pertain to allegations related to the Dresser integration.[90] On only one of the four dates of

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[88] Regarding January 5, 2000, the Nettesheim Report (¶92), states:

> The reductions in earnings estimates are based at least in part on the problems with the large fixed-price contracts and the lack of benefits from the Dresser merger. . . . Thus, a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger.

Regarding October 24-25, 2000, the Nettesheim Report (¶93) states:

> Thus, a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged in the Complaint.

Regarding December 21-22, 2000, the Nettesheim Report (¶112) states:

> As there was no other negative news released that day, all of the price decline on December 22 was caused by the partial disclosures related to the operational problems at the engineering and construction units and is related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged by Lead Plaintiff.

[89] I discussed the decline in the price of Halliburton stock on December 21 as being related to these allegations; however, the decline on this date was not statistically significant.

[90] The Nettesheim Report (¶84) states "[October 5, 1999] is an instance where the Company released negative news, which concerned the lack of benefits arising from the Dresser merger."

corrective disclosures (January 5, 2000) do I find confounding non-culpable news that may have contributed to the decline in Halliburton's stock price—however, in the Nettesheim Report, I demonstrate that a substantial portion of the decline was related to the curative disclosures.[91] It is my understanding that when all of the news on a given day causing a change in the stock price is related to the allegations (*i.e.*, when there is no non-culpable news causing a change in the stock price), Lead Plaintiff is not required to attribute the cause of a decline among multiple culpable negative statements, and I have not been asked to do so in this matter.[92] Therefore, it is my understanding that Plaintiffs are not required to separate out the portion of Halliburton's stock price declines due to disclosures pertaining to the allegations regarding the Dresser integration from the allegations regarding the accounting for unapproved claims.

60. I also note that the allegations regarding the Dresser integration and the allegations regarding accounting for unapproved claims are inherently related. Among other things, the Complaint alleges that the Company's apparently favorable financial results due to accounting for unapproved claims were misleadingly attributed by Defendants to successful restructuring of the Company upon the Dresser merger:

> Thereafter, Cheney and Halliburton's other top executives continued to conceal that they had secretly changed the manner by which Halliburton accounted for Unapproved Claims. They told investors that the favorable

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[91] Nettesheim Report, ¶¶88-92.

[92] Lead Plaintiff's Motion, p. 22.

> financial results of Halliburton's construction operations were due to their "successful consolidation and restructuring" and, when negative industry conditions emerged, that the "benefits of [Halliburton's] . . . restructuring activities allowed [them] to remain profitable during this most difficult period." Halliburton said that the integration of Dresser's and Halliburton's construction operations had been "particularly effective" and had resulted in "strength in all facets of construction and project management." They also told investors that the "keys" to improving Halliburton's "profit margins . . . will be . . . acceptance of more fixed-price contracts" and "reiterated their confidence in the integrity (i.e., margins)" of Halliburton's construction backlog.[93]

The Dresser Integration and E&C:

61. Ms. Allen accuses me of attributing "any negative news that relates to E&C" to corrective disclosures related to the integration of Dresser.[94] She cites October 25, 2000 as an example.[95] This is not true. I did not arbitrarily select October 25, 2000 as a curative disclosure date as Ms. Allen suggests. The curative disclosures of the allegations related to the Dresser integration cited in the Nettesheim Report

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[93] Complaint, ¶14, emphasis removed.

[94] Allen Report, p. 16.

[95] *See, e.g.*, Complaint ¶¶44-147. October 25, 2000 is a date I conclude contains disclosure related to both the integration of Dresser to accounting for unapproved claims. Defendants' criticisms of this date as it pertains to accounting for unapproved claims are addressed elsewhere in this Rebuttal Report.

(including October 24-25, 2000) are disclosures of the operational problems and cost overruns at the Company's engineering and construction units that resulted from the lack of benefits from the Dresser merger that are alleged by Lead Plaintiff. The events of October 24-25, 2000 and their relationship to the allegations regarding the Dresser integration (as well as the allegations regarding cost overruns and accounting for unapproved claims) are discussed extensively in the Complaint, as well as in the Nettesheim Report.[96]

62. Moreover, at issue (among other things) is the allegedly unsuccessful integration of Dresser's construction unit (M. W. Kellogg) with Halliburton's Brown & Root engineering and construction operations, which, together, formed Halliburton's Kellogg Brown and Root—one of two divisions of Halliburton's Engineering and Construction Group.[97] M. W. Kellogg comprised a significant portion of the Company's E&C segment. As such, disclosures of the alleged operational problems related to the integration of Dresser's M. W. Kellogg will inevitably entail discussions of the performance of the E&C unit as a whole. Disclosures such as the restructuring of the Company's E&C unit due to "serious operational problems in Halliburton's construction business" (as disclosed on October 24-25, 2000 and December 21-22, 2000) directly relate to the alleged unsuccessful Dresser integration. The significance of the integration of Dresser's M. W. Kellogg business into Halliburton's E&C segment was recognized by the Company and by analysts. For

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[96] *See, e.g.*, Complaint ¶144.

[97] Halliburton's Engineering and Construction Group segment consisted of Kellogg Brown & Root and Brown & Root Services. (Company 2000 10-K SEC filing.)

example, the September 29, 1998 Company press release announcing the completion of the merger states:

> Dick Cheney . . . said, "The merger . . . improves our position as the leader in providing integrated project management services . . . . The combination of M.W. Kellogg's engineering expertise with Brown & Root's project management and construction strengths enhances the competitive position of the new Kellogg Brown & Root organization. . . . The merger will both lower Halliburton's cost structure and increase its operating income from added revenues. We expect that net synergistic benefits will add at least $250 million pretax to earnings on an annualized basis."[98]

On March 1, 1999, Donaldson, Lufkin & Jenrette issued a report on Halliburton in which it rated the Company's stock a "Top Pick." The report stated:

> *Leading engineering and construction company in the world*—The combination of Dresser's M.W. Kellogg subsidiary and Halliburton's Brown & Root subsidiary creates one of the largest and best positioned e&c companies with a worldwide presence and a number of unique technologies in diverse areas including LNG, ammonia, olefins and ethylene.[99]

Curative Disclosures:

63. Ms. Allen suggests that the presence of days with positive company-specific returns and negative news announced related to E&C somehow undermines

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[98] Cited in the Complaint, ¶83.

[99] Cited in the Complaint, ¶93.

my analysis of loss causation. She cites July 26, 2001 and July 27, 2000 as examples. As discussed in the Nettesheim Report, the positive change in Halliburton's stock price on July 26, 2001 was due to the fact that Halliburton released its second quarter financial results that day, reporting strong revenue and earnings and, as a result, several analysts raised their estimates.[100] The positive change in Halliburton's stock price on July 27, 2000 was due to positive second quarter 2000 earning results released after market close on July 26.[101] The positive returns on both days do not indicate that the market did not react to negative news. Rather, it indicates that the reaction to positive news may have been greater than the reaction to negative news. Ms. Allen's analysis merely suggests that there may be additional dates beyond those identified in the Nettesheim Report that demonstrate loss causation. While I do not necessarily agree that these dates represent curative disclosures, to the extent that negative curative information exerted downward pressure on Halliburton's stock price, which rose or maintained its price for other reasons on days such as July 26, 2001 and July 27, 2000, my analysis of loss causation is conservative.

Controlling for the E&C Industry:

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[100] Nettesheim Report, Appendix, ¶¶58-59.

[101] *See, e.g.*, Deutsche Banc Alex. Brown, "Halliburton Company [HAL] 'BUY': Upgrading Rating to Buy From Market Perform, 2000/2001 Estimates Raised," July 27, 2000; SunTrust Robinson Humphrey Capital Markets, "HAL—June Q Above Expectations, Driven by Strength in Energy Services," July 27, 2000.

64. Ms. Allen argues that I do not properly control for the E&C industry[102] and that I "mischaracterize the underperformance of E&C as due to unrealized benefits of the Dresser merger."[103] These topics are addressed in paragraphs 24-27 of this Rebuttal Report.

Alleged Non-Culpable News on Dates of Curative Disclosures:

65. Ms. Allen alleges that non-culpable information was released on dates which I find curative disclosures of the allegations related to the Dresser integration. However, her examples of confounding news are misleading, not substantial, unrepresentative of the overall market consensus, and/or not relevant to loss causation in this matter. I address each of these dates in what follows.

66. *October 5, 1999:* After market close October 4, 1999, the Company warned that it expected its 1999 third-quarter earnings to be in the range of 11 to 13 cents per diluted share. The previous average analyst estimates was 19 cents per share. The Company attributed the reduction, in large part, to the lower than expected profits of the joint ventures of its subsidiary, Dresser Industries, which was part of its engineering and construction units and many of the other business units of the Dresser Equipment Group. Ms. Allen misleadingly cites two analyst reports released on October 5, 1999 as evidence of confounding non-culpable news released on that date.

67. Ms. Allen claims that an October 5, 1999 CIBC World Market report evidences that the October 5

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[102] Allen Report, p. 18.

[103] Allen Report, p. 20.

decline may be attributed to "industry issues."[104] I cite the same analyst report in the Nettesheim Report.[105] The actual decline in Halliburton's stock price that day was 13.2%; the company-specific decline was 9%. Industry-wide disclosures are generally captured by the industry index and are not reflected in the company-specific returns. Thus, these negative "industry issues" are accounted for in my analysis.

68. Ms. Allen states that the weakness in the Company's earnings was in "virtually all areas of the business" (citing the same CIBC report). However, as stated in the Nettesheim Report, Halliburton attributed the reduction, "in large part," to the lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group[106] Dresser Equipment Group was one of three business segments created at Halliburton as a result of the Dresser merger, encompassing what was formally Dresser's Energy Equipment segment.[107]

69. Lastly, Ms. Allen cites an October 5, 1999 Merrill Lynch report as evidence that "the market considered the sale to be positive news."[108] Such positive statements noted by Ms. Allen would not be a contributing factor to the decline in Halliburton's stock price—they are not confounding negative news. These positive statements by analysts were noted in the Nettesheim Report. However, as also noted in the

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[104] Allen Report, pp. 23-24.

[105] Nettesheim Report, ¶86.

[106] Nettesheim Report, ¶84, citing *Reuters News*, "Halliburton to Exit Two Ventures, Sees Lower Q3 EPS," October 4, 1999, 5:23 pm.; Halliburton SEC Form 8-K filed October 4, 1999.

[107] Halliburton SEC Form 8-K dated September, 29, 1998.

[108] Allen Report, p. 24 (emphasis removed).

Nettesheim Report, these same analysts also recognized that the move would "negatively affect earnings in the fourth quarter and for at least part of 2000.[109] This analyst attributed "most" of the shortfall to the lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group. This is consistent with my conclusion that a significant portion of the stock price decline on October 5, 1999, was caused by information that partially corrected prior misstatements and omissions regarding the Dresser merger and the Company's related operational problems.

70. *January 5, 2000:* On Wednesday, January 5, 2000, both a Merrill Lynch analyst and a Brown Brothers Harriman & Co. analyst cut their earnings estimates for Halliburton. The Merrill Lynch analyst

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[109] Nettesheim Report, 1185. As stated in the October 5, 1999 Merrill Lynch report cited by Ms. Allen:

> Late yesterday afternoon, HAL announced both positive and negative developments.
>
> - The positive is that HAL will sell its JV interests in Dresser-Rand and IR Dresser Pump to IngersonRand for $1.1 billion (pretax). HAL expects to retain pooling treatment of the Dresser Industries merger.
>
> . . .
>
> - The negative is that 3Q EPS is only expected to be $0.08—$0.10 from operations, which is below our $0.16 estimate. While most of the shortfall comes from the JVs that are being sold, HAL's oilfield earnings are also weaker than expected due to lower overseas results.
> - We are cutting our 1999E from $0.71 to $0.57 and are taking our 2000E down from $1.30 to $1.15. About half the cut reflects elimination of the JV earnings sooner than we expected.

attributed his cut to reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America and "less powerful synergies from the Dresser merger than [h]e had envisioned." I conclude that this was a partial disclosure related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits realized from the Dresser merger."[110] Ms. Allen argues that, contrary to my conclusion, the "reduced expectations for offshore construction results" is a non-culpable disclosure, because the Merrill Lynch analyst attributes this to "weak future business from projects in the North Sea, a delay regarding deepwater development projects and reductions in offshore construction that are in line with competitors"—reasons, she asserts, that "bear no relationship" with the allegations.[111] I disagree. The condition and success of Halliburton's construction operations is directly related to the allegations pertaining to the Dresser integration. Furthermore, to the extent these were industry-wide concerns, they are generally accounted for by my industry index, and not reflected in Halliburton's company-specific returns. In the Nettesheim Report, I opine that the news related to industry oilfield spending is non-culpable. However, I conclude that this news is unlikely to be a contributing factor to the significant company-specific decline in Halliburton's stock price because it was an industry-wide concern.[112] Ms. Allen argues that if the price decline is due to the reduction in the analysts' estimates, and the analyst cites this information as a "key factor" to the cut, then this information must

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[110] Nettesheim Report, ¶88.

[111] Allen Report, p. 25.

[112] Nettesheim Report, ¶¶90-91.

have contributed to the decline in Halliburton's stock price.[113] Her argument does not undermine my analysis. I did not conclude that this factor did not contribute to the total decline in Halliburton's stock price. Rather, I conclude that this news is unlikely to be a contributing factor to the significant company-specific decline. As explained in the Nettesheim Report, industry-wide concerns such as these generally are accounted for in my analysis through my industry index and are not reflected in the company-specific returns.

71. Notably, Ms. Allen does not refute my conclusion that one of the key reasons for the estimates cut by Merrill Lynch, namely "less powerful synergies from the Dresser merger than [the Merrill Lynch analyst] had envisioned," is relevant to loss causation."[114] The fact that this was one of the key reasons for the analyst's downgrade of Halliburton stock supports my conclusion that a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger.

72. *October 25, 2000*: After market close on October 24, 2000, while announcing its third quarter earnings release, the Company disclosed that it would be restructuring its engineering and construction units. The subsequent restructuring charge taken in the fourth quarter (as revealed later in the December 21-22, 2000 partial disclosure) was predominantly due to the delays and cost overruns of Halliburton's large

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[113] Allen Report, p. 25.

[114] Merrill Lynch, "Halliburton Co; Downgrading from Buy to Accumulate," January 5, 2000, p. 2.

fixed-price construction projects.[115] In the Nettesheim Report, I conclude that a significant portion, if not all, of the significant price decline on October 25 is related to the Company's booking unapproved claims on fixed-price contracts (discussed below) and lack of benefits from the Dresser merger.[116] Ms. Allen cites just one analyst report (by Dain Rauscher Wessels) as evidence of confounding news on October 25, 2000. Ms. Allen contends that the confounding news that day was regarding "the weaker than expected international market for the Energy Service Group.[117] The effect of that news is generally captured by my industry index. She puts forth the same information that I present in the Nettesheim Report, which demonstrates that more than 80% of Dain Rauscher Wessels' reduction in estimated operating earnings for 2001 comes from the Company's E&C unit (less than 20% comes from the Company's Energy Services unit). This supports my conclusion that "the negative news and sentiment is predominately about the operational problems, delays and cost overruns for large construction projects."[118]

73. *December 22, 2000*: On Thursday, December 21, 2000, Halliburton pre-announced fourth-quarter earnings and formally unveiled the restructuring of its engineering and construction units and its plan to take a charge of $120 million in the fourth quarter, the bulk of which was due to cost overruns at several overseas projects (the Company's initial announcement of its intent to restructure on October 24-25, 2000 is a curative disclosure discussed above). Ms. Allen contends

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[115] Nettesheim Report, ¶95.

[116] Nettesheim Report, ¶¶93-105.

[117] Allen Report, p. 26.

[118] Nettesheim Report, ¶104-105.

that there was confounding information regarding "increased competitive pressure and intensified competition in pricing and labor disturbances in Venezuela and West Africa," in reference to a CIBC analyst report.[119] I also cite this CIBC analyst report and I note these factors in the Nettesheim Report.[120] However, these factors are not confounding news. On the contrary, they are reasons provided by the Company for the cost overruns at issue in this matter. As the CIBC report states, these factors were company-specific problems leading to cost overruns that were not expected to be recovered. The CIBC report distinguishes these problems from "general industry-wide issues" (which are generally accounted for in my analysis by my industry index):

> Although the E&C division was weak in the first half of 2000, we were surprised by management's earnings warning on the 3Q conference call. There were concerns that HAL might not have the critical mass to generate consistent and predictable profitability in the E&C business. Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts. HAL has submitted claims on these costs to clients, but HAL does not believe that all the costs will be recovered. Additionally, relationships with some customers have deteriorated and the cost increase claims on seven other projects have not resolved as expected.

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[119] Allen Report, p. 27, citing CIBC World Markets analyst report, dated December 22, 2000.

[120] Nettesheim Report, ¶110.

> General industry-wide issues are also impacting the E&C business. . . .[121]

74. As noted above, the Dresser's construction unit (M. W. Kellogg) and Halliburton's Brown & Root engineering and construction operations, together, formed Halliburton's Kellogg Brown and Root—one of two divisions of Halliburton's Engineering and Construction Group. As disclosed on December 21-22, significant cost overruns, which were not expected to be recovered, were incurred at Kellogg Brown & Root and both Brown & Root Energy Services and Kellogg Brown & Root were impacted by the charges and reorganization.[122] As such, the December 21-22, 2000 disclosure of the restructuring necessitated by the severe operational problems arising from the failed Dresser merger was a partial disclosure of the allegations pertaining to the integration of Dresser (as well as the allegations pertaining accounting for unapproved claims, discussed further below), causing a significant decline in Halliburton's stock price.

ii. Accounting for Unapproved Claims

75. Ms. Allen puts forth the following arguments in order to dispute my analysis of loss causation for the allegations pertaining to the accounting for unapproved claims:

- Ms. Allen states that I attributed any bad news related to fixed-price contracts as related to

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[121] CIBC World Markets, "Halliburton Co.—4Q Outlook In Line With Prior Guidance; Restructuring Charge Announced," December 22, 2000.

[122] *PR Newswire*, "Halliburton Announces New Structure and Engineering and Construction Charges," December 21, 2000, 8:59 am, cited in Nettesheim Report, ¶106.

the allegations regarding unapproved claims and that the curative disclosures identified in the Nettesheim Report are not curative;[123]

- Ms. Allen states the risk of cost overruns was known by the market prior to the curative disclosures identified in the Nettesheim Report:[124]
- Ms. Allen states that there was no statistically significant price reaction to the actual disclosure of the change in accounting for unapproved claims.[125]

Each of these arguments is addressed in what follows.

Alleged Non-Culpable News on Dates of Curative Disclosures:

76. Ms. Allen criticizes my analysis of loss causation regarding allegations pertaining to accounting for unapproved claims because she asserts that I wrongly consider bad news related to fixed-price contracts as relevant to the allegations. She states "clearly, not all information related to fixed-price contracts is necessarily related to Plaintiff's allegations regarding booking of unapproved claims."[126] However, she fails to identify material negative information on these dates that is not related to the allegations (other than that already discussed in the Nettesheim Report). I address each of these dates of curative disclosures in what follows.

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[123] Allen Report, pp. 28, 29.

[124] Allen Report, p. 32.

[125] Allen Report, p. 32.

[126] Allen Report, p. 28.

77. *January 5, 2000*: Ms. Allen argues that Carol Lau's January 5, 2000 analyst report "reveals absolutely no information regarding the booking of unapproved claims on fixed-price contracts."[127] As described in the Nettesheim Report, Ms. Lau reduced her year 2000 EPS forecast for the Company by $0.20, $0.07 of which was due to the E&C segment and the Dresser Equipment segment. I also note that on that day, Merrill Lynch analyst K. Simpson ("Simpson") cut his estimates of Halliburton's earnings due to reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America and "less powerful synergies from the Dresser merger than [he] had envisioned." The reasons Simpson cites for cutting his rating for Halliburton—except for his concerns about oilfield spending, an industry trend not a company-specific development—are related to Halliburton's alleged misstatements and omissions concerning revenues and profitability from large fixed-price construction contracts and the benefits of the Dresser merger. These disclosures reveal, in part, the true state of the Company's operating income due to unsatisfactory profitability of certain large fixed-price contracts, which Plaintiffs allege should have been disclosed earlier in the Class Period.[128]

78. *October 25, 2000*: Ms. Allen argues that, with respect to the October 25, 2000 disclosures, "there is no basis for [my] conclusion that E&C, a major segment of Halliburton's business, is synonymous with the allegations regarding unapproved claims."[129]

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[127] Allen Report, p. 30.

[128] Complaint, pp. 140-141.

[129] Allen Report, p. 30.

The Complaint alleges (among other things) that "defendants were concealing ever increasingly serious operational problems with Halliburton's construction businesses, [and] huge unpaid change orders and cost overruns ("Unapproved Claim(s)") it was suffering on several of its large fixed-price/lump-sum contracts . . . ."[130] As discussed above, the events of October 24-25, 2000 and their relationship to the allegations regarding the Dresser integration, cost overruns and accounting for unapproved claims are discussed extensively in the Complaint, as well as in the Nettesheim Report. The price decline on October 25, 2000, was caused by revelations related to these allegations.

79. *December 22, 2000*: Regarding the December 22, 2000 disclosures, Ms. Allen argues that "problems with fixed-price contracts can occur independent of how unapproved claims are booked." She cites no such "problems." She also argues that Halliburton's cost overruns were attributed by analysts to "changes in market conditions" and cites the December 22, CIBC analyst report which discusses labor disputes in Venezuela and West Africa.[131] As discussed above, the CIBC report cited by Ms. Allen attributes the Company's cost overruns to Halliburton-specific problems—it distinguishes these problems from "general industry-wide issues." Ms. Allen also notes that "Plaintiff made no allegations about these labor disturbances or how Halliburton could have known them at the beginning of the alleged class period and

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[130] Complaint, ¶2.

[131] Allen Report, p. 31. (This is the same (and only) analyst report Ms. Allen cites as evidence of confounding news on December 22,2000 in her discussion of the allegations pertaining to the integration of Dresser.)

failed to disclose them."[132] This statement mischaracterizes the allegations regarding accounting for unapproved claims. The allegations pertain to the undisclosed true probability of such cost overruns and that Halliburton had not disclosed such cost overruns.[133]

The Risks of Cost Overruns:

80. Ms. Allen contends that "the risks of cost overruns connected to fixed-priced contracts were known by the market before the alleged curative disclosures."[134] The market may have been aware generally that there were certain risks associated with long-term fixed price contracts, but the allegations are that Defendants failed to adequately disclose the true probability of cost overruns, the magnitude of such probable cost overruns and the fact that it was recording revenue (as a consequence of cost overruns) it knew it was not likely to collect.[135] The fact that the market was not aware of the true probability of cost overruns, the magnitude of such probable cost overruns and the fact that Halliburton was recording uncollectible revenue is demonstrated by the market's reaction to disclosures of such cost overruns—including the decline in the price of Halliburton stock upon such disclosures.

March 14, 2000 Disclosure:

81. Ms. Allen asserts that March 14, 2000 was "an actual curative disclosure" regarding unapproved

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[132] Id.

[133] *See, e.g.*, Complaint, ¶42(f).

[134] Allen Report, p. 32. Ms. Allen refers to three analyst reports dated April 7, 1998, October 3, 1998 and October 7, 1998.

[135] *See, e.g.*, Complaint ¶¶2, 10, 42(f).

claims—because the change in Halliburton's accounting practices relating to the booking of revenues related to claims and change orders was disclosed on that date to the market in the company's Form 10-K. Ms. Allen wrongly states that the "Complaint alleges that March 14, 2000 was a partial disclosure," and notes that on this date Halliburton's stock price did not change significantly.[136] On the contrary, the Complaint alleges that Halliburton's March 14, 2000 SEC filing was misleading:

> The Company did not disclose [] $34 million of Unapproved Claims that the Company recognized in 99 in connection with joint venture projects. The omission flattened the ascending curve of Unapproved Claims recognized by the Company . . . . In addition, the Form 10K was false and misleading because many of the Unapproved Claims accrued by Halliburton did not qualify for recognition, i.e., recovery was not objectively probable. Also, Halliburton was continuing to improperly record and recognize millions of dollars of such Unapproved Claims as revenue. . . .[137]

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[136] Allen Report, p. 33. Despite her conclusion that my event study analysis in insufficient, I note that Ms. Allen relies on my event study analysis to conclude whether there was a statistically significant stock price movement on certain dates. (For example, for March 14, 2000, and for her analysis of whether there was a statistically significant stock price increase on dates of misstatements alleged in the Complaint on page 42 of her report.) Ms. Allen does not put forth her own event study analysis in this matter. Her criticisms of my event study are undermined by her conclusions which rely on my event study.

[137] Complaint, ¶231.

My analysis (which finds no significant stock price movement on this date) is consistent with this allegation. If Defendants had accurately disclosed its improper application of the accounting rules for fixed-price contracts, Halliburton's stock price would have declined substantially, as it did when the truth regarding cost overruns on fixed-price contracts was revealed to the market later in the Class Period.

iii. Asbestos Liability

82. Ms. Allen puts forth the following arguments in order to dispute my analysis of loss causation for the allegations pertaining to asbestos liability:

- Ms. Allen states that I fail to link the alleged misrepresentations to the curative disclosures[138] because (i) my loss causation analysis is not based on an understanding of Plaintiffs' allegations, (ii) the curative disclosures are not curative, and (iii) there is no consistency in my choice of curative disclosures;[139]
- Ms. Allen states that I fail to control for changes in the asbestos litigation environment;[140]
- Ms. Allen states that the stock price of other asbestos defendants reacted to Halliburton's

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[138] This argument is also put forth in Defendants' Motion, p. 11, which states I "ignore the first step of specifically identifying what Halliburton said or did that was fraudulent" and fail to "link a later disclosure of the 'truth' to anything previously said or done by Halliburton."

[139] Allen Report, pp. 33-40.

[140] Allen Report, p. 39.

curative disclosure, evidencing the disclosure contained unrelated information;[141]

- Ms. Allen states that the December 7, 2001 curative disclosure contained a credit rating agency downgrade for reasons separate from the allegations.[142]

Each of these arguments is addressed in what follows.

The Curative Disclosures are Related to the Allegations:

83. Ms. Allen asserts that my analysis is not based on a proper understanding of the allegations related to the asbestos liability, and that I "do not have an understanding of how Halliburton's asbestos reserves were estimated, nor how the market perceived how the estimation was made." Ms. Allen opines that the allegations in this matter pertain only to Halliburton's reserve for pending (and not future) asbestos claims, and that the Company's reserve was adequate. She implies that undisclosed liabilities not yet materialized by way of a lawsuit suit being filed are unrelated to the allegations.[143] I disagree—it is my understanding that the allegations are regarding Defendants' improper disclosure of Halliburton's overall asbestos liability.

84. Ms. Allen does not provide any evidence as to the market's perception, let alone evidence that the market's assessment contradicts my conclusions or the allegations. As cited in the Complaint, a UBS analyst report released during the Class Period on July 26,

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[141] Allen Report, p. 39.

[142] Allen Report, p. 41.

[143] Allen Report, p. 33. Allen Deposition, pp. 120:3-121:4.

2001, states the Company assured the market that the majority of any future asbestos claims or increases in settlement rates were covered by insurance:

> The company touched on its asbestos situation and once again indicated that it believed that it has the situation under control and that the financial impact should not be material to the financial health of the company. These comments also came out in a private meeting that we had with HAL's CEO several weeks ago. In that meeting, Mr. Lesar indicated that HAL maintains a significant amount of insurance that should that should cover the majority of any future claims or increases in settlement rates.[144]

85. Ms. Allen concedes that the curative disclosures that the Nettesheim Report related to asbestos liability are in fact "related to asbestos," however, she argues that I provide "no further link." She cites June 28, 2001 as an example, stating that "there is no allegation . . . that Halliburton knew or should have known prior to June 28, 2001 that Harbison-Walker would request financial assistance from Halliburton for its asbestos claims . . . ." Similarly, she argues that the events of August 9, 2001 (when Halliburton disclosed an increase in the number of pending asbestos claims and also increased its reserve) could not have been known at the beginning of the Class Period.[145] Theses arguments are fact based, and nevertheless fail to contradict loss causation. The allegations are that the Company failed to adequately disclose the full extent of its asbestos liability and the

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[144] Complaint, ¶77 (emphasis removed).

[145] Allen Report, p. 37.

true probability of events such as these or similar events occurring; and failed to adequately reserve for the eventuality of these events. The decline in Halliburton's stock price that occurred as a result of these two partial disclosures is a consequence of such misrepresentation.

86. Ms. Allen argues that the stock price declines on five of the curative disclosure dates identified in the Nettesheim Report were related to verdicts which were considered "surprising" and "unexpected."[146] The verdicts were "surprising" to the market, because the market was alleged to have been previously misinformed by Defendants as to the full extent of its asbestos liability and the true probability of events such as these occurring, and misled by Defendants that the "pending asbestos claims [would] be resolved without material effect on [Halliburton's] financial position or result of operations."[147]

87. Ms. Allen states that "there is no consistency in [my] choice of curative disclosure dates . . ." because there are dates during the Class Period "where information related to asbestos is announced that [I do] not consider curative disclosures." She cites news released on April 7, 2000 and March 21, 2001 regarding litigation involving Highlands Insurance Group, Inc. and Halliburton as examples.[148] Neither of these two dates had a statistically significant stock price movement and confounding disclosures may explain Halliburton's stock price movement on those

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[146] Allen Report, pp. 37, 40.

[147] Complaint ¶74, citing Halliburton's SEC Form 10-K for 1999.

[148] Allen Report, p. 38.

dates.[149] Ms. Allen is merely proffering additional dates that may demonstrate loss causation. As stated in the Nettesheim Report, in the future, I may consider additional and/or different dates as partial disclosures of the alleged fraud based on additional analyses, materials, further discovery, and/or the opinions of other experts in this matter.[150] To the extent that disclosures related to the asbestos allegations occurred on dates proffered by Ms. Allen and contributed to a decline in Halliburton's stock price, my analysis of loss causation is conservative.

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[149] The article cited by Ms. Allen for April 7, 2000 was released at the end of the trading day (3:56 pm). Halliburton's stock price was up 1.1% and down 3.3% on Friday, April 7 and Monday, April 10, respectively. The company-specific returns are 1.2% and 3.0%, respectively (these are not statistically significant returns). Also, after market close on April 7, 2000, there was a positive article regarding a decision by U.S. Ex-Im Bank to guarantee a total of $500 million of loans extended to the Tyumen Oil Company (the largest guaranteed by the bank for Russian companies), making it possible to involve numerous U.S. companies including Halliburton Energy Service, in joint projects and create thousands of jobs. (*Daily News Bulletin*, "U.S. Ex-IM Bank's Guarantees of TNK Loans Largest in Russia," April 7, 2000, 7:41 pm.)

The article cited by Ms. Allen for March 21, 2001 was released after market close (6:25 pm). Halliburton's stock price was down 5.6% and down 2.5% on March 21 and 22, respectively. The company-specific returns are 3.0% and 0.4%, respectively (these are not statistically significant returns). On March 22, 2001, Halliburton announced "its legal counsel, Vinson & Elkins LLP, believed that the ruling would likely be reversed on appeal to the Delaware Supreme Court and that it planned to file an appeal as soon as possible." (*Reuters*, "UPDATE 1—Halliburton to appeal Highlands asbestos ruling," March 22, 2001.)

[150] Nettesheim Report, ¶78.

Changes in the Asbestos Litigation Environment:

88. Ms. Allen argues that I "fail[] to control for changes in the asbestos litigation environment" because I have "done nothing to include in [my] index companies with similar asbestos exposure to Halliburton."[151] The flaws in Ms. Allen's argument are discussed at paragraph 28 to this Rebuttal Report.

The Stock Prices of Other Asbestos Defendants:

89. Ms. Allen's cites the decline in other companies' stock prices following the December 7, 2001 disclosure as evidence that "the disclosure contained information other than about Plaintiff's allegations regarding asbestos reserves." She fails to identify what this "other" information may be. As discussed above, industry-wide factors generally are not reflected in Halliburton's company-specific return. Moreover, as Ms. Allen indicates, Halliburton's stock price did not go down because of industry or market concerns—rather, the stock prices of these other companies when down because of news specific to Halliburton.[152]

90. I also note that the decline in the stock prices on December 7, 2001 for the companies presented by Ms. Allen are significantly less than the decline in the price of Halliburton stock price that day. Halliburton's

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[151] Allen Report, p. 39.

[152] Ms. Allen cites the following statement in an analyst report:

> Asbestos litigation re-emerged as a concern for investors last week after oilfield services giant Halliburton Co. said a jury slapped one of its units with $30 million in damages . . . [the verdict] spurred continued anxiety on Monday, driving down shares of a disparate group of other companies facing asbestos claims.

stock price dropped 42.4% (the company-specific return was 42.7%). Sealed Air, Georgia-Pacific, CBS/Viacom, and Crown Holdings dropped 9.8%, 13.9%, 4.9% and 0%, respectively. Ms. Allen's arguments support, rather than contradict, my conclusion that this date contained company-specific disclosures relevant to loss causation. She does not provide any evidence that the price of Halliburton stock declined because of news about other companies' asbestos exposure, or non-specific Halliburton news about the "asbestos litigation environment."

91. Lastly, Ms. Allen argues that on December 7, 2001, Moody's Investors Service (Moody's) downgraded Halliburton for reasons unrelated to the allegations. As Ms. Allen states, Moody's downgrade "reflected concerns about the future asbestos claims, and the inconsistencies in the size of judgments."[153] Ms. Allen's argument is based solely on her flawed characterization of Lead Plaintiff's allegations regarding Halliburton's asbestos "reserve" and asbestos "liability," which I discuss above. Since Moody's downgrade does, in fact, relate to the allegations in the Complaint, the downgrade cannot be considered a non-culpable cause of Halliburton's stock price decline. A correct interpretation of Plaintiffs' allegations, which includes misrepresentations regarding the probability of future asbestos claims against the Company, is consistent with my conclusion that this Moody's downgrade is a corrective disclosure.[154]

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[153] Allen Report, p. 41, citing Moody's Investors Service Press Release, December 7, 2001.

[154] I note that in her deposition, Ms. Allen concedes that the announcement by Halliburton on December 7, 2001 regarding the

iv. An Empirical Analysis of Loss Causation

92. Defendants argue, generally, that my analysis of loss causation is flawed because I have "not provided the required empirical showing that some percentage of the stock price drop was attributable to the corrective disclosure."

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recent asbestos verdicts contributed to the decline in the Company's stock price that day.

> Q. So is it the case that, as you understand it the decline in Halliburton stock on December 7 was at least in part related to something that Halliburton said on that day?
>
> A. Yes and I think it's in part related to the 30 million dollars verdict. (p. 179:6-12)
>
> Q. Am I correct that on December 7 there was a very substantial decline in Halliburton's share price?
>
> A. Correct.
>
> Q. And did you reach any judgment or conclusion as to what caused that drop in Halliburton's stock price?
>
> A. Around the time—around this time in December, I believe the price of Halliburton stock was falling because of uncertainty regarding asbestos and the change in the asbestos environment as well as some recent and unexpected verdicts and judgments that related to Halliburton and I also believe that there is at least some commentary from the analyst that the market reaction around the time was an overreaction, particularly the reaction around the December—around December 7. (pp. 97:20-98:14)
>
> A. It's my understanding that the new piece of information that the analysts considered important that was discussed on December 7 is the 30 million dollars verdict. I don't recall other information that the analysts picked upon from what the company had said or considered new information. (p. 173:14-20)

93. As stated in the Nettesheim Report, I conducted several empirical analyses demonstrating loss causation. These analyses include: an econometric analysis of the Company's stock returns; a review of all of the news surrounding the day on which the alleged disclosure was made; a determination of how much of the day's stock return can be attributed to company-specific news and events; a review of all of the available analyst reports surrounding the day on which the alleged disclosure was made to determine how the company's statements or communications impacted market participants' assessments of the company's value; an empirical analysis of the information on and surrounding the disclosure date; an analysis to determine what specific news items were important on the day of the alleged disclosure or on the days surrounding the day of the alleged disclosure; an empirical analysis to determine the relative importance of different pieces of news with respect to impact on stock valuation, i.e., how different pieces of news impacted the stock price, an examination of contemporaneous assessments (both qualitative and quantitative) as to the impact on value.[155] Defendants fail to proffer additional or alternative analyses relevant to loss causation to those contained in the Nettesheim Report.

94. In fact, Ms. Allen's conclusions regarding loss causation in this matter rest heavily on the opinions of analysts and news commentators during the Class Period. For example, on page 21 of her report she cites three analyst reports and one news commentator in support of her conclusions regarding the October 25, 2000 disclosures:

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[155] Nettesheim Report, ¶81.

> The fact that analysts attributed the Engineering & Construction segment's difficulties not to any failure to achieve the benefits of the merger with Dresser, but to industry conditions that were unanticipated at the time of the merger and were of unknown duration demonstrates that the disclosure of these problems is unrelated to the alleged fraud, and, as such, caused no losses.[156]

Similarly, Ms. Allen has relied on analysts' opinions in assessing loss causation in other recent securities litigation.[157]

C. The Curative Disclosures Have Been Adequately "Linked" to the Alleged Misrepresentations

95. Defendants and Ms. Allen argue that the curative disclosures identified in the Nettesheim Report are not curative of the alleged disclosures because I "made no effort whatsoever to actually link later disclosures to specific prior statements."[158] As discussed herein, in the Nettesheim Report, and in my deposition testimony, I tie each of the curative disclosures to specific allegations in this matter.[159] My analysis

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[156] *See also, e.g.*, Allen Report, pp. 23-24, citing CIBC World Markets and Merrill Lynch reports regarding the October 5,1999 disclosures; Allen Report, p. 27, citing CIBC World Markets report regarding the December 21-22, 2000 disclosures.

[157] *See, Jerry Ryan, et al. v. Flowserve Corporation, et al.*, Civil Action No. 3:03- CV-1769-B ECF, United States District Court for the Northern District of Texas, Dallas Division, 2007 U.S. Dist. LEXIS 83824, Decided and Filed November 13, 2007.

[158] Defendants' Motion, pp. 13-14. *See also*, Allen Report, p. 17.

[159] *See, e.g.*, Nettesheim Deposition, pp. 110:7-111:5.

demonstrates that significant declines in Halliburton's stock price were caused by the corrective disclosures pertaining to the allegations and not by unrelated information.

D. Alleged Misstatements Inflated Halliburton Stock is Adequately Demonstrated by the Decline in the Price of Halliburton Stock upon Partial Corrective Disclosures

96. Ms. Allen argues that "on 20 of the 22 alleged misstatement dates in the Complaint, [my] event study results are not consistent with an increase in alleged inflation in Halliburton's stock price."[160] It is not necessary that disclosures by Defendants that Plaintiffs allege were false or misleading are associated with statistically significant stock price returns. It is sufficient if the misstatements or omissions fraudulently propped up Halliburton's stock price.

E. Ms. Allen's Analysis of Loss Causation for Halliburton "Peer" McDermott is Misleading, Erroneous and Irrelevant

97. Ms. Allen claims to have applied the "same steps" used in my analysis to McDermott and concludes her analysis "yields loss causation." This leads her to conclude that my test for loss causation is not reliable because "regardless of the underlying condition under study, it yields a positive result."[161]

98. Ms. Allen's exercise makes no sense, particularly given that she is assuming that any negative information regarding McDermott's marine construction business is a partial corrective disclosure. Rather than assume that negative news about Halliburton's E&C business is a corrective disclosure, I analyzed the news

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[160] Allen Report, pp. 41-44.

[161] Allen Report, p. 45.

to determine whether it relates to the failed Dresser merger or problems with long-term, fixed-price contracts. Because of the absence of allegations regarding McDermott's marine construction business, her conclusions are meaningless. Using a nonsensical methodology (which is not my methodology, as discussed below) she concludes that there are dates during the Class Period in this matter where McDermott's stock price declined significantly upon negative disclosures related to McDermott's marine construction business. This merely demonstrates that when bad news came out, McDermott's stock price went down—it says nothing to loss causation. If, in her hypothetical example, Ms. Allen assumed that the information disclosed on these "bad news dates" was information that McDermott should have disclosed earlier in the Class Period (which she does not), then, possibly, she has analyzed loss causation for such allegations. But a finding of loss causation under this assumption would be consistent with and supportive of my methodology.

99. The methodology applied by Ms. Allen is not the methodology I applied in the Nettesheim Report. The methods used in my analysis (including, but not limited to, the control period, the Class Period, the market and industry indices, and the analysis of news and stock prices movements surrounding particular events to determine whether negative news relates to the allegations in the Complaint) were designed specifically for the allegations against Halliburton in this matter. They are not transferable, as Ms. Allen suggests, to a meaningless analysis of another company for which there are no allegations. If one were to analyze loss causation for another company with another set of allegations, in order to replicate my methodology, one would follow the same steps, but

the results of these steps would inevitably be very different.

100. For example, contrary to Ms. Allen's suggestion, there is no evidence that the appropriate industry index for McDermott is the same as the industry index I use for Halliburton. I conducted a rigorous analysis to determine the most appropriate industry index for Halliburton.[162] Also, Ms. Allen uses the same control period as I use for Halliburton. The control period I use was chosen because of reasons specific to Halliburton and the allegations in this matter[163] and are not necessarily appropriate for Ms. Allen's hypothetical McDermott case.[164] Moreover, Ms. Allen fails to apply any economic theory to her analysis—this contradicts statements elsewhere in her report.[165]

/s/
Jane D. Nettesheim

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[162] See, Appendix to Nettesheim Report, ¶¶6-8.

[163] Appendix to Nettesheim Report, ¶3:

> In this case, I used a control period from October 1, 1998 through September 30, 1999. This is a one-year period that begins shortly after the Dresser Merger, and overlaps approximately the first four months of the Class Period. The control period is typically a one-year period that occurs prior to the start of the Class Period. However, in this case, the control period must start after the Dresser Merger in order to reflect the stock price of the combined companies.

[164] I also note that the table presented on page 47 of the Allen report that is labeled "Results of Nettesheim Loss Causation Analysis for Halliburton" which she cites to paragraph 45 of Nettesheim Report contains the results from my analysis of *Cammer / Unger / Bell* Factor 5, not the results from my analysis of loss causation.

[165] In her report, Ms. Allen asserts that one must apply economic theory to an industry index (pp. 12-13) which would seem to be relevant to a loss causation argument.

SUPPLEMENTAL EXPERT REPORT OF LUCY P. ALLEN, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, DATED JANUARY 18, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al.,
Plaintiffs,

v.

HALLIBURTON COMPANY, et al.,
Defendant.

Supplemental Expert Report of Lucy P. Allen

January 18, 2008

TABLE OF CONTENTS
[TABLE INTENTIONALLY OMITTED]

I. SCOPE OF ASSIGNMENT

We were asked by Counsel for Halliburton Co. ("Halliburton") in *Archdiocese of Milwaukee Supporting Fund, Inc., et al.* v. *Halliburton Company, et al.* to review and comment on the Rebuttal Report of Jane D. Nettesheim ("Nettesheim Rebuttal") as well as Plaintiff's Opposition to Motion to Strike Expert Report of Jane Nettesheim and Plaintiff's Motion to Strike the Expert Report of Lucy Allen.

II. SUMMARY OF FINDINGS

Ms. Nettesheim's Rebuttal Report and Plaintiff's briefs fail to address any of the issues that were raised in my first report in this matter, dated November 16, 2007 ("First Allen Report").

Ms. Nettesheim has provided no evidence to support the claim that the alleged misrepresentations inflated Halliburton's stock price. According to her analysis, there is no statistically significant price increase during the alleged class period at the time of the alleged misrepresentations that can be tied to the misrepresentations.

Ms. Nettesheim's only evidence that the price was inflated is that Halliburton's stock price allegedly declined in a statistically significant manner and did so because of a partial corrective disclosure of the alleged fraud. Yet both parts of Ms. Nettesheim's analysis are erroneous and unreliable, i.e., she has failed to show that the price decline is statistically significant and has failed to show that the reason for the decline was a corrective disclosure of the alleged fraud.

On each alleged curative disclosure, Ms. Nettesheim failed to make a reliable link between the alleged price decline and a specific allegation.

There is virtually no analyst or other market commentary on any of Ms. Nettesheim's dates of alleged curative disclosures that discusses a revelation related to any of the allegations.

III. QUALIFICATIONS AND REMUNERATION

My qualifications and remuneration were set forth in the First Allen Report.

IV. MATERIALS CONSIDERED

In preparing this report, we considered the following materials in addition to what was considered for the First Allen Report:

- Lead Plaintiff's Opposition to Motion to Strike Expert Report of Jane Nettesheim ("Opp Mot Strk Nettesheim");
- Lead Plaintiff's Motion to Strike the Expert Report of Lucy Allen and Incorporated Memorandum of Points and Authorities ("Mot Strk Allen");
- Lead Plaintiff's Reply in Support of its Motion for Class Certification;
- Appendix of Lead Plaintiff's Reply in Support for its Motion for Class Certification, Motion to Strike the Expert Report of Lucy Allen, and Opposition to Motion to Strike Expert Report of Jane Nettesheim, including the Rebuttal Report of Jane D. Nettesheim ("Nettesheim Rebuttal") and materials cited in it;
- Defendants' Response to Lead Plaintiff's Motion for Class Certification;
- Defendants' Joint Motion to Strike the Report of Jane Nettesheim;
- Transcript of deposition of Lucy Allen in this matter;
- Expert reports, declarations and court opinions in *In re: Homestore, Inc. Securities Litigation ("Homestore"), In Re Vivendi Universal, S.A. Securities Litigation ("Vivendi"), In re: WorldCom, Inc. Securities Litigation ("WorldCom"), In re Enron Corporation Securities Litigation ("Enron");*

- Files and documents provided by Ms. Nettesheim;
- Analyst reports and other market commentary on Halliburton, and issues related to Halliburton and its industry;
- Stock prices and indexes information from FactSet Research Systems, Inc. and Bloomberg L.P.; and
- Textbooks and academic literature on statistics.

V. MS. NETTESHEIM FAILS TO ADDRESS THE ISSUES IDENTIFIED IN THE FIRST ALLEN REPORT

A. Overview

Ms. Nettesheim's Rebuttal Report and Plaintiff's briefs fail to address any of the issues that were raised in the First Allen Report.

Ms. Nettesheim has provided no evidence to support the claim that the alleged misrepresentations inflated Halliburton's stock price. According to her analysis, there is no statistically significant price increase during the alleged class period at the time of the alleged misrepresentations that can be tied to the misrepresentations. Her conclusion that the stock was inflated as a result of the alleged misrepresentations is contradicted by her statistical results which fail to tie any statistically significant price increase to any alleged misrepresentation.

Ms. Nettesheim's only evidence that the price was inflated is that the price allegedly declined in a statistically significant manner and did so because of a partial curative disclosure of the alleged fraud. Yet both parts of this analysis are erroneous and unreliable: i.e., she has failed to show that the price

decline is statistically significant and she has failed to show that the reason for the decline was a curative disclosure of the alleged fraud.

Her statistical tests are not valid and do not reliably test whether there is a statistically significant price movement on the dates of alleged curative disclosures. She presents no valid statistical evidence that the movements in Halliburton's stock price during the alleged class period are different from the movements during her control period. She has failed to show that any more days during the class period are statistically significant than would be expected if there were no fraud-related news events.

Ms. Nettesheim's statistical tests and event study analysis are neither reliable nor consistent with accepted methods. They are not consistent with the academic literature she originally cited and they are not consistent with, and, in fact, are directly contradicted by, the literature she and Plaintiff cite in their new reports and briefs. For example, the cited academic literature consistently indicates that the identification of a relevant event comes before the type of statistical test Ms. Nettesheim attempted to conduct.

Ms. Nettesheim has failed to present any reliable evidence that the reason for the alleged stock price decline was a curative disclosure of the alleged fraud. Plaintiff in this matter alleges three categories of allegations:

1. "severe but undisclosed problems associated with the acquisition and integration of Dresser" (herein, integration of Dresser);
2. "improper booking of unapproved claims as revenue" (herein, unapproved claims); and

3. "knowingly inadequate reserves for asbestos liability" (herein, asbestos reserves).[1]

For each alleged curative disclosure, Ms. Nettesheim fails to make a reliable link between the alleged price decline and a specific allegation. The Nettesheim analysis erroneously combines the first two categories and treated them both as being synonymous with the engineering and construction (E&C) business. More problematic than failing to treat the allegations separately is the fact that neither category of allegation is synonymous with E&C. There can be problems with Halliburton's E&C that are not caused by or related to the accounting for unapproved claims. And there can be problems with Halliburton's E&C business that are not caused by problems associated with the acquisition and integration of Dresser.

Not only has Ms. Nettesheim failed to show that the alleged curative disclosures are curative of the alleged fraud, she has failed to show that they are due to Halliburton-specific problems with E&C, rather than changes in the E&C industry overall. Ms. Nettesheim claims that she has controlled for movements in Halliburton's industry so that all observed excess returns cannot be due to changes in the E&C industry overall. The fact that her analysis and industry index fail to adequately control for changes in the E&C industry is clear, however, from a simple review of her index and market commentary during this period. According to market commentary, the period from the beginning of the alleged class period through the middle of 2001 was a difficult time for the E&C industry. We have plotted alternative E&C

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[1] Plaintiff's Motion, p. 3.

industry indexes, all of which are consistent with the market commentary and show a general decline over this period. Ms. Nettesheim's industry index, which she claims controls for this trend, is completely inconsistent with both the E&C indexes and the market commentary; her index is going up over this time period while the E&C indexes and the E&C market according to commentary are declining. If her index is her only control and it is not consistent with the overall movement in the E&C industry, she cannot be adequately testing whether Halliburton's decline is due to overall changes in the E&C industry or problems specific to Halliburton. Moreover, she needs to do more than prove that the decline is unrelated to the E&C industry overall; she needs to prove that the decline is caused by the revelation of the truth concerning specific prior misrepresentations alleged in this case. She fails to do so.

Similarly, Ms. Nettesheim fails to show that the alleged curative asbestos-related disclosures are curative of the alleged fraud related to the asbestos allegations. Furthermore, Ms. Nettesheim fails to control for changes in the asbestos litigation environment. There is abundant evidence that the asbestos litigation environment in general changed from the beginning of the alleged class period to the end of the alleged class period.

Ms. Nettesheim's conclusion that Halliburton's price declines during the alleged class period are caused by revelations of the alleged fraud is further belied by the analyst and other market commentary. There is virtually no analyst or other market commentary on any of her dates of alleged curative disclosure dates that discusses a revelation of any of the alleged misrepresentations. For example, there is

no discussion in any analyst or other market commentary that new information regarding the accounting for unapproved claims has been learned by the market or that the prior understanding of the accounting for unapproved claims has been corrected. Further, no evidence has been presented that any analyst or market commentary on the dates of any of the alleged curative disclosures suggested any falsity in any prior statements that the company had made about asbestos, asbestos reserves, or the integration of Dresser.

B. "Summary of Opinions" Section of Ms. Nettesheim's Rebuttal Report

Ms. Nettesheim's Rebuttal Report has a section entitled "Summary of Opinions." In the table below we list all the bullet points Ms. Nettesheim included in this section of her report. In particular, in the left column, we list each of Ms. Nettesheim's claims and, in the right column, our response to each claim. (Note that this section addresses only the points listed in the section entitled "Summary of Opinions"; there are other claims that Ms. Nettesheim makes in her Rebuttal Report which are addressed elsewhere in this report or in the First Allen Report.)

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
Contrary to Defendants' assertions, the event study methodology used in the Nettesheim Report is appropriate and fully consistent with the standards of my profession:	Not true. See below.
▪ It is the same method I have employed in other securities cases,	▪ She cites two prior reports: it is not the same method as described in one and the other is confidential and was not produced. While the report is unavailable for review, the part cited by the judge does not indicate any analysis of loss causation or discuss an event study at all (See section V.H below.)
▪ it has been accepted by the courts,	▪ The evidence provided contradicts Nettesheim's statement. See section V.H.
▪ and it is recognized in relevant literature.	▪ It is not recognized in any of the literature she cites (or any we could find). (See section V.G.)

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
▪ My industry index captures the effect of industry trends on Halliburton. Defendants fail to demonstrate that the industry index used in the Nettesheim Report is not appropriate (nor do they suggest a meaningful alternative).	Nettesheim's industry index does not capture the changes in the E&C industry or the asbestos environment during the class period. As used, it cannot test, for example, whether general E&C conditions rather than alleged fraud caused a price decline. Nor can it test whether changes in the asbestos litigation environment caused a price decline. (See section V.C.2.a.)
▪ The fact that approximately 5% of the days during the Class Period are statistically significant is not relevant to determining loss causation—whether there are more than or less than 5% of days with statistically significant stock price changes does not contribute to or detract from the statistical significance of those days.	Nettesheim's discussion of this claim is inconsistent with fundamental statistical principles in hypothesis testing. (See section V.E. 1 below.)

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
• Allen erroneously claims I purported to distinguish between news and non-news days. Allen's assertion that Halliburton's stock price reaction on "news days" is no different than its reaction on "non-news days" is unfounded because, among other reasons, her classification of news days and non-news days is flawed and her statements regarding fundamental concepts of statistical significance are erroneous.	A proper test of whether a company's stock price reacts to news would entail some control. Nettesheim did not distinguish between news days from non-news days to test her hypothesis that the stock reacts to news. Nettesheim claimed the stock reacted to material new information, but if she failed to identify the new information days first and merely looked to the days of reactions (as her report indicates), this method fails scientific reliability standards.[2]

[2] For example, the *Polymedica* court endorsed the testimony of an expert that said that searching for the largest price drops to analyze market efficiency is not a scientific study and that a statistical comparison between news-days and non-news-days should have been performed instead. The court order reads as follows:

"Dunbar [the expert] testified:

> [Y]ou went and searched for the largest price drops. That's not a scientific study. A scientific study is one where you draw a sample and then you compare a test statistic from that sample to another sample . . . . All you did was went and picked the largest stock price drops and said, oh, gee, that just shows that it's informationally efficient. You

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
• Allen misleadingly claims that my market index analysis is not replicable when the alleged	Allen claims the market index is not identifiable. CRSP, Nettesheim's alleged data provider, was

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picked five days out of about 160 trading days. What you should do is look at all 160 trading days and do a scientific study to see if there's a difference between the news days and the non-news days. And if you would have done that you would have found that there wasn't any difference between them. . . . .

[I]f you picked news days as a sample, all news days, not just the ones you self selected. I mean, you selected the few news days that would prove your point. But there's many other news days in that contested period, anywhere from 23 to 59, versus [sic] on how you want to count them. If you want to look at what the stock price reaction is on those news days versus the non-news days, you'll find that you can't say that the news days were drawn from a different sample than the non-news days. In other words, they were providing as much information to the market as the non-news days.

Evid. Hr'g at 22-23. The Court endorses this criticism." [Polymedica Order, p. 14-15]

The *Polymedica* court order also states the following:

"*Cf. Lehocky*, 220 F.R.D. at 506 (comparing news days with non-news days using "sophisticated statistical tests" . . .). It is not sufficient simply to report movement on significant news days. To approach usefulness, an analysis should statistically compare all news days with all non-news days. *See Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (explaining that an expert's testimony must be "relevant to the task at hand") (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993))" [Polymedica Order, p. 15]

discrepancies are not only immaterial, but, in fact, *de minimis,* and are the result, not of an error in my analysis, but rather a change by a third party data provider of the price of some stocks other than Halliburton during the Class Period.	unable to identify her data. The differences in the market index are not *de minimis:* 40% of the days during the class period have returns that differ by more than 5% between the two data sets. Nettesheim's claim that this difference is the result of the data provider changing the price of stocks is unsupported and unbelievable.[3]

[3] See section V.I.2

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
The control period used in the Nettesheim Report is more "robust" than that suggested by Allen, and is better suited for identifying dates of significant stock price movements during the Class Period.	The point is not whether the control period is robust; the point is that her findings are not robust or reliable. A change in the control period changes her findings substantially (9 out of 11 of her alleged curative disclosures are no longer significant).[4] Contrary to her claims, the academic literature Plaintiff cites supports the Allen alternative period and does not support her period [5]

[4] See First Allen Report, p. 13-14.

[5] Plaintiff's cite from the Tabak and Dunbar article does not support Ms. Nettesheim's control period:

> In securities fraud cases, estimations [control] windows are often placed before the beginning of the alleged class period, . . . **so that the estimation window would cover a "clean" period that could not have been tainted by any alleged stock price inflation.** [Mot Strk Allen p. 10, emphasis added]

This cite does not support Nettesheim's choice of control period because (a) the Nettesheim control period overlaps with the alleged class period and therefore it is allegedly tainted by inflation according to Plaintiff, and (b) the portion of the Nettesheim control period that precedes the alleged class period is also allegedly tainted by inflation according to Plaintiff (Plaintiff is not seeking damages in relation to that period because claims relating to that period are time-barred.)

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
Loss causation has been established for each of the allegations in this matter. - Allen mischaracterizes my methodology - The Nettesheim Report addresses each of the three categories of allegations identified by Defendants	Her response appears to be that she read the Complaint and understood the allegations before conducting her statistical analysis. Her report does not *separately* address each of the categories and is overly broad in their treatment.[6]

Also, note the Allen alternative control period is consistent with the Tabak and Dunbar article, which says:

> There are three general choices for the placement of an estimation [control] window: before the event window, surrounding the event window, or after the event window. [Tabak, David I. and Frederick C. Dunbar, "Materiality and Magnitude: Event Studies in the Courtroom," National Economics Research Associates, Working Paper #34. April 1999, p. 9]

The Marais and Schipper article cited by Ms. Nettesheim contradicts the Nettesheim control period:

> Analysts also cannot include returns during a period of alleged fraud [in their control period]. [p. 17A-21]

The Marais and Schipper article cited by Ms. Nettesheim supports the Allen alternative control or estimation period:

> **Estimation period** . . . : Time period . . . over which returns are taken to estimate the parameters of the market model or augmented market model; can include returns before the event period, after the event period, or both. [p. 17A-23]

[6] For example, the Nettesheim Report claims that much of the negative news around the alleged October 25, 2000 curative disclosure related to problems with E&C and, from this, concluded that a significant portion of the price decline is due to Halliburton's booking unapproved claims on fixed-price

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
▪The misrepresentations and omissions have been adequately tied to the curative disclosures.	Any stock price decline with news which mentions asbestos, E&C, fixed price contracts or cost overruns is "adequately tied" according to Nettesheim.[7]

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contracts and lack of benefits from the Dresser merger, and attributes both to the news about E&C problems.

This is an instance where the Company released negative news . . . A significant portion of the negative news, as attributed to the Company, in news reports and by analysts, was related to the problems with the engineering and construction units that Lead Plaintiff alleges could have been and should have been revealed earlier. Thus, a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged in the Complaint. [Nettesheim Report ¶93]

For example, regarding the asbestos allegations, Ms. Nettesheim testified as follows:

> Q. So in your mind, this news release on June 28, 2001, was that a partial disclosure of, or is it, again, all of the company's prior statements about asbestos?
>
> A. It relates to the allegations regarding the under reserving of the asbestos reliability [sic].
>
> Q. How does it relate?
>
> A. It is talking about asbestos claims and the potential asbestos liability of Halliburton.
>
> Q. And that's a sufficient link in your mind? A. Yes. [Nettesheim Deposition, p. 124]

[7] Ms. Nettesheim's testimony regarding fixed price contracts:

Q. If there is a disclosure of bad news that in any way, shape or form relates to fixed price contracts, then it relates to the allegations about unapproved claims, correct?

A. Yes, in this case I did [sic]. [Nettesheim Deposition, p. 181]

Ms. Nettesheim's testimony regarding E&C:

Q. In your mind, is this one piece of information or multiple pieces of information contained in Exhibit number 4?

A. Well, I think it is referring generally to the restructuring and to the charges. It refers to generally the engineering and construction projects . . .

. . .

A. There is—well, there is—I mean, generally, it contains information about the engineering and construction business. And it gives you some information about that business. [Nettesheim Deposition, p. 125-126]

Ms. Nettesheim's testimony regarding asbestos:

Q. So in your mind, this news release on June 28, 2001, was that a partial disclosure of, or is it, again, all of the company's prior statements about asbestos?

A. It relates to the allegations regarding the under reserving of the asbestos reliability [sic].

Q. How does it relate?

A. It is talking about asbestos claims and the potential asbestos liability of Halliburton.

Q. And that's a sufficient link in your mind?

A. Yes. [Nettesheim Deposition, p. 124]

Ms. Nettesheim's report regarding E&C:

As there was no other negative news released that day, all of the price decline . . . was caused by the partial disclosures related to the operational problems at the engineering and construction units and is related to the Company's booking unapproved claims

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
Each news item mentioned by Defendants as non-culpable on a date of a curative disclosure is misleading, immaterial to company-specific movement in Halliburton's stock, and/or unrepresentative of the overall market consensus.	Nettesheim's criticism is unfounded. Nettesheim's method of analyzing the cause of price movements is not replicable, is not based on accepted methods, applies faulty logic and is unreliable.[8]

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on fixed-price contracts and lack of benefits from the Dresser merger alleged by Lead Plaintiff [Nettesheim Report ¶112].

Ms. Nettesheim's testimony regarding cost overruns:

> Q. And on this same issue, in your mind, this is a corrective disclosure or partial corrective disclosure of what statements made by Halliburton?
>
> A. This is related to the—what's generally called the unapproved claims or the cost overruns in the engineering and construction units. [Nettesheim Deposition p. 130]

[8] See sections V.C, V.D, V.E, V.F and V.G in this report and sections VII, VIII, IX, X, XI, and XII in the First Allen Report.

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
▪ Loss causation is demonstrated by the decline in Halliburton's stock price upon the partial corrective disclosures during the Class Period. The absence of statistically significant stock price increases upon each date of a misrepresentation or omission is not unexpected and does not undermine my conclusion that Halliburton's stock price was inflated during the Class Period.	She appears to have concluded that the price was inflated at the beginning of the class period because the price declined at the alleged curative disclosures. She does not reconcile the fact that according to her analysis the price does not go up at the alleged misrepresentations yet goes down at the alleged curative disclosures. Rather than prove that the stock is inflated, her event study analysis indicates that there is no inflation from the alleged misrepresentations.[9]

[9] See First Allen Report, p. 41-45 and section V.D of this report.

"Summary of Opinions" Section of Nettesheim Rebuttal Report	
Nettesheim claim:	**Response:**
Allen's analysis of loss causation for Halliburton peer McDermott International, Inc. is misleading, erroneous and irrelevant. Without any reasonable assumptions regarding allegations concerning McDermott, she has no basis for her conclusions regarding loss causation.	Exactly. The same can be said of the Nettesheim analysis of Halliburton (and, in fact, was said in the First Allen Report). See section V.F.2 below.

C. Ms. Nettesheim Does Not Prove Loss Causation for Any of the Allegations

1. Ms. Nettesheim's alleged curative disclosures are not curative of the alleged misrepresentations

Ms. Nettesheim does not describe how her alleged curative disclosures are, in fact, curative of the alleged misrepresentations in this case. Not only is there no demonstrated link in her report or analysis between the alleged misrepresentations and the curative disclosures, but Ms. Nettesheim never attempts to make such a link, apparently not considering this a necessary step in loss causation analysis.[10]

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[10] In her deposition, she testified as follows:

> Q. And the reason why, as part of your loss causation analysis, is you're looking at prior statements by the company or officers of the company to identify that

Indeed, we are unable to determine, for example, which "severe but undisclosed problems associated with the acquisition and integration of Dresser" were revealed on the alleged disclosure dates.[11]

2. Ms. Nettesheim does not prove loss causation for the allegations regarding the integration of Dresser

a. Ms. Nettesheim does not control for changes in the E&C industry

Ms. Nettesheim allegedly analyzes whether Halliburton's stock price declines are related to Halliburton's E&C segment.[12] As discussed below,

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the corrective statements that are being identified in your report relates back to a prior statement that was not accurate; is that correct?

A. Well, as I said earlier, I did not link or match up statement by statement earlier statements with the partial disclosures I discussed. [Nettesheim Deposition, p. 164-165]

According to Plaintiff's brief:

". . . she testified in her deposition that she did not link a particular corrective disclosure to a single misrepresentation . . . . " [Opp Mot Strk Nettesheim, p. 13]

[11] See Plaintiff's Motion, p. 3.

[12] Ms. Nettesheim's testimony regarding E&C:

Q. In your mind, is this one piece of information or multiple pieces of information contained in Exhibit number 4?

A. Well, I think it is referring generally to the restructuring and to the charges. It refers to generally the engineering and construction projects.

. . .

this is not the appropriate test of loss causation for the alleged misrepresentations. Nor is her methodology an appropriate test of whether Halliburton's stock price declines are due to company-specific problems in the engineering and construction business.

Ms. Nettesheim mistakenly claims that, if her industry index does not explain Halliburton's stock price movement on a given date, then any negative news related to Halliburton's E&C segment must be a company-specific problem.[13] Her industry index, however, was not designed to test this hypothesis, as her selection criteria are not based on companies having a substantial E&C segment. The industry index is composed of 52 companies. Of the 4 E&C companies detailed in a Merrill Lynch Engineering & Construction industry report analyzing the Halliburton/Dresser merger,[14] only one company, McDermott International, Inc., was included in Ms. Nettesheim's 52-company industry index.

> A. There is—well, there is—I mean, generally, it contains information about the engineering and construction business. And it gives you some information about that business. [Nettesheim Deposition, p. 125-126]

Nettesheim report regarding E&C:

> As there was no other negative news released that day, all of the price decline . . . was caused by the partial disclosures related to the operational problems at the engineering and construction units and is related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged by Lead Plaintiff [Nettesheim Report ¶112].

[13] Nettesheim Report, ¶88-92.

[14] Merrill Lynch report dated March 13, 1998.

Ms. Nettesheim claims there is "no index described as engineering and construction that includes Halliburton;"[15] but this does not release her from the burden of controlling for industry movements that are confounding factors in the analysis of Halliburton's stock price changes, such as the movements of the E&C industry. E&C accounted for approximately 30% to 50% of Halliburton's annual revenues during the alleged class period.[16] Additionally, the construction of an E&C index is perfectly feasible: there are several sources (including analyst reports and financial press) which discuss the E&C industry and its participants.

Ms. Nettesheim in her rebuttal report claims that her industry index adequately controls for the E&C business because it includes 5 companies (in addition to McDermott) that have some E&C component to their business.[17] But these companies account for

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[15] Nettesheim Rebuttal, ¶21

[16] Computed as a ratio of revenues of the E&C segment (including BRES) to total Halliburton revenues for the years 1999-2001 as reported in Halliburton's 10-K for 2001, filed on March 12, 2002. See p. 15 and p. 17. The following are the percent of Halliburton's annual revenues accounted for by its E&C segment: 1999: 52%, 2000: 43%, 2001: 33%.

[17] See Nettesheim Rebuttal, 1124.

> Prior to submitting her rebuttal report, Ms. Nettesheim testified at deposition that she did not know whether the companies in her industry index had any E&C business:
>
> Q. And were all of the companies in you index as reflected in Exhibit 16 to your report oil services companies?
>
> A. It's our understanding that they are.
>
> Q. Did any of those companies in your index have significant construction operations the way Halliburton did?

only 8% of her industry index during the alleged class period and their E&C portion therefore would necessarily account for even less.[18] Although she claims that these companies have E&C business segments based on her review of their business description, we could not find these companies in any list of E&C companies, in contrast to Halliburton, which was contained in numerous lists of E&C companies.

Ms. Nettesheim criticizes the E&C index shown in the First Allen Report:

> Ms. Allen's definition of the E&C industry is based on only three companies identified in one analyst report issued over one year prior to the start of the Class Period. Unlike Ms. Allen, I did not limit my search for comparable companies to a single analyst's report published more than one year prior to the start of the Class Period.[19]

Contrary to Ms. Nettesheim's implication, the Merrill Lynch report is relevant to the allegations she claims to have analyzed. The first paragraph of the report is as follows:

> **Merrill Lynch: Engineering & Construction Reason for Report: Potential for Changes in E&C Valuation?**
>
> The pending acquisition of Dresser Industries by Halliburton is undoubtedly a deal driven primarily by issues in the oil services industry. But, in the process, a formidable

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A. I don't know specifically what the companies did . . . [Nettesheim Deposition p. 21]

[18] McDermott accounts for another 1% of her industry index.

[19] Nettesheim Rebuttal, ¶24.

> engineering and construction company . . . with $5 billion in revenues has been created and that new company could potentially change the E&C landscape . . . [Merrill Lynch. March 13, 1998]

The Merrill Lynch report on the E&C industry addresses expected changes in the E&C industry as a result of the pending Halliburton/Dresser merger. Thus, rather than being a random source for E&C companies, the topic and content of this report is directly relevant to the issues Ms. Nettesheim claims to have analyzed. Ms. Nettesheim claims to analyze allegations related to problems with the integration of Dresser and claims to find Halliburton-specific problems related to the Company's E&C segment as related to the Dresser merger. This report, which Ms. Nettesheim dismissed, describes the expected change in the E&C industry as a result of the Dresser merger. In conducting her loss causation analysis, Ms. Nettesheim, according to her testimony, neither reviewed this report, nor any other material describing the anticipated effect of the merger or any other material or statement by Halliburton prior to the start of the alleged class period.[20] According to *Fortune* magazine, for the years 1999, 2000 and 2001, Halliburton was the largest E&C company in the country. *(Fortune's* 2000 E&C industry list is attached as Attachment A)

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[20] Ms. Nettesheim testified at deposition:

> Q. And there were many statements before the class period and you're not attributing to any one of those either, correct?
>
> A. I didn't look at statements before the class period. [Nettesheim Deposition p. 114]

When we plot alternative E&C indexes based on reports published during the alleged class period, we obtain the same result that we obtained with the E&C index in the First Allen Report (the one based on the Merrill Lynch report). In particular, we find that the E&C industry is declining, in sharp contrast to Ms. Nettesheim's industry index, which is rising over the period of alleged E&C-related curative disclosures.

Specifically, a November 24, 1999 CSFB analyst report lists 19 businesses which it characterizes in a table entitled "Engineering and Construction Markets and Participants;" it included M.W. Kellogg and Brown & Root (both owned by Halliburton).[21] Additionally, *Fortune* articles produced by Ms. Nettesheim ranked its *Fortune 1000* by industry classification during each year of the alleged class period, 1999-2001.[22] Each of these rankings listed Halliburton as the #1 company in the Engineering

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[21] Credit Suisse First Boston, November 24, 1999, "The Engineering and Construction Monthly". Companies listed in the report are: M.W. Kellogg and Brown & Root (parts of Halliburton), Michael Baker, B E & K, Black & Veatch, Fluor, Foster Wheeler, Granite, ICF Kaiser (ICF Int'l), Jacobs, Kvaerner/John Brown, Lummus (Asea Brown Boveni), Morrison Knudsen, Parsons, Perini, Peter Kiewit Son's Inc., Raytheon, Stone & Webster, Turner.

[22] *Fortune,* April 26, 1999, April 17, 2000 and April 16, 2001, "Fortune 1 Thousand Ranked Within Industries." Companies listed in the 2000 article are: Halliburton, Fluor, Centex, Peter Kiewit Sons', Foster Wheeler, Kaufman & Broad Home, Pulte, D.R. Horton, Lennar, Emcor Group, Jacobs Engineering Grp., Champion Enterprises, Morrison Knudsen, Ryland Group, NVR, U.S. Home, Oakwood Homes, MDC Holdings, Toll Brothers, URS, Beazer Homes USA, Comfort Systems USA, Clayton Homes, Granite Construction, IT Group, Stone & Webster, Standard Pacific.

and Construction industry classification. None of the 5 companies in Ms. Nettesheim's industry index that Ms. Nettesheim claimed have E&C businesses appear in any of these lists of E&C industry participants, while the companies included in the E&C index in the First Allen Report do appear.

We plotted two additional indexes for the E&C industry based on the Credit Suisse and *Fortune* lists of E&C market participants issued during the alleged class period.[23] In addition, we included *Standard and Poor's 500 Construction & Engineering Index*.[24]

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[23] The CSFB index is based on companies listed in the Credit Suisse First Boston report from November 24, 1999 (excluding M.W. Kellogg and Brown & Root of course), which have available price information in the period between the beginning of the alleged class period and the last alleged E&C related disclosure. These companies are: Foster Wheeler, Granite, Jacobs, Michael Baker, Perini, Raytheon, Stone & Webster, and Turner. Fluor, although listed in the analyst report, was excluded because of a spin-off during the alleged class period. (As a check, we also created the index including Fluor while excluding the company's returns on the day of the spin-off. The results are virtually the same.)

The Fortune index is based on companies listed in the Fortune article from April 17, 2000 (excluding Halliburton of course), which have available price information in the period between the beginning of the alleged class period and the last alleged E&C related disclosure. These companies are: Beazer Homes USA, Centex, Champion Enterprises, Clayton Homes, Comfort Systems USA, D.R. Horton, Emcor Group, Foster Wheeler, Granite Construction, Jacobs Engineering Grp/., Lennar, MDC Holdings, NVR, Oakwood Homes, Pulte, Ryland Group, Standard Pacific, Stone & Webster, Toll Brothers, U.S. Home, URS, and IT Group. Fluor, although listed in the article, was excluded because of a spin-off during the alleged class period. (As a check, we also created the index including Fluor while excluding the company's returns on the day of the spin-off. The results are virtually the same.) Similar indexes are obtained

As can be seen from the graph below, the Credit Suisse E&C Index, the Fortune E&C Index, and the S&P 500 Construction & Engineering Index yield the same result as that of the E&C Index shown in the First Allen Report. All 4 indexes decline over the period of alleged E&C-related curative disclosures, while Ms. Nettesheim's industry index rises over the same period. Clearly, Ms. Nettesheim's industry index does not capture the general decline in the E&C industry over this time.

Market commentary further contradicts Ms. Nettesheim's claim that her industry index properly controls for changes in the E&C industry.

During the alleged class period, there is substantial commentary from analysts that E&C companies

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based on the companies listed in the April 26, 1999, and April 16, 2001 articles.

[24] Over the period graphed, the S&P Construction & Engineering Index contained Foster Wheeler Ltd., Fluor Corp., and McDermott International, Inc.

are generally experiencing weakness. For example, in the period between her alleged curative disclosures regarding E&C, analysts state the following:

> So far this year, HAL shares are up about 31%, reflecting anticipated improvement in industry fundamentals. However, HAL shares have underperformed the Oil Service Index by about 20% so far this year, mainly reflecting a sluggish anticipated recovery in the E&C business. [ABN AMRO, August 31, 2000]
>
> E&C stock prices end September flat from August but outperform the S&P Industrials, which declined 2.3% . . . The majority of engineering & construction stocks again saw declines in their share prices in the month of September despite a continuing stream of positive project announcements [Credit Suisse, October 21, 1999]
>
> The majority of engineering & construction stocks again declined in September, despite a continuing stream of positive project announcements . . . . The valuations of E&C companies remain depressed on an absolute P/E basis and relative to the S&P Industrials. [Credit Suisse, October 25, 1999]
>
> Engineering and construction stocks decline [sic] in October, and November has offered no relief . . . Investing in engineering and construction companies has been a mostly painful experience throughout the past year. [Credit Suisse, November 24, 1999]

For example, October 25, 2000 is one of the dates alleged by Ms. Nettesheim to be a curative disclosure regarding Halliburton's E&C segment. Ms. Nettesheim claims that Halliburton's stock price decline is statistically significant after she controls for industry

factors. Analyst commentary following this announcement, however, contradicts her claim. According to an article published by *The Oil Daily* on October 26, 2000, which quotes Simmons & Co.'s analyst Dan Pickering:

> Halliburton is not being punished for poor execution from its engineering and construction unit, but rather for its unfortunate exposure to a currently weak market, Pickering said.

b. Ms. Nettesheim presents no evidence that the price declines on any of the alleged curative disclosure dates are due to problems with the integration of Dresser

Ms. Nettesheim, illogically and without support, conflates news about the E&C business with the alleged problems with the integration of Dresser. While the integration of Dresser could affect E&C, many other factors unrelated to the alleged fraud could do so as well, as indicated by analyst commentary. The existence of general problems with the E&C business does not imply that there are difficulties with the Dresser integration. Such a link has not been made.

In her rebuttal report, Ms. Nettesheim argues that her analysis adequately links issues regarding the E&C business with Plaintiff's allegations about the integration of Dresser. She states:

> Disclosures of the alleged operational problems related to the integration of Dresser . . . will inevitably entail discussions of the performance of the E&C unit as a whole. [Nettesheim Rebuttal ¶62]

The logic that this supports her linkage of E&C announcements to allegations regarding the integration of Dresser is incorrect. Even if operational problems related to the integration always entail a discussion of E&C, it is not true that discussions of E&C imply operational problems regarding the integration of Dresser.[25]

In addition, Ms. Nettesheim's rebuttal report offers the following as evidence that she linked the alleged curative disclosures to the allegations regarding the integration of Dresser:

> Disclosures such as the restructuring of the Company's E&C unit due to "serious operational problems in Halliburton's construction business" (as disclosed on October 24-25, 2000 and December 21-22, 2000) directly relate to the alleged unsuccessful Dresser integration. [Nettesheim Rebuttal ¶62]

We reviewed all of the news articles and analyst reports that Ms. Nettesheim provided for the days following her alleged Dresser-related disclosures (the announcements on October 24-25, 2000 and December 21-22, 2000), and find no mention of:

- "operational problems" (serious or otherwise), or

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[25] Moreover, it is not clear why, if operational problems existed with the integration of Dresser, the analysts would discuss E&C as a whole. Halliburton and the analysts who followed the company were often quite specific in discussing the issues affecting the company. For example, an analyst report on December 22, 2000 stated: "Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts." [CIBC World Markets, December 22, 2000]

- integration or merger (in particular, a search of those terms yielded no results).

Ms. Nettesheim does not provide any source for the sentence cited above or any indication of the source of the quoted phrase ("serious operational problems in Halliburton's construction business"). Moreover, this is the only sentence that she provides as evidence of a disclosure during the alleged class period in the whole subsection discussing loss causation entitled "The Dresser Integration and E&C." We found no evidence of such a quote in market commentary on the days of Ms. Nettesheim's alleged curative disclosures or any of the days in the following calendar week. We found a very similar sentence in the Complaint where it is an allegation, not a quote.[26] Ms. Nettesheim mischaracterizes the allegation of "serious operational problems" above as a curative disclosure.

3. Ms. Nettesheim does not prove loss causation for the allegations regarding the accounting of unapproved claims

Ms. Nettesheim does not prove loss causation for the allegations regarding the accounting of unapproved claims. Plaintiff alleges that, "Halliburton had secretly changed the way it was accounting for Unapproved Claims on construction contracts and was now recognizing them as revenue when the claims were asserted . . ."[27] Further, Plaintiff alleges that, "By including the unapproved claims in the Company's reported revenue, profit and margins

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[26] See Complaint ¶30 which uses the same phrase as the one quoted in Nettesheim Rebuttal Report as an allegation with the variation that in the Complaint the word business is plural.

[27] Complaint, ¶42d.

were more favorable than they would have been if the accounting policy had not been changed."[28]

Ms. Nettesheim testified that if a disclosure was in any way related to fixed-price contracts, then she considered it related to the allegations regarding unapproved claims:

> Q. If there is a disclosure of bad news that in any way, shape or form relates to fixed price contracts, then it relates to the allegations about unapproved claims, correct?
>
> A. Yes, in this case I did [sic]. [Nettesheim Deposition, p. 181]

An announcement of information that could have some connection to an alleged misrepresentation is not proof of loss causation. Clearly, not all information related to fixed-price contracts is necessarily related to Plaintiff's allegations regarding booking of unapproved claims.

a. The alleged curative disclosures are not curative of alleged misrepresentations regarding the booking of unapproved claims

In her first report, Ms. Nettesheim states:

> The following events [October 5, 1999, January 5, 2000, October 25, 2000 and December 22, 2000] are examples of information disclosed during the Class Period that brought, in part, investors' perceptions of the Company's financial condition related to its booking of unapproved claims on fixed-price contracts and the benefits from the Dresser

[28] Plaintiff's Motion, p. 5.

> merger more in-line with its alleged true condition at that time.[29]

In her rebuttal report, Ms. Nettesheim alleges that three of the listed alleged curative disclosures (January 5, 2000, October 25, 2000 and December 22, 2000) are curative of the alleged misrepresentations regarding the booking of unapproved claims.[30] We find that on none of these alleged curative disclosures dates were the alleged misrepresentations regarding unapproved claims revealed.

January 5, 2000

Although Ms. Nettesheim concludes that January 5, 2000 was a curative disclosure of the allegations regarding unapproved claims, she presents no evidence that supports her conclusion. Regarding January 5, 2000, Ms. Nettesheim claims:

> On Wednesday, January 5, 2000, Halliburton made a partial disclosure related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits realized from the Dresser merger as revealed in a conversation with analyst Carol Lau with Brown Brothers Harriman & Co. [Nettesheim Report, ¶88.]

Contrary to Ms. Nettesheim's finding, this report reveals absolutely no information regarding the booking of unapproved claims on fixed-price contracts, and Ms. Nettesheim offers no support for her conclusion that the price decline is cause by the disclosure of the allegations regarding the booking of

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[29] Nettesheim Report, ¶83.

[30] Nettesheim Rebuttal, ¶76-79.

unapproved claims.[31] Plaintiff claims that Ms. Nettesheim has conducted a post-mortem analysis of the cause of the price reaction on this date.

> January 5, 2000 . . . While she considered analyst reports, she also looked behind the Brown Brothers Harriman & Co. report to analyze the changes in the earnings per share estimate for different segments of Halliburton's business, and to determine which part of the news had most effect on the analyst's model and Halliburton's stock price. This is precisely the type of "post-mortem" analysis endorsed by *Allegiance*. [Opp Mot Strk Nettesheim, p. 17-18]

If Ms. Nettesheim did "look behind" the Brown Brother Harriman report, she has provided no information about what she found. Contrary to Plaintiff's implication, there is no analysis of the analyst report; the numbers presented in Ms. Nettesheim's expert report are merely a recitation of the numbers in the analyst report.[32]

In Ms. Nettesheim's rebuttal report, she responds to our finding that the analyst reports on January 5, 2000 reveal "absolutely no information regarding the booking of unapproved claims on fixed-price contracts." Her response is that the content of these analyst reports proves loss causation because they "reveal, in part, the true state of the Company's

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[31] We can find no indication in the Nettesheim Report, or in any of the materials referenced by Ms. Nettesheim, what was revealed by Halliburton to Carol Lau in the referenced conversation.

[32] Nettesheim Report, ¶88.

operating income."[33] It is our understanding, however, that the *Flowserve* court rejected this "true financial condition" theory. The Flowserve court ruled:

> [t]he more serious shortcoming, however, is the use of Plaintiffs' expert of the "true financial condition" theory . . . In effect, Plaintiffs' expert leads the Court to a dangerous precipice. Under his logic, the relatedness tests set forth in *Dura* and *Greenberg* are optional. Rather than follow precedent, a plaintiff, like here, with debatable evidence of fraud can pick the largest stock drop irrespective of the actual reason and still relate the fraud because the stock drop is nevertheless a revelation of the company's true financial health.[34]

October 25, 2000

With regard to October 25, 2000, Ms. Nettesheim states:[35]

> After market close on October 24, 2000, while announcing its third quarter earnings release, the Company made a partial disclosure concerning the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger. . . . A significant portion of the negative news, as attributed to the Company, in news reports and by analysts, was related to the problems with the engineering and construction units

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[33] Nettesheim Rebuttal, ¶77.

[34] *Ryan v. Flowserve Corp., et al.*, No. 03-CV-1769-B (ND Tex. Nov. 13, 2007), p. 23-24.

[35] Nettesheim Report, ¶93.

> that Lead Plaintiff alleges could have been and should have been revealed earlier. Thus, a significant portion of the stock price decline on October 25, 2000 was related to the Company's booking unapproved claims on fixed-price contracts and lack of benefits from the Dresser merger alleged in the Complaint.

Ms. Nettesheim's logic is flawed. Ms. Nettesheim claims that if she finds that a price decline is related to E&C, then it is a curative disclosure of the company's booking of unapproved claims. There is no basis for her conclusion that E&C, a major segment of Halliburton's business, is synonymous with the allegations regarding unapproved claims. We found no evidence of a curative disclosure of the allegations regarding the booking of unapproved claims on October 25, 2000.

December 22, 2000

With regard to December 22, 2000, Ms. Nettesheim states:[36]

> The charges for cost overruns that were announced in December 2000 make clear that the problems in the engineering and construction were related to the large, fixed-price contracts and, therefore, the negative news on October 24 and 25, 2000, is a partial disclosure related to the Company's booking unapproved claims on fixed-price contracts and the lack of benefits from the Dresser merger alleged in the Complaint.

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[36] Nettesheim Report, fn. 61.

Ms. Nettesheim claims that if a price decline is related to large fixed-price contracts, then it is a curative disclosure of the allegations regarding booking of unapproved claims.[37] Ms. Nettesheim's analysis makes sense only under the premise that there are no possible problems that can occur with fixed-price contracts other than those related to the booking of unapproved claims. This premise is false, however, because problems with fixed-price contracts can occur independent of how unapproved claims are booked. Further, while analysts discuss cost overruns, they attribute these overruns to changes in market conditions, specifically to labor disturbances in Venezuela and West Africa.[38] In her rebuttal report, Ms. Nettesheim's response to these criticisms is that the allegations regarding unapproved claims "pertain to the undisclosed true probability of such cost overruns and that Halliburton had not disclosed such cost overruns."[39]

b. Risks of cost overruns connected to fixed-price contracts were known by the market before the alleged curative disclosures

Although some of the disclosures alleged by Ms. Nettesheim as being curative relate to fixed-price contracts, we find no indication that they relate to the accounting issue of the booking unapproved claims as revenue. The fact that fixed-price contracts were at risk of cost overruns was known by the

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[37] See section V.C.3.

[38] "Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts." [CIBC World Markets, December 22, 2000]

[39] Nettesheim Rebuttal, ¶79.

market even before the beginning of the alleged class period.

> The company will be undertaking large, lump sum fixed price contracts. The potential for cost overruns, and lower earnings from some of this work, will be an ever-present risk. [Prudential Securities, April 7, 1998]

> Engineering and construction is an inherently risky business, as any number of problems can arise when transforming a project idea into a physical reality . . . . The segment also began accepting a greater level of project risk by offering gain sharing or fixed price contracts. [Robinson-Humphrey, October 3, 1998]

> The company will be undertaking large, lump-sum fixed-price contracts. The potential for cost overruns is an inherent risk of those businesses. [Prudential Securities, October 7, 1998]

c. Ms. Nettesheim's event study analysis shows that there was no statistically significant price reaction to the actual disclosure of the change in accounting for unapproved claims

The alleged disclosures that Ms. Nettesheim claims are curative of the allegations regarding unapproved claims are not, in fact, curative of the allegations. There is, however, an actual curative disclosure of the alleged misrepresentation regarding the accounting of unapproved claims.

On March 14, 2000, the change in Halliburton's accounting practices relating to the booking of

revenues related to claims and change orders was disclosed to the market in the company's Form 10-K. This filing included the amounts booked as revenue for claims and change orders for 1998 and 1999.[40]

The Complaint alleges that March 14, 2000 was a partial curative disclosure.[41] Ms. Nettesheim should have used an event study analysis to test the stock price reaction on this date rather than on the four dates on which no curative information was released. While her report does not specifically address this date, Ms. Nettesheim's event study analysis found no statistically significant price reaction on March 14, 2000, an actual curative disclosure of the unapproved claims allegations.[42]

4. Ms. Nettesheim does not prove loss causation for the asbestos reserves allegations

a. Ms. Nettesheim's loss causation analysis does not control for changes in the asbestos litigation environment

There is abundant evidence that the asbestos litigation environment in general changed from the beginning of the alleged class period to the end of the

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[40] See, Halliburton's Form 10-K filed March 14, 2000, p. 34

[41] According to the Complaint ¶213: "Halliburton failed to disclose until 3/00, when the Company filed its 99 Form 10-K, that the Unapproved Claims on its [engineering, procurement and commissions] contracts were, in fact, being recognized as revenue before the customer had agreed to pay them and were, thus, a component of the Company's earnings."

[42] See First Allen Report, p. 32-33.

alleged class period. For example, a *Financial Times* article in January 2001 states:[43]

> Although asbestos-related problems for companies date back more than four decades, the issue and its effects have returned with court decisions in the past year. Unexpectedly large verdicts against asbestos defendants in the first half of last year helped raise the bar for liability claims.

A September 2001 article in the insurance publication Best's Review described the changes in the asbestos environment as follows:[44]

> During 2000 and the first half of 2001, there has been a significant increase in the expectation of future payments for the defendants involved in asbestos litigation and the insurance companies that provided insurance coverage to them.
>
> ***
>
> The number of filings made against a number of defendants more than doubled in 2000 as compared to previous years.
>
> ***
>
> As the resources available to compensate claimants have been depleted due to bankruptcies of defendants, the cost of compensating claimants is being shifted to others.

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[43] Bowe, Christopher. "Companies & Finance, The Americas - USG Takes Charge on Asbestos Litigation." *Financial Times,* January 12, 2001.

[44] Bhagavatula, Raji, et al. "Asbestos: A Moving Target." Best's Review, Volume 102, Issue 5. September 1, 2001

> Plaintiff lawyers, in an effort to procure full value for their clients, have been demanding increases in contributions from the solvent companies, and have also cast their net wider to include new defendants.
>
> ***
>
> Eight companies mired in asbestos litigation have declared bankruptcy in 2000 and the first half of 2001, asserting that the court system has ceased to make a fair determination of their asbestos-related liability and that any legislative solution appears unlikely.
>
> ***
>
> These estimates are significantly higher than estimates made by many experts just a few years ago.
>
> ***
>
> Individual defendants have experienced significant increases in both the number of claims filed and their average payment per claim, increases far beyond those projected a few years ago.

b. Ms. Nettesheim does not tie the alleged curative disclosures to the allegations

Ms. Nettesheim claims that she adequately tied her alleged curative disclosures to alleged misrepresentations and omissions.

> "The misrepresentations and omissions have been adequately tied to the curative disclosures," [Nettesheim Rebuttal, p. 4]

She has not done that. Asserting alleged curative disclosures are adequately tied is not the same as

actually linking them to an alleged misrepresentation. For example, according to Ms. Nettesheim, a mention of asbestos claims or liability is enough to link an alleged curative disclosure to the alleged fraud.

> A. It relates to the allegations regarding the under reserving of the asbestos reliability [sic].
>
> Q. How does it relate?
>
> A. It is talking about asbestos claims and the potential asbestos liability of Halliburton.
>
> Q. And that's a sufficient link in your mind?
>
> A. Yes. [Nettesheim Deposition p. 124]

And similarly, later on in her deposition, Ms. Nettesheim testified:

> A. No. As I said, I did not go back and match this particular disclosure with a prior specific statement. [Nettesheim Deposition p. 138]

Plaintiff admits that Ms. Nettesheim did not link corrective disclosures to specific misrepresentations:

> [S]he testified in her deposition that she did not link a particular corrective disclosure to a single misrepresentation . . . [Opp Mot Strk Nettesheim, p. 13]

c. Ms. Nettesheim does not show that the alleged curative disclosures are actually curative of the alleged misrepresentations regarding asbestos reserves

Ms. Nettesheim's loss causation analysis does not take into account the specifics of the allegations regarding asbestos reserves. Plaintiff alleges that

the asbestos reserves were misleading, and Ms. Nettesheim claims to determine whether disclosures during the alleged class period were curative of this allegedly misleading information. According to Ms. Nettesheim, however, she does not have an understanding of how Halliburton's asbestos reserves were estimated, nor how the market perceived how the estimation was made.[45]

Without an understanding of what Plaintiff alleges the misrepresentations regarding the asbestos reserves are, what the asbestos reserves represented, and what the market believed the reserves represent-

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[45] Q. Let me ask it this way: You understood, did you not, that throughout the class period, or at no time during the class period did Halliburton suggest to the marketplace that its current asbestos reserve was intended to apply to whatever future exposure the company had to asbestos, no matter how far down the road?

A. As I said earlier, I don't have a specific—I didn't think of it in that way. [Nettesheim Deposition, p. 115-116]

Q. You don't recall seeing the company's description of the asbestos reserves and its methodology for it?

A. I recall looking at it generally, but that wasn't something I was looking at specifically so I don't recall specifically what was said.

* * *

Q. And would you agree with me that all of the analysts who were following Halliburton whose reports you saw at least understood that Halliburton was reserving only for pending or open asbestos claims as opposed to whatever the future universe of asbestos claims may be?

A. You would have to show me the specific analyst reports. [Nettesheim Deposition, p. 116-117]

ed, Ms. Nettesheim cannot reliably test whether an announcement about asbestos was a curative disclosure of the alleged misrepresentations regarding asbestos reserves.

At the time of the alleged curative disclosures related to asbestos, analysts and market commentary commented that the asbestos litigation environment is unpredictable and often irrational, as the following two examples illustrate.

> We continue to monitor the situation closely and we recognize the unpredictability and apparent irrationality of the asbestos litigation environment in general. [Salomon Smith Barney, October 31, 2001]
>
> Results of asbestos litigation have proven to be unpredictable and often irrational. The number of claims submitted to Halliburton doubled in 2Q01 sequentially, then dropped in the following quarter. Overall, claims have risen in recent years and show no signs of subsiding. Also, while the settlement process tends to produce reasonable and predictable results, venue shopping and unpredictable juries increase the likelihood of occasional large judgments, as recently seen. [Jefferies, December 10, 2001]

Ms. Nettesheim presents no evidence that any analyst or market commentary on the dates of any of the alleged curative disclosures suggested any falsity in any prior statements that the company had previously made about asbestos or asbestos reserves. We conducted a review for such evidence and could not find a single statement that suggested any such falsehood.

D. There is no evidence in Ms. Nettesheim's analysis that the alleged misstatements inflated Halliburton's stock price

Plaintiff alleges that Halliburton made "a series of false and misleading statements that misrepresented the condition and success of Halliburton's business"[46] and that this resulted in "artificial inflation in Halliburton's stock price . . . during the Class Period."[47] We reviewed the Complaint for all dates during the alleged class period on which Plaintiff alleges that misstatements were made and thereby allegedly inflated Halliburton's stock price.

We then reviewed Ms. Nettesheim's analysis to determine whether, according to her analysis, the alleged misstatement resulted in a statistically significant increase in Halliburton's stock price. As detailed in the First Allen Report, we found that, according to Ms. Nettesheim's event study analysis, there is no statistically significant stock price increase that can be associated with any of the alleged misstatements in the Complaint.[48]

Ms. Nettesheim in her rebuttal report makes the following statement without any support or further explanation:

> The absence of statistically significant stock price increases upon each date of a misrepresentation or omission is not unexpected and does not undermine my conclusion that Halliburton's stock price was inflated during the Class Period.[49]

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[46] Complaint, ¶2.

[47] Complaint, ¶3.

[48] See First Allen Report, p. 41-45.

[49] Nettesheim Rebuttal, ¶6.

It is not clear why Ms. Nettesheim does not see the lack of price movement to the alleged misrepresentations as undermining her conclusions. Plaintiff's claim is that the alleged misrepresentations inflated the price and that the price declined when information curative of the alleged misrepresentations was released to the market. Ms. Nettesheim's own analysis does not support the claim that the price is inflated by the alleged misrepresentations. Ms. Nettesheim nonetheless claims she has proven inflation because she has proven that the stock declined at the alleged curative disclosures. She offers no explanation as to why the lack of price movement at the time of the misrepresentation is "not unexpected."

E. Ms. Nettesheim's Event Study is Methodologically Flawed and Her Tests of Statistical Significance Are Invalid

In the First Allen Report, we detailed how Ms. Nettesheim's event study is methodologically flawed and her tests of statistical significance are invalid.[50]

Ms. Nettesheim performed an event study as the basis for her claim of having proven loss causation. Her event study, however, is methodologically flawed. Ms. Nettesheim first conducted a hypothesis test (actually, 633 hypothesis tests) to determine whether any of the days during the alleged class period exhibited a statistically significant price reaction. Then, for those days on which she found statistically significant price reactions, she reviewed news and analyst commentary to determine whether they contained news related to the allegations.

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[50] First Allen Report, p. 7-15.

This procedure is methodologically flawed because her tests of statistical significance are invalid, and because her news analysis is not at all systematic.

The valid statistical methodology for conducting a hypothesis test is to *first* state a hypothesis to be tested (e.g., whether a particular piece of news has a significant effect on the price), and *then* perform the test. Ms. Nettesheim inverts the order of these steps by performing a hypothesis test for each day during the alleged class period, thereby invalidating her tests.[51]

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[51] Q. What you did was you looked at every day during the class period and then determined which days had statistically significant returns, correct?

A. That's one of the many things that I did.

Q. An alternative approach would have been to look at the dates alleged in the complaint and determine if on those dates there was a statistically significant return?

A. It's not an approach that related to what I was doing. [Nettesheim Deposition p. 41]

A. I did not look at every Halliburton statement during the class period and then look to see whether or not the stock price went up.

Q. Sure. What you did was you looked at the dates in which there was a statistically significant return with a positive or negative, correct?

A. Correct [Nettesheim Deposition p. 75]

Q. So how did you begin trying to ascertain the loss causation aspects of this case?

A. After collecting the data, then we did statistical analyses which entailed forming an industry index, and after several steps, went through to form the industry index and did a regression analysis to determine the relationship between Halliburton and

1. Ms. Nettesheim's discussion of the significance at the 95% level is misguided

Ms. Nettesheim states:[52]

> Ms. Allen contends that the number of statistically significant days is 'no more than the number expected' and thus, 'yields no evidence that the stock price declines during the alleged class period are caused by anything other than the normal daily variation in stock price.' This statement is misleading and erroneous.

On the contrary, this statement from the First Allen Report quoted by Ms. Nettesheim is correct. Ms. Nettesheim's discussion of the Allen statement contains no references, academic or otherwise, and is contrary to fundamental statistical theory and principles.

The test statistic performed by Ms. Nettesheim is conducted at the 95% confidence level.[53] By

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> the stock returns and returns on a market index, industry index. [Nettesheim Deposition p. 18]
>
> Q. But what you were doing was trying to determine loss causation as opposed to materiality, recognizing that oftentimes there is overlap between these different elements of a fraud claim?
>
> A. I discussed materiality, and I think that in the loss causation section, I looked at events where there were statistically significant company specific returns, but that does not ignore materiality. [Nettesheim Deposition p. 34]

[52] Nettesheim Rebuttal, ¶33.

[53] In this section we are discussing statistical significance at the 95% confidence level *as if* Ms. Nettesheim had performed all the rest of her analysis correctly. We have discussed both in the

construction, the 95% confidence level is expected to yield a false positive 5% of the time. In other words, the test statistic used by Ms. Nettesheim is designed so that 5% of the time the test is expected to indicate statistical significance when there is *no* company-specific news of importance to the market (that is, "under the null").[54] If the null is true, meaning, in this case, that there is no company-specific news, then 5% of the time the test will falsely indicate a statistically significant excess return.

The quote on statistical significance in the First Allen Report from the "Reference Guide on Statistics" part of the *Reference Manual on Scientific Evidence,* published by the Federal Judicial Center, confirms this well known and fundamental principle of statistical hypothesis testing:

> **[M]ultiple comparison.** Making several statistical tests on the same data set. Multiple comparisons complicate the interpretation of a *p*-value. For example, if 20 divisions of a company are examined, and one division is found to have a disparity "significant" at the 0.05 level, the result is not surprising; indeed, it should be expected under the null hypothesis. [Kaye, David H. and David A. Freedman, "Reference Guide on Statistics", *Reference Manual on Scientific Evidence,* (2000, Federal Judicial Center, Second Edition), p. 166]

First Allen Report and in this report many other reasons why Ms. Nettesheim's analysis is erroneous and unreliable.

[54] Miller, Irwin and Marylees Miller. John E. Freund's Mathematical Statistics with Applications, Seventh Edition, Pearson Prentice Hall, 2004, p. 377.

Ms. Nettesheim repeats this basic principle of hypothesis testing levels:

> The significance level of a test is the probability of making a decision to reject the null hypothesis when the null hypothesis is actually true (i.e., to make a decision that the residual return was not due to chance when it actually was due to chance). [Nettesheim Rebuttal ¶32]

Yet, Ms. Nettesheim fails to understand the implication of this basic principle to her analysis. Under the null, i.e., when in truth there is no material company-specific news, if the test is performed 633 times, we would expect on average to find that 5% of the time, or approximately 32 times, the price movement is statistically significant even though there is no material news. After performing her test 633 times, Ms. Nettesheim finds 31 statistically significant events, thus, no more than expected in the absence of any material news.

The introduction to *Multiple Comparisons and Multiple Tests,* a manual on how to perform analyses that involve multiple statistical tests, explains this problem with Ms. Nettesheim's methodology:

> Practically every day, you find in the newspaper or other popular press, some claim of association between a stimulus and outcome, with consequences for health or general welfare of the population at large. Many of these associations are suspect at best, and often do not hold up under scrutiny . . .
>
> How do such incorrect conclusions become part of the scientific and popular landscape? While scientists typically fault such things

as improper study design and poor data, there is another explanation that is the focus of this book. Data analysts can easily make such incorrect claims when they analyze data from large studies, reporting any test that is "statistically significant" (usually defined as "$p < 0.05$," where "p" denotes "p-value") as a "real" effect. On the surface, this practice seems innocuous. After all, isn't that the rule we learn in statistics classes-to report results where we find "$p < 0.05$" as "real"?

The problem, briefly stated, is that when multiple tests are performed, "$p < 0.05$" outcomes can often occur even when there are no real effects. Historically, the rule was devised for a single test, with the following logic: if the $p < 0.05$ outcome was observed, then the analyst has two options. He or she can believe that there is no real effect, and that the data are so anomalous that they are within the range of values that would be observed only 1 in 20 samples; or, he or she may choose to believe that the observed effect is real. Because the 1 in 20 chance is relatively small, the common decision is to "reject" the hypothesis of no real effect, and "accept" the conclusion that the effect is real.

This logic breaks down when you consider multiple tests or comparisons in a single study. If you consider 20 or more tests, then you expect at least one "1 in 20" significant outcome, even when none of the effects are real. Thus, there is little protection offered by the "1 in 20" rule, and incorrect claims

> can result. While problems of faulty study design, bad data, etc., can and do cause faulty conclusions, you should be aware that multiplicity is also a likely cause, especially in large studies where many tests or comparisons are made. Such studies are common, as the following examples indicate.

Further, Ms. Nettesheim erroneously claims that:

> Ms. Allen's assertion that one would expect 5% of the days during the Class Period to be significant would only be true if the control period is the same as the Class Period. [Nettesheim Rebuttal ¶34]

Ms. Nettesheim's statement is not only contradicted by the quote above from the Federal Judicial Center, but also reveals a deep misunderstanding of both the test she performs and the underpinnings of the event study methodology. Ms. Nettesheim provides no academic citation for her statement.

Contrary to Ms. Nettesheim's claim, it is not necessary that the control period and the alleged class period be the same period for one to expect 5% of the days to be significant even in absence of any fraud. In fact, one of the underpinnings of the event study methodology is that the relationship between Halliburton's stock and the market and industry indexes should be the same over the control period and the alleged class period.

If the relationship between Halliburton's stock and the market and industry indexes is not the same in the control period and the alleged class period, then Ms. Nettesheim's analysis is contrary to the underpinnings of the event study methodology and her results are unreliable. Ms. Nettesheim seems to

agree that the relationship should be the same over the control period and the alleged class period for the analysis and results to be reliable.[55]

F. Ms. Nettesheim's Results Are Not Robust or Reliable

1. The fact that Ms. Nettesheim's results change dramatically with a different control period is evidence that her methodology and conclusions are not reliable

The First Allen Report stated that:

> More importantly, this change shows that her results are not robust. Applying the regression results based on this alternative control period, we found that there was no longer any statistically significant price decline on most of Nettesheim's alleged curative disclosure dates. We find that 9 of her 11 alleged curative disclosure dates are not statistically significant if we apply her methodology and simply change the control period from being a one-year period that starts before the alleged class period to a one-year period that starts after the alleged class period. [p. 14]

Ms. Nettesheim responded as follows:

> Ms. Allen contends that my findings are not "robust" based on her analysis of an alterna-

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[55] It is important to select a control period that is representative of the company during the Class Period and with as little impact as possible from the fraud in determining the normalized relationship between a company's stock price returns and the returns on a market index and an industry index." [Nettesheim Rebuttal, ¶51].

> tive control period—a one-year period that begins after the Class Period. She is incorrect, my findings are "robust," as demonstrated below, and it is her alternative control period that is arbitrary and irrelevant.
>
> It is important to select a control period that is representative of the company during the Class Period and with as little impact as possible from the fraud in determining the normalized relationship between a company's stock price returns and the returns on a market index and an industry index. The control period I used is more highly correlated and representative of Halliburton stock price returns during the Class Period than the control period proposed by Ms. Allen. [Nettesheim Rebuttal, ¶50, 51]

Ms. Nettesheim appears to miss the point made in the First Allen Report. Our point was that her findings are not robust and reliable, not that the later control period is more appropriate.

The evidence Ms. Nettesheim presents in her rebuttal report to address this criticism not only fails to address the criticism, but also undermines Ms. Nettesheim's claim that her results are robust and reliable.

For example, in her response, Ms. Nettesheim performs her analysis using another alternative control period that yields 19 new statistically significant dates,[56] a more than 60% increase in the number of statistically significant days from the analysis in her first report. Ms. Nettesheim offers no

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[56] Nettesheim Rebuttal, ¶54. Footnote 14 states, "There are 19 additional significant dates using the 2000-2001 control period."

explanation as to why this new control period would so dramatically affect her findings of statistical significance.[57]

Although Ms. Nettesheim claims that the post-class control period used in the First Allen Report is inappropriate, none of the academic literature she cites supports her claim, and much of it directly contradicts her claim.[58]

Further, Ms. Nettesheim claims that the post-class control period is less suitable in part because Halliburton had restructured its E&C business such that it was a "different company from what it was prior to the class period." Yet, Ms. Nettesheim used her control period (which is entirely pre-restructuring of E&C) to test the movement of Halliburton's stock *after* the company's restructuring of its E&C business. Her argument, therefore, undermines her own choice of control period for the analysis of disclosures after the E&C restructuring, because her control period is not representative of the post-restructuring of E&C part of the alleged class period, according to her logic.

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[57] Note that, according to Ms. Nettesheim, her alternative control periods do not, however, change her ultimate conclusion regarding loss causation. As discussed elsewhere in this report, her methodology does not reliably test loss causation.

[58] For example, the Marais and Schipper article cited by Ms. Nettesheim states that the control periods, both before and after the event period, can be used. [p. 23] Further, according to Tabak and Dunbar: "There are three general choices for the placement of an estimation window: before the event window, surrounding the event window, and after the event window." [p. 9]

Also, according to the Marais and Schipper article cited by Ms. Nettesheim, "Analysts . . . cannot include returns during a period of alleged fraud" in their estimation period. [p. 21]

Again, our point is not whether one control period is better than another, but that the change in her findings that result from a change in the control period is evidence that her findings are not robust and reliable.

2. The unreliability of Ms. Nettesheim's methodology is illustrated by the unreasonable conclusions that result when her method is applied to McDermott

To illustrate that Ms. Nettesheim's test of loss causation is unreliable, we used her same methodology of testing loss causation and applied it to a different company, McDermott International, Inc. ("McDermott").[59] We showed that her methodology is unreliable and yields positive results for loss causation regardless of the underlying true situation — i.e., her test of loss causation found inflation and loss causation even when there was no underlying fraud or even allegation of fraud. Despite the fact that McDermott had no allegations of fraud similar to those of Halliburton, using her methodology, we were able to similarly "prove" that McDermott's price was inflated and that there was loss causation. In fact, using her methodology, we are able to "prove" inflation and loss causation for McDermott's misleading accounting for unapproved claims, despite the fact that there is no indication that McDermott had any such problem.

Ms. Nettesheim in her Rebuttal Report responded to our illustration that her methodology is unreliable and yields positive results for loss causation regardless of the underlying true situation. Her response was as follows:

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[59] See First Allen Report section XII.

> Allen's analysis of loss causation for Halliburton peer McDermott International, Inc. is misleading, erroneous and irrelevant. Without any reasonable assumptions regarding allegations concerning McDermott, she has no basis for her conclusions regarding loss causation. [Nettesheim Rebuttal ¶37, internal parenthetical omitted]

This is exactly our point. The methodology used by Ms. Nettesheim to test inflation and loss causation is misleading, erroneous and irrelevant. Her conclusions are completely unreliable; using her test one can conclude there is loss causation even in situations where there is clearly no inflation and no price decline related to an alleged fraud. A test is not reliable if, regardless of the underlying condition under study, it yields a positive result.

G. None of the Academic Literature Cited by Ms. Nettesheim is Consistent with Her Approach

Ms. Nettesheim claims her loss causation analysis using her event study is reliable and based on accepted methods.[60] In support of this claim, Ms. Nettesheim and Plaintiff cite five academic articles - Marais and Schipper,[61] Eisenhofer, *et al.*,[62] Koslow,[63] Mitchell and Netter,[64] Tabak and Dunbar.[65]

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[60] Nettesheim Rebuttal, p. 6-13.

[61] See Marais, M. Laurentius and Katherine Schipper, "Event Study Methods: Detecting and Measuring the Security Price Effects of Disclosures and Interventions," in *Litigation Services Handbook, The Role of the Financial Expert, Third Edition*, 2004 Cumulative Supplement, edited by Roman L. Weil, Michael J. Wagner and Peter B. Frank, p. 17A-1-27 ("Marais and Schipper").

Contrary to Plaintiff and Ms. Nettesheim's claim, however, all five of these articles contain evidence that Ms. Nettesheim's event study is unreliable and not based on accepted methods. Some of the reasons are detailed below.

Ms. Nettesheim fails to identify event dates first, as called for by the academic literature cited

For example, according to the literature cited:

> PERFORMING THE BASIC EVENT STUDY *Identifying the Event*: Many texts discuss how to perform the event study. While there are some differences in exposition, there is a uniform agreement in the literature on the necessary steps and general procedures to be followed. First, one must identify the event or events to be studied. [Tabak and Dunbar, p. 7]
>
> There are three basic steps in conducting an event study: (i) define the event window; (ii)

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[62] Eisenhofer, Jay W., Geoffrey C. Jarvis and James R. Banko, "Securities Fraud, Stock Price Valuation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation," 59, *Business Lawyer*, p. 1419-1445, August 2004 ("Eisenhofer, *et al.*").

[63] Koslow, Jon, "Estimating Aggregate Damages in Class-Action Litigation under Rule 10b-5 for Purposes of Settlement," *Fordham Law Review*, April 1991, Vol. 59, p. 811-842 ("Koslow").

[64] Mitchell, Mark L. and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," *The Business Lawyer*, 49, p. 545-590.

[65] Tabak, David I. and Frederick C. Dunbar, "Materiality and Magnitude: Event Studies in the Courtroom," National Economic Research Associates, Working Paper #34. April 1999 ("Tabak and Dunbar").

> calculate abnormal stock price performance around the event; and (iii) test for statistical significance of the abnormal stock price performance. . . . The first step in the event study is selecting an event window. The event window is the period when information about the event becomes available to the stock market and thus may affect the relevant company's stock price. [Mitchell and Netter, p. 557-558]

Ms. Nettesheim fails to account for confounding factors as described by the academic literature cited

For example, according to the literature cited:

> Clearly, security returns react to causes other than the announcement under consideration. To assess the effect of the announcement itself . . . the study should ideally identify those causes and remove their effects from the data. [Marais and Schipper, p. 17A-6]

> [P]roblems [that] require additional financial analysis . . . A lack of direct correlation between the initial fraud and subsequent disclosures: Frequently, frauds are cured by corrective statements that also contain additional information, leading to problems of "over-disclosure" and "under-disclosure." It does not follow then that the market's reaction to a curative statement is attributable purely to fraud-related information. [Koslow, p. 6]

Ms. Nettesheim fails to link the alleged curative disclosures to prior alleged misstatements as described in the academic literature cited

For example, according to the literature cited:

> First, the analysis can address whether . . . a statistically reliable link exists between the information event in question and stock price responses. For example, in securities litigation over allegedly defective disclosures, financial experts must link the share-price reaction to the alleged correction of the allegedly defective prior disclosures or omissions. [Marais and Schipper, p. 17A-8]

Ms. Nettesheim fails to compare news days to non-news days as described in the academic literature cited

For example, according to the literature cited:

> Thus, the problem of assessing the evidence for a material market effect reduces to that of comparing the event-day return to the nonevent . . . returns . . . [Marais and Schipper, p. 17A-6]

Ms. Nettesheim fails to address several other issues as described in the academic literature cited

For example, according to the literature cited:

> [C]alculations should be based not on whether the market was efficient or inefficient, but rather on whether the fraud was sufficiently material to have a statistically significant impact on the market price, given the degree of market efficiency. [Koslow, p. 3]

Yet, Ms. Nettesheim's calculations are based on her finding of market efficiency, rather than the "degree of market efficiency." The literature cited also notes:

> During a prolonged class period, particularly when other major changes in company operations accompany the fraud, the beta may change suddenly and by a significant amount . . . [Koslow, p. 5]

Yet, despite a prolonged alleged class period in this matter, Ms. Nettesheim did not test whether the beta (the relationship between the movement in Halliburton's stock price and the market) may have changed during the alleged class period.

H. Ms. Nettesheim Offers No Evidence That Her Loss Causation and Event Study Methodology is Court-Approved

Ms. Nettesheim states that:[66]

- The courts in *Enron* and *WorldCom* have approved the methodology she used in this matter; and
- She has used the same methodology she is using in this case in *Homestore* and *Vivendi.*

Ms. Nettesheim claims that her colleague, Blaine Nye, used in *WorldCom* and *Enron* the same event study methodology that she is using in this matter. Ms. Nettesheim also claims that the *WorldCom* and *Enron* courts accepted Dr. Nye's methodology.[67]

We found no evidence that Dr. Nye submitted any loss causation analysis in the *Enron* matter. Dr. Nye's declaration dated January 2006 reads:

> "This Declaration on efficiency of markets for Enron securities is not a damage study,

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[66] Nettesheim Rebuttal, ¶11.

[67] Nettesheim Rebuttal, ¶11.

> or a calculation of damages, or a determination regarding loss causation, and should not be construed as such." [Declaration of Blaine F. Nye, Ph.D. in Support of Lead Plaintiff's Amended Motion for Class Certification Declaration (Docket No. 1445), January 6, 2006, ¶196, p.89]

In addition, the methodology used by Dr. Nye in *WorldCom* is not the same as that used by Ms. Nettesheim in this matter. Unlike the methodology employed by Ms. Nettesheim, Dr. Nye analyzed the stock price reaction to misrepresentations and his analysis of loss causation did not appear to start with a list of statistically significant price reactions and then to proceed to an examination of whether information related to the alleged fraud was released on those dates.[68] Dr. Nye's *WorldCom* report has a section entitled "Causation" in which he details the alleged misrepresentations and associated stock price movements and the alleged curative disclosures and their stock price movement.[69] This section includes a discussion of alleged disclosure dates that, according to his event study analysis, did not have a statistically significant price decline. In addition, the method used by Dr. Nye to construct his industry index is not the method used by Ms. Nettesheim in

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[68] See fn. 51.

[69] "This section describes certain disclosures by the Company that are alleged to have been misleading or omitted to disclose important information regarding WorldCom's revenue and earnings and its prospects and how these misrepresentations and omissions caused WorldCom's securities prices to be inflated during the Class Period. This section also describes how certain disclosures later in the Class Period and at the end of the Class Period caused the securities prices to decline." [Expert Report of Blaine Nye, Ph.D., August 20, 2004, ¶30]

this matter. Dr. Nye did not select companies for inclusion in his industry index on the basis of a statistical technique.[70]

Ms. Nettesheim's event study methodology as described in *Homestore* differs from her methodology in *Halliburton*. In *Homestore*, Ms. Nettesheim analyzed stock price reactions on dates on which allegedly misleading information about Homestore's financials was released (thereby causing the stock price to increase), and tied these alleged misstatements to corrective disclosures made later (which caused the stock price to decline).

> This section describes certain disclosures by the Company that were misleading or omitted to disclose important information regarding Homestore's financial condition and its prospects and how this caused the stock price to be inflated during the Class Period. This section also describes how certain partial disclosures of Homestore's true financial condition late in the Class Period caused the stock price to decline. [Expert Report of Jane D. Nettesheim dated January 16, 2004 ¶61]

Ms. Nettesheim does not use this approach in *Halliburton*. Rather than performing an event study on pre-determined event dates, she analyzes

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[70] Moreover, Dr. Nye's opinion in *WorldCom* regarding negative causation was struck by the court. The *WorldCom* Court found: "The Underwriter Defendants' motion *in limine* is granted to the extent of striking Nye's opinions that there is 'no offset for negative causation . . . '" *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 2216, *19-23 (S.D.N.Y. February 17, 2005)

Halliburton's stock price reactions on all dates during the alleged class period.

Plaintiff and Ms. Nettesheim have not provided her report in *Vivendi* or any evidence Ms. Nettesheim's event study methodology in *Vivendi* is equivalent to her methodology in *Halliburton*. The only comment regarding Ms. Nettesheim's report in the *Vivendi* court's decision provided by Plaintiff's counsel in this matter says that Ms. Nettesheim opined that the markets for Vivendi shares in Europe and the US are highly integrated and that therefore this supports *Vivendi* Plaintiffs' claim that one class rather than two was appropriate. The decision has no mention of event studies and does not address loss causation.

I. Response to Miscellaneous Points Made in Nettesheim Rebuttal

1. Ms. Nettesheim claims that her news analysis is not complete

Ms. Nettesheim states:

> It is not possible to obtain at this time all news that was available to market participants during the Class Period; for example, I know that I have do not have [sic] First Call reports or all of the analyst reports that were published during the Class Period. Furthermore, there very likely are other types of relevant information about Halliburton that was of interest and available to market participants during the Class Period that we will never know existed. Thus, to segregate days during the Class Period into "news days" and "non-news days" is a meaningless exercise at this time. [Nettesheim Rebuttal ¶37]

If at this point in her research, Ms. Nettesheim feels that she does not have enough information to segregate the days in the alleged class period into news days and non-news days, then her research is too preliminary for her to be able to draw reliable conclusions regarding the cause of Halliburton's stock price movement. Ms. Nettesheim appears to believe that she is likely missing material news on days that can explain statistically significant price reactions. Given that her search for news covered the entire class period, it would therefore seem likely that she would be missing material news on other days, including those days that she claims are curative disclosures. How can she be confident, then, that she is not missing non-culpable news that actually caused the price reactions on her dates of alleged curative disclosures? Or how can she be confident that the allegedly culpable news was not, in fact, released prior to the alleged price declines and, therefore, could not have been the cause of those declines? If her knowledge of news is such that she is unable to classify days into news days and non-news days, her results cannot be reliable.

2. The difference between Ms. Nettesheim's market data and CRSP data is not *de minimis*

The First Allen Report explained that we were unable to identify Ms. Nettesheim's market index and that CRSP, the data provider Ms. Nettesheim allegedly used, similarly could not identify her data series or substantiate that CRSP was the source of the data.[71]

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[71] See First Allen Report, p. 12.

Ms. Nettesheim claims that the differences between the data she used and the CRSP data are "*de minimis.*"[72] Yet the returns she used and the CRSP returns differ by more than 5% on 251 days out of the 633 trading days during the alleged class period. Moreover, on five of the days the two different datasets have the market moving in *opposite* directions—for example, the data we obtain from CRSP records the market going down on February 4, 2000 while the data she used records the market going up on that day.

Ms. Nettesheim now claims that she obtained the data from CRSP years ago and that differences between her data and the CRSP data are due to "a change by a third party data provider of the price of some stocks other than Halliburton during the Class Period."[73] Ms. Nettesheim's claim that this difference is the result of the data provider changing the price of stocks is unsupported and unbelievable.

VI. RESPONSE TO SPECIFIC POINTS IN PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE THE NETTESHEIM REPORT

In the table below, we summarize the claims and allegations made by Plaintiff in its Opposition to Motion to Strike Expert Report of Jane Nettesheim in the left hand column and our response in the right hand column. Note that many of the issues addressed above are also relevant here.

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[72] See Nettesheim Rebuttal, ¶6.

[73] See Nettesheim Rebuttal, ¶6.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
I. NETTESHEIM'S METHODOLOGY IS PROPER AND APPROPRIATELY APPLIED. A. Nettesheim's Methodology Is Sound. • In Nettesheim's Rebuttal Report, Nettesheim began her event study by reviewing the Complaint to identify the alleged misrepresentations and the alleged partial disclosures.	Whether she did or did not read the complaint first is not the point. Her methodology is inappropriate for the reasons discussed in other sections of this report and the First Allen Report. (See sections V.C, V.D, V.E, V.F and V.G in this report.)
• Nettesheim's event study methodology is the same methodology that she has employed in other securities actions and has been accepted by courts in other actions.	The cases cited do not support this claim. (See section V.H above.)

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• Nettesheim's methodology is fully consistent with the description in the literature and case law of the proper way to conduct an event study.	Nettesheim's methodology is not consistent with any of the academic literature or cases cited. (See section V.G.)
• Allen's misunderstanding of the Nettesheim Report may stem from the fact that Allen did not review the Appendix to the Nettesheim report.	The First Allen Report demonstrates that Allen reviewed and analyzed Nettesheim's Appendix.
• Allen's equivocal testimony and uncertain experience in ever having conducted a loss causation analysis undercuts whatever weight her assertions might otherwise carry.	Allen testified that she has conducted an analysis as to whether or not there was loss causation.[74]

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[74] Allen testified:

Q. Have you ever done an analysis as to whether or not there was loss causation?

A. Yes [Deposition of Lucy Allen, p.84, lines 11-13]

Q. Let me ask that question. Have you ever done an analysis as to whether or not there was loss causation in a securities class action case?

A. Yes [Deposition of Lucy Allen, p.85, lines 6-10]

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
B. Nettesheim's Industry Index Was Properly Constructed. • Employing an objective and sound methodology with both theoretical and statistical measures.	Her industry index is not constructed appropriately for the tests she claims to perform. The industry index cannot test whether the price decline in Halliburton is due to industry problems with E&C or changes in the asbestos litigation environment, as opposed to revelation of any alleged fraud by Halliburton, since it does not control for changes in E&C or changes in asbestos.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• Defendants criticize Nettesheim's market index because she did not include two stocks discussed in a single Merrill Lynch analyst report issued more than a year before the class period that mentioned Halliburton's E&C Group. The Merrill Lynch report only mentions these companies in passing.	(Presumably Plaintiff means "industry index" not "market index.") The Merrill Lynch report concerns the pending merger between Halliburton and Dresser and its effect on the E&C.[75] Many other sources during the class period including ones produced by Nettesheim indicate that Halliburton and these other companies are competitors in the E&C industry. Nettesheim claims that Halliburton's stock price declined because of problems related to E&C. The important point is not

[75] The Merrill Lynch report reads

Merrill Lynch: Engineering & Construction

Reason for Report: Potential for Changes in E&C Valuation?

The pending acquisition of Dresser Industries by Halliburton is undoubtedly a deal driven primarily by issues in the oil services industry. But, in the process, a formidable engineering and construction company . . . with $5 billion in revenues has been created and that new company could potentially change the E&C landscape . . . [Merrill Lynch. March 13, 1998]

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
	which E&C companies are in an index, but that Plaintiff has **some** method of proving that the decline in Halliburton's stock price is not due to changes in the E&C industry overall (or asbestos environment overall) rather than alleged fraud.
• Halliburton is not an engineering and construction company	Halliburton's business is not all E&C (approx 30-50% of annual revenues are E&C during the years of the class period); but Halliburton is one of the largest E&C companies in the world.[76] According to Nettesheim Rebuttal Report, Halliburton is the "leading engineering and construction company in the world."[77]

[76] Computed as a ratio of revenues of the E&C segment (including BRES) to total Halliburton revenues for the years 1999-2001 as reported in 10-K for 2001, filed on March 12, 2002. See p. 15 and p. 17.

[77] The Nettesheim Rebuttal ¶62 quotes a report by the analyst at Donaldson, Lufkin & Jenrette on March 1, 1999:

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• There is no index described as an E&C index that includes Halliburton.	Whether or not a premade index exists does not relieve Nettesheim's burden to control for E&C industry effects. Since much of Halliburton's business is not E&C, Halliburton might not be included in an E&C off-the-shelf index, but the effect of the industry must still be addressed.
• The inclusion of the other two companies mentioned in the March 13, 1998, Merrill Lynch report would have no material impact on the overall industry index used in the Nettesheim Report.	That is not the point; averaging these two companies in with other 50 plus companies that are not related to E&C is still not going to help one determine whether any of Halliburton's stock price

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Leading engineering and construction company in the world — The combination of Dresser's M.W. Kellogg subsidiary and Halliburton's Brown & Root subsidiary creates one of the largest and best positioned e&c companies with a worldwide presence and a number of unique technologies in diverse areas including LNG, ammonia, olefins and ethylene.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
Their inclusion does not change the statistical significance of any of the partial corrective disclosures related to the failed Dresser merger or the improper accounting for unapproved claims on long-term, fixed price contracts.	decline is due to alleged fraud regarding the integration of Dresser or accounting of unapproved claims, or, rather, due to a decline in the market for E&C. See graph above in section V.C.2.a.
• The adverse asbestos news that drove down Halliburton's stock price during the class period was Halliburton-specific asbestos news.	Although some of the news was specific to Halliburton, it was evidence of a change in the asbestos litigation environment.[78] If it only revealed information to the market regarding Halliburton's alleged fraud, then it would not have affected the stock prices of other companies.[79]

[78] See section V.C.4.a.

[79] See First Allen Report, p. 39-40.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• Allen does not provide evidence to suggest that asbestos news about other companies depressed *Halliburton's* stock price during the class period or that Halliburton stock moved in sync with the stock of other companies with asbestos exposure during the class period.	This misses the point. If the alleged curative disclosure revealed that Halliburton has misstated its asbestos reserves in the past, then the stock prices of other companies with asbestos exposure, but no similar alleged fraud, would not decline. The fact that there was a decline in the stock prices of other companies with asbestos exposure that were not even named in the lawsuits indicates that the information was not specific to Halliburton and its alleged fraud but rather a potential change in the asbestos litigation environment.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• Neither Defendants nor Allen provide any authority for the assertion that it would be proper to add to an industry index companies from outside a given industry on account of their asbestos exposure.	The literature cited by Ms. Nettesheim states that Plaintiff must prove that the price decline is due to the revelation of the alleged fraud.[80] The analyst and market commentary all indicate that the asbestos environment changed unexpectedly and that these verdicts were large and unprecedented. The Nettesheim index cannot test whether the price decline is due to the alleged fraud or a change in the environment.

[80] See section V.G.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
C. Allen's Analysis of Nettesheim's News Days Is Flawed. • *Polymedica*, cited by Allen, is not relevant here. Nettesheim found that there were 31 days during the class period with statistically significant market movement, and determined that on more than two-thirds of those days, the movement was explained by release of company-specific news.	While the first Allen Report does not cite *Polymedica*, it is relevant here.[81]

[81] See fn.2 for detail on the *Polymedica* order.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
D. Allen's Criticism of Nettesheim's Calculation For Statistical Significance Is Without Merit. • Allen's claim that one would expect 5% of the days during the Class period to have a statistically significant return with a 95% confidence interval is true only if the control period is the same as the Class period.	Nettesheim's discussion of this claim is inconsistent with fundamental statistical principles in hypothesis testing. (See section V.E.1 above.)

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• Defendants claim that Nettesheim's results are not reliable because she found a statistically significant return on 31 days and that, due to Nettesheim's use of a 95% confidence interval, which is no more than one would expect if the stock price was affected by random chance. A single example shows that assertion is untenable. (1) Allen balked at calling Halliburton's stock movement on December 7, 2001 random.	We do not claim there is no news that affects the stock during the class period; rather, we find that *her statistical analysis yields no evidence* that the stock price declines during the alleged class period are caused by anything other than the normal daily variation in stock price. See section V.E.1.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
II. NETTESHEIM CORRECTLY FOUND LOSS CAUSATION. A. The Corrective Disclosures Tie to the Prior Fraudulent Statements. • Nettesheim testified in her deposition that she did not link a particular corrective disclosure to any single misrepresentation.	Exactly.
• She did properly determine that the corrective disclosures were tied to the alleged misrepresentations and omissions in the complaint during the class period.	Ms. Nettesheim did not link alleged corrective disclosures to alleged misrepresentations. See sections V.C.3, V.C.4.b, and footnote 7.

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
• The record shows Allen misunderstood the complaint, as demonstrated by the following exchange in her deposition: Q: As you understand it, do the plaintiffs claim that one of the misrepresentations that Halliburton made was the assertion that Halliburton insurance should cover the majority of any future claims relating to asbestos? A: That's not my understanding. Allen Dep. at 120:3-9, PI. App. 103. (1) The Complaint quotes a July 26, 2001 UBS Warburg report, which said in pertinent part: "Mr. Lesar indicated	The alleged misrepresentation that Halliburton insurance should cover the majority of asbestos claims is not an allegation analyzed or specifically referenced by the Nettesheim Report, and the Nettesheim Report does not contend that information to the contrary was ever disclosed to the market place. Moreover, even at the end of the alleged class period, analysts still note that insurance will cover the majority of future claims

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
that HAL maintains a significant amount of insurance that should that should [sic] cover the majority of any future claims or increases in settlements rates."	relating to asbestos.[82] So the revelation of the alleged fraud related to this allegation cannot be the cause of the price decline.

[82] For example, in the week following the last alleged curative disclosure about asbestos (the end of the alleged class period) an analyst for CIBC World Markets stated:

Negative impact limited by insurance and solid balance sheet. HAL has $2 billion in insurance to cover 95% of asbestos claims. As for the costs that are not covered by insurance, HAL is financially solid with a strong balance sheet and $250 million in cash. [CIBC World Markets. December 11, 2001]

Similarly, an analyst for RBC stated:

[t]he balance sheet is currently very strong, in our opinion, insurance protection is very high, and all of the recent verdicts are expected to be appealed. [RBC Capital Markets. December 10, 2001]

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
B. Nettesheim Performed An Empirical Analysis When Necessary to Disaggregate Culpable and Non-Culpable Bad News. • October 4, 1999: (1) Neither market or industry news, captured by Nettesheim's market and industry indices, nor positive Halliburton-specific news would explain the company-specific drop in Halliburton stock on this day. (2) Halliburton acknowledged that the decline in the price of	Not true; her only attempt at an "empirical analysis" is for October 24-25, 2000 (see below). Nettesheim's analysis does not explain her conclusion regarding the October 4, 1999 disclosure. She claims the decline is due to partial disclosure of the alleged fraud related to the integration problems, but not a single one of the analyst reports or news stories surrounding this date refer to integration problems. Halliburton described the reason for the decline in *expected profits*, not the

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
Halliburton stock was due in large part to the lower than expected profits of the joint ventures of Halliburton's engineering and construction units and many of the other business units of Dresser Equipment Group.	reason for the decline in the *stock price.*[83]
• January 5, 2000: (1) Nettesheim acknowledges that both culpable and non-culpable news was released on this date, but explains that the non-culpable news was industry-wide and thus was captured by her industry index and so could not have contributed to Halliburton's company-specific return.	She claims that the problems are in the E&C portion of Halliburton. She has done nothing to effectively control for changes in the E&C industry. See section V.C.2.a.

[83] According to the Halliburton's press release on October 4, 1999: "The lower than expected profits of the joint ventures and many of the other business units of the Dresser Equipment Group are significantly affecting the company's 1999 third quarter earnings." [PR Newswire, October 4, 1999, Halliburton to Sell Two Joint Ventures, Announces Earnings Outlook]

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
(2) While she considered analyst reports, she also looked behind the Brown Brothers Harriman & Co. report to analyze the changes in the earnings per share estimate for different segments of Halliburton's business, and to determine which part of the news had the most effect on the analyst's model and Halliburton's stock price. This is precisely the type of "post-mortem" analysis endorsed by *Allegiance*.	She did not "look behind" the Brown Brothers Harriman report and she reports no analysis. The numbers presented in her report are merely a recitation of the numbers in the analyst report. See section V.C.3.a.
• October 24, 2000: (1) Defendants claim there was non-culpable, negative news released, but that news is not specific to Halliburton and so would not explain its company-specific stock return.	More importantly, there is no evidence that even the allegedly culpable information which Nettesheim claims is responsible for the entire price decline on October 25 was revealed to the market on October 24-25. The allegedly culpable news that she says is responsible relates to "serious

Plaintiff's Opposition to Motion to Strike the Nettesheim Report	
Plaintiff claims:	**Response:**
	operational problems" in Halliburton's construction business. We find no support for this claim in any of the analyst reports or news stories. (See section V.C.2.b.)

VII. RESPONSE TO SPECIFIC POINTS IN PLAINTIFF'S MOTION TO STRIKE FIRST ALLEN REPORT

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
A. Allen's Criticism of Nettesheim's Event Study Demonstrates a Fundamental Lack of Understanding of Nettesheim's Methodology. • As Nettesheim testified at her deposition, she began her analysis by reviewing the allegations of the Complaint to obtain an understanding of the allegtions of misrepresentations and to identify dates with alleged partial disclosures.	Plaintiff misses the point. The point is not whether Nettesheim read the Complaint before performing her event study. The point is that Nettesheim ran 633 hypothesis tests and any day that she found to have a negative, statistically significant excess return she concluded was a partial corrective disclosure if, in her opinion, she found news related to the allegations.[84]

[84] Q. What you did was you looked at every day during the class period and then determined which days had statistically significant returns, correct?

A. That's one of the many things that I did.

Q. An alternative approach would have been to look at the dates alleged in the complaint and determine if on those dates there was a statistically significant return?

A. It's not an approach that related to what I was doing. [Nettesheim Deposition, p. 41]

A. I did not look at every Halliburton statement during the class period and then look to see whether or not the stock price went up.

Q. Sure. What you did was you looked at the dates in which there was a statistically significant return with a positive or negative, correct?

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
	This process, whether she read the Complaint before performing it or not, is an invalid process to perform hypothesis testing and it risks becoming a mere ex-post justification of a particular result. See the academic quotes in the First Allen Report.

A. Correct [Nettesheim Deposition, p. 75]

Q. So how did you begin trying to ascertain the loss causation aspects of this case?

A. After collecting the data, then we did statistical analyses which entailed forming an industry index, and after several steps, went through to form the industry index and did a regression analysis to determine the relationship between Halliburton and the stock returns and returns on a market index, industry index. [Nettesheim Deposition as quoted in Nettesheim Rebuttal fn. 14]

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Indeed, Allen's misunderstanding of the Nettesheim Report may stem from the fact that Allen did not review the appendix to that report in which Nettesheim detailed her methodology. When asked whether she reviewed certain materials attached to the Nettesheim Report, Allen responded: "I don't believe she attached any material period to her report."	The First Allen Report demonstrates that Allen reviewed and analyzed Nettesheim's Appendix.[85] The statement that is taken out of context from my deposition is the following: Q. Were there any transcripts of analyst calls attached to the Nettesheim report in this case? A. I don't believe she attached any material, period, to her report. [Allen deposition transcripts, p. 31] From the context it is clear that I was referring to source documents, not material generated by Nettesheim. The five preceding pages of deposition transcript contain questions by counsel referring to source material.

[85] For example, p. 8 and p. 11-12 of the First Allen Report include discussion of material contained in the Appendix of the Nettesheim Report.

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
B. Allen's Criticism of Nettesheim's Calculation of Statistical Significance Is Not Based in Sound Economic Theory. • In her deposition, Allen admits that Nettesheim's use of the 95% statistical significance level is the commonly used and accepted confidence interval.	95% is a common standard to test statistical significance; the problem is with Nettesheim's methodology, not the 95%. See section V.E.1.
• Allen's claim that one would expect 5% of the days during the Class period to have a statistically significant return with a 95% confidence interval is true only if the control period is the same as the Class period.	Plaintiff and Nettesheim's discussion of this claim is inconsistent with fundamental statistical principles in hypothesis testing. (See section V.E.1.)

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Even assuming 31 days would be statistically significant as a result of "normal variations," Allen offers no explanation for why Nettesheim found those 31 days to frequently correlate with major news days.	The statement that major news days "frequently correlate" with statistically significant reactions is statistically nonsensical. There is no statistical analysis in either Nettesheim report to support this statement. It is a testable hypothesis whether the price moves differently on days with news than on days without news. Nettesheim has failed to show that the price moves differently on news days as compared with non news days. In fact, when Allen shows there is no statistical difference, Nettesheim says she never coded news versus non-news days. If she has not determined which days are news (or major news) then she cannot test whether the price movement on these

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
	days differs from other days.[86]
Allen criticism of Nettesheim's use of the 95% confidence level is not supported by reference to any objective, independent authority.	Allen does not criticize using the 95% level, but rather the Nettesheim methodology. The First Allen report includes cites.[87] See also section V.E.1 of this report.

[86] See fn. 2 for detail on the *Polymedica* order.

[87] The First Allen Report contained the following cites:

Kaye, David H. and David A. Freedman, "Reference Guide on Statistics", *Reference Manual on Scientific Evidence,* (2000, Federal Judicial Center, Second Edition), p. 83-178;

Inge F. Goldstein and Martin Goldstein, *How Much Risk? A Guide to Understanding Environmental Health Hazards,* Oxford University Press, 2002; and,

Studenmund, A.H., *Using Econometrics: A Practical Guide,* Pearson Education, Inc., Fifth Edition, 2006, p. 114

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
C. Allen's Criticisms of Nettesheim's Industry Index Are Contrary to the Methodology Endorsed by Allen's Colleagues at NERA. • Allen levies several criticisms at Nettesheim's construction of an industry index, yet cites no authority for those criticisms.	There were cites in the First Allen Report.[88] In addition, Nettesheim's own cites also support Allen's criticisms.[89]

[88] See First Allen Report p. 13: Peter Kennedy, *A Guide to Econometrics*, Fifth Edition, The MIT Press, 2003, p. 108-9, 383. See also First Allen Report p. 13: Michael A. Babyak, "What You See May Not Be What You Get: A Brief, Nontechnical Introduction to Overfitting in Regression-Type Models," Statistical Corner, *Psychosomatic Medicine*, Vol. 66, p. 411-421 (2004).

[89] "First, the expert's failure to indicate whether he conducted an "event study" to determine whether the company's stock price was affected by company specific factors exclusive of the challenged fraud called into question the reliability of the expert's report." (p. 5 Eisenhofer, Jay W., Geoffrey C. Jarvis and James R. Banko, "Securities Fraud, Stock Price Valuation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation," 59, *Business Lawyer*, p. 1419-1445, August 2004). See also section V.G of this report.

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Nettesheim's approach is endorsed by Tabak and Dunbar, Allen's NERA colleagues, as she used both theoretical measures and statistical measure.	Nettesheim approach is not supported by Tabak/ Dunbar. The article says selection should not be done blindly. [90] Nettesheim has made a selection that is blind to the nature of the allegations. E.g., her index does not control for E&C industry or asbestos environment.
• Nettesheim started her selection of companies to consider for the industry index by identiying those listed as competitors in analyst reports. This is the same initial step that Allen employed.	The step employed by Allen was to show that Nettesheim has not controlled for changes in the E&C industry. (See section V.C.2.a.)

[90] *See Tabak and Dunbar*, p. 10.

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Nettesheim also looked at companies identified in the same industry index as Halliburton.	This did not adequately control for changes in the asbestos environment or the E&C industry and thus could not reliably test the allegations.
• These statistical measures are also endorsed by Tabak and Dunbar. • Allen's colleagues at NERA have criticized the failure to employ Nettesheim's methods.	Not true, the steps described in Tabak/Dunbar are not the same as those used by Nettesheim's. The article does not support a procedure of looking at all statistically significant days and then looking for events. They mention the use of statistical measure, but, say, for example that "there are various reasons for not simply choosing the index with the strongest statistical properties."

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Allen, in constructing her "E&C" industry index, does not comply with the procedures endorsed by her NERA colleagues in that the statistical measure is entirely lacking.	The index in the Allen report is used to demonstrate that Nettesheim has not analyzed whether the price decline in Halliburton is related to problems overall in the E&C industry or to the alleged fraud. See section V.C.2.a.
D. Allen's Selection of a Post-Class Control Period Is Not Supported by Academic Literature.	Not true. The literature cited by Plaintiff and Nettesheim supports the use of a post-class control period.[91]

[91] For example, the Marais and Schipper article cited by Ms. Nettesheim states that the control periods, both before and after the event period, can be used. [p. 23] Further, according to Tabak and Dunbar: "There are three general choices for the placement of an estimation window: before the event window, surrounding the event window, and after the event window." [p. 9]

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
• Allen's criticisms are based on a supposed "testing" of Nettesheim's model. However, Allen provides no explanation or methodology for how the testing was conducted. As such, there is no basis to test whether Allen's findings are accurate, and her results are not verifiable.	The First Allen Report explains how the testing was conducted [First Allen Report p. 13-14]. We used exactly the Nettesheim approach and merely changed the date of the control period. Nettesheim herself implicitly admits she is able to replicate and understand the test by repeating the test on other alternative control periods.
• Utilizing a post-class period control period is contrary to academic literature, which recognizes that: In securities fraud cases, estimations [control] windows are often placed before the beginning of the alleged class period, . . . so that the estimation window would cover a "clean" period that could not have been tainted by	Not true. This is a complete mischaracterization of the article cited. "There are three general choices for the placement of an estimation window: before the event window, surrounding the event window, and after the event window. The most common choice is to place the estimation window before the event. The estimation window can also

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
any alleged stock price inflation.	be placed after the event windows or split to cover periods before and after the event window. When multiple events are studied, the estimation window may cover the periods around the event windows, include the period(s) between event windows." [Tabak and Dunbar, p. 9] Other academic literature cited by Plaintiff and Nettesheim also supports a post-event control period.[92]
• Allen acknowledged that the post-class period was not a better control period than the pre-class period utilized by Nettesheim.	The point is not which control period is better, but that the Nettesheim methodology is not reliable as evidenced by the fact that a change in the control period substantially changes the results.

[92] See fn. 91.

Plaintiff's Motion to Strike First Allen Report	
Plaintiff claims:	**Response:**
E. Allen's *Report Is Results-Oriented and Should Be Excluded.* • Allen did not perform a market efficiency analysis, prepare a proper industry index, or undertake a loss causation analysis in this case, all of which would be necessary to properly gauge Nettesheim's conclusions.	Allen was asked to review Nettesheim's loss causation analysis and found the Nettesheim methodology unreliable and methodologically flawed. Allen prepared a report which detailed her analysis and conclusions regarding the Nettesheim loss causation analysis. Nettesheim's methodology (looking at statistically significant days and then attempting to associate them with the alleged fraud) could be called results-oriented.

/s/ Lucy P. Allen

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS DALLAS DIVISION

CIVIL ACTION NUMBER
Master Docket Number
3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE
SUPPORTING FUND, INC. et al.,
On Behalf of itself and All
Others Similarly Situated,
Lead Plaintiff,

v.

HALLIBURTON COMPANY, et al.
Defendant.

CLASS ACTION
March 21. 2008
3:30 p.m.

TRANSCRIPT OF MOTIONS HEARING BEFORE THE HONORABLE BARBARA M.G. LYNN UNITED STATES DISTRICT JUDGE

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[3] PROCEEDINGS
March 21. 2008
3:30 p.m.
MOTIONS HEARING

(Judge enters the courtroom.)

(Court opening.)

THE COURT: All right. My interns are all here this afternoon. They are going to watch the argument.

I particularly want to introduce Ali Gross at the end here, who is a high school student. She's actually spending her last day of spring break following me around today, so make it good.

Let me also apologize to everyone. I frankly just did not notice that it was Good Friday when I invited you all to spend the afternoon with me. I sincerely hope that I did not inconvenience anyone, and I will say going forward that if I ever do something like that again, and it does inconvenience you, if you would please point it out to me, I certainly will not be offended by it. In fact, I appreciate it. I am embarrassed that I did not notice it myself, but too late now, you all are here.

Now, I thought we were scheduling around Ms. Pulliam, who had a conflict, and I don't see her.

Are we waiting for her?

MR. VOYLES: We're not waiting for her, your Honor, [4] but she is running late. She had the other hearing.

THE COURT: Well, she advised me of that, and I did tell her that we would wait on her. If you would like me to, we will.

MR. VOYLES: I don't think we need to, your Honor. She said to go ahead.

THE COURT: All right. It was quite short notice. I had something cancel, and this was a big stack in my conference room. I thought since time permitted, that we would go ahead. I very much appreciate you all making yourself available on short notice.

Now, before we begin with something more formal, let me cover a couple of things.

What scheduling issues do any of you have? Especially those of you who are traveling. So we will time the arguments so as not to unduly inconvenience you.

Are you planning to leave this evening?

MR. BOIES: We are planning on leaving this evening, your Honor, but not until 8:00 at night. So I hope we will be okay.

THE COURT: Yes. As much as I enjoy your company, I don't enjoy it quite that much. So we will be done with no problem.

Any other scheduling difficulties?

(No response.)

[5] THE COURT: Now, what I would like to do is begin with some questions so that I can attempt to sort out what is here, and what is not in terms of what is in dispute.

I take it from the briefing that the issue of numerosity is not disputed?

MR. VOYLES: Correct.

THE COURT: The issue of commonality is not disputed?

MR. VOYLES: Correct.

THE COURT: The issue of the class device as a superior method, assuming the other issues are satisfied, is not in dispute?

MR. VOYLES: Correct.

THE COURT: And adequacy of counsel is not in dispute?

MR. VOYLES: Correct.

THE COURT: Is the efficiency of market in dispute?
MR. VOYLES: No, ma'am.

THE COURT: All right. Judge Lynn, five for five. That's the end of my list, though. Did I miss something else that was not in dispute?

MR. VOYLES: Not that I can recall.

THE COURT: All right. Now, I want to talk a little bit about—I want to begin with the simple issue—simplest issues. I'm not sure if it's simple, but I need to begin with [6] the simpler issues.

One being the adequacy of the particular representatives and Mr. Murphey.

With respect to AMS the entirety of the objection is that investment decisions for AMSF, which I might call the Archdiocese. I know it's not, but it's a little bit easier to worry about the initials.

Is that all right with everyone?

MR. BOIES: Yes, your Honor.

MR. VOYLES: Yes, your Honor.

THE COURT: Is that the decisions about purchases of Halliburton stock and other stock that the Archdiocese owns are made by money managers, and

that the Archdiocese did not even know that it owned Halliburton until after Halliburton was purchased.

That's the thrust of the objection as to the Archdiocese.

MR. VOYLES: That's correct, your Honor. I think it actually goes a little bit further. I don't think that the Archdiocese knew that it owned Halliburton stock until after the problems occurred, and close to the time this lawsuit got filed.

THE COURT: The basis for the conclusion that that is disqualifying are two cases from the Northern District of Illinois, that at least in one other case from the Northern District of Illinois have been rejected.

[7] Is that correct?

MR. VOYLES: Yes. As we noted in our brief, neither of those cases that we have relied on have been cited in this circuit.

THE COURT: Fry and Caremark?

MR. VOYLES: Yes.

THE COURT: All right. That position of yours, I am rejecting. I think that the statute contemplated—because I think it is quite common that large entities of this type use money managers, and I don't think it was intended that that would disqualify that kind of entity from being a plaintiff in a securities fraud case. So I'm rejecting that position.

The issues with respect to Mr. Murphey are more troublesome to me. I have to confess, and I didn't have time while—I don't want to use wading through analogy as pajorative connotation, but there was a lot to swim through, wade through, dive through, drown

through, and so I didn't do my own research on this subject. I will confess my ignorance.

I guess I will direct this to Mr. Boies.

This is my understanding about Mr. Murphey—I'm going put aside this issue of whether or not Mr. Murphey is a day trader.

My understanding is that with respect to the stock that Mr. Murphrey bought during the class period when—what portion of that stock he sold, he made money on?

[8] MR. BOIES: Yes, your Honor.

THE COURT: Before you all are arguing, if you're comfortable you can stay seated while answering my questions. Most lawyers are structurally incapable of it, but if you feel more comfortable, you can stay seated.

With respect to the stock he held, it's my understanding that now, maybe not in the last week, but in the recent past anyway, that stock was worth more than he paid for it, but as of the end of the class period was worth less than he paid for it. I don't know the law on that subject.

What is—my instinct tells me that if that—if I just had one plaintiff, and at the time of trial the plaintiff had held the stock, my instinct tells me there would be no damages.

Is that wrong?

MR. BOIES: Your Honor, I think some courts would rule that that was wrong, although I think the issue is quite disputed.

I think it is a significant policy issue as to whether somebody should be unable to actually recover damages

when they haven't actually lost out-of-pocket money. That is, they bought at a price, they held it, it went down, then it came back up after the class period.

I think the policy argument is if it comes back up, you haven't really been damaged.

[9] The other side of that argument, and the argument that we would urge, is that the whole point of a class period is to bring something to an end, and then allow people to buy or hold that stock going forward. That is, there is no particular policy reason other than to enrich stockbrokers to say in order to have damages, what he has to do if he wants to hold the stock is sell it, lock in his loss, and then buy again.

When somebody continues to hold after the end of the class period it's economically the same as somebody who sold at the end of the class period, and then bought it back the next day.

The decision somebody makes from an investment standpoint going forward should not, we would argue, affect their right for damages for something that happened during a class period.

As I say, there are there is no definitive ruling on that issue that I am aware of, although there are courts that have ruled our way.

THE COURT: I assume there are courts that have ruled the other way. I assume if there was something definitive in this circuit, you would tell me that?

MR. BOIES: If there was something definitive in this circuit, we would tell you that.

THE COURT: So let's just give it the benefit of the doubt, and at this point the benefit of doubt is it's a [10] disputed issue.

So Mr. Murphey at best is potentially subject to a big old defense that these lawyers over here are going to be asserting against him; that is, he didn't suffer any damages.

Whether you ultimately prevail on that issue or not, that's a serious claim that is going to be made with respect to him that is of concern to me in terms of his being a class representative.

MR. BOIES: But that defense would be available for anybody who held the stock at the end of the class period, and then rode it up again.

In other words, there will be not just Colonel Murphey, but a number of people who will be in that situation.

THE COURT: That's true. But he's the only one of two potential class reps that is subject to that defense, and those people may not recover. I don't know whether they will or they won't. The argument will be made if the case goes forward that they have not suffered any damages.

I recognize there is a lot of back-door discussions going on in these things about who is going to be proposed as a class rep, and who's not. Most of that I'm not privy to. I know there are negotiations about that, and I'm not asking to be made aware of that, but—I'm not going back to the issue that I have already resolved with respect to the Archdiocese, but I have concluded that the Archdiocese is an adequate [11] representative. These problems that have been raised by the defense—these issues that have been raised by the defense notwithstanding.

So that now I'm faced with the issue of should I have another class rep in the person of Mr. Murphey, whose

record of knowledge about this case is not nearly as comprehensive as AMS—by the way, Mr. Voyles, I did not mention your issue about the 30(b) (6). I didn't ignore that, but I don't buy that one.

MR. VOYLES: Understood.

THE COURT: But I did not ignore the reading of it.

MR. VOYLES: I see that.

THE COURT: So why should I add to the mix a second plaintiff who has considerably less knowledge than does AMSF about this case, and is subject to potential defenses to which the Archdiocese is not?

MR. BOIES: Your Honor, I'm a little bit uncertain how to answer that question, because I have got to say that whether or not Colonel Murphey was in this case, we would ask, as counsel for the class, advocate that people situated as he is should be able to recover. That is, our contention to advocate that position is not dependent—

THE COURT: I wasn't suggesting—I think that would be your—he is a member of the class if I certify the class that you have proposed, and therefore the reps would be [12] advocating—the Archdiocese would be advocating for him and he would present claims and if we got to that point, the Court would determine that.

But my understanding of my responsibilities in terms of adequacy and typicality in particular is that I am to look at whether the claims are typical, and look at whether the reps would be subject to a potential defense that most people in the class—well, maybe not—I can't tell whether that's most people. I don't know that.

MR. BOIES: We don't know.

THE COURT: I see an issue here that he may have suffered no damages. Knowing that—I'm not making a decision about that, I am concerned about him being a class representative.

Do you have anything else you want to say about that issue?

MR. BOIES: No, your Honor. Only that I think you could look at it one of two ways.

You could look at in the sense that since he is subject to defenses that some other people aren't, he's not a typical representative, or an adequate representative.

On the other hand, you could look at it since a lot of the people in the class are going to be subject to those same defenses, it's a good thing to have a class representative who's also subject to those defenses.

[13] I think that's the two sides of it.

THE COURT: Let me ask one more question about Colonel Murphey, and then we will move on to something else.

Why would I, without anything being presented to me about how it would be managed, approve an even number of class representatives when assuming one person/entity one vote, that subjects every decision to be made by class reps to a tie?

MR. BOIES: Your Honor, that's a question that I had not thought of.

THE COURT: Really.

MR. BOIES: I have been in class actions with an even number of class representatives before. I suspect—I would want to think about this for a moment, but I would suspect that the answer is that if they did

disagree, then it would be brought to the Court for resolution.

I have had situations in which we have had even number of class representatives, and they have always worked out a consensus with the advice of counsel. I believe that has been the case up until now. I believe that will be the case in the future.

But I think if you did arrive at that situation, the only alternative with an even number, if they split evenly, and we have only two, if they split, they will be even, would be to come to the Court.

THE COURT: That is not a prospect that I would look [14] forward to, nor do I really think that's the appropriate way to handle it.

I have in the past, where I have appointed lead plaintiffs who were seemingly unrelated, have required them to come to the Court with a government structure.

All right. I am not going to approve Colonel Murphey as a rep. I am concerned about his involvement in the case. I'm concerned about this issue that I mentioned. I am not persuaded from what I have seen that he adds anything of significance—I don't mean that to be insulting to him—that would cause me to feel that I would need to have an additional representative if I otherwise certify the class. So I am not going to appoint him as a class rep.

Now, the fact that he wasn't a lead plaintiff is not dispositive of this. I have looked before and have not found much guidance or explanation for the movement from lead plaintiff status to class rep status, but I don't think that not being a lead plaintiff is preclusive of being a class rep. That is not a reason for my not

electing him. All in all I do not think that he is an adequate or typical rep, and therefore will not appoint him if I would otherwise do so. If I would otherwise certify the class.

Those are the only issues that I thought were reasonably easy with what was one additional exception; and that is, I want to talk a little bit about Mr. and Ms. Boies. You might [15] not know that down here in the sticks we call it the Daubert case. You probably pronounce it more properly.

MR. BOIES: Not in New York, your Honor. I don't know how they do it in Florida.

THE COURT: I think in Louisiana they call it Daubert, which I believe is correct. But like voir dire, we take great pride in mispronouncing it. So we're going to call it Daubert like we do down here.

I want to talk a little bit about it because in this context it is more than a little odd, because I'm the decision maker. I have to decide issues of loss causation as the fact finder.

For me to get to the end of the decision on Daubert, I have to do exactly the same thing that I have to do to make the decision.

So why am I going to bother with that?

Is it important to anyone?

I don't see the reason why I would—I certainly don't see the reason why I would strike Ms. Allen, who I don't mean this in a negative way to defense counsel, is the trained mouthpiece for the defendants' attack on the plaintiffs' expert. I don't mean that in a pejorative. That gives you an economic kind of spokesperson for your criticisms of her report.

You're not trying to prove anything by that except that [16] she's wrong, and I get that. I'm not going to strike that. It doesn't make any sense for me to strike that. That's what they would be arguing even if she weren't here.

On the other hand, if I don't buy what the plaintiffs' expert is saying, then I won't find loss causation, and they lose.

So why do I need to strike her report?

So I would like to overrule all these motions to strike reports unless I'm missing something.

MR. BOIES: I don't think you're missing anything, your Honor.

MR. VOYLES: This is when Ms. Pullman should be here actually, but I don't think you are missing anything either, your Honor.

THE COURT: Well, I'll give Ms. Pullium a motion to reconsider your conceding her position.

MR. VOYLES: She won't need one. She was the one who insisted in persuading me that we should do that.

Her basic logic was that if we didn't do it now, would we somehow later on be precluded from doing it when there is a different fact finder.

THE COURT: Well, I will make that clear, that if I determined to certify the class that would not preclude you from taking another shot at Daubert as long as it wasn't reurging issues that I have directly already addressed unless [17] the facts on which it was based were different or expanded based on discovery.

MR. VOYLES: If I understand the Court correctly, I agree with that.

I think your analysis of it, you have to read it anyway and make a ruling on it. Everything that is in there goes to the weight of her opinions, and will ultimately go to your decision.

THE COURT: Well, I think it goes even slightly beyond the weight of. I mean, it may be that certain—you're arguing that certain things done are legally incorrect. I might agree with you, but if I do, then I'm going to find that there is no loss causation. I think the result is the same. I'm just trying to avoid—I mean, it all had a ring of similarity to it. I'm reading the motions to strike and I'm reading the responses to motion for class certification and I had a Yogi Beara moment. I have been here. Read that.

I'm not going to say that there was any cutting and pasting going on, but there was cutting and pasting going on.

So I recognize that there were wholesale parts of these briefs that were moved from one to the other.

To the extent it was designed to make sure I got it, to the extent I'm capable of getting it, I got it. The rest of that is up to you.

Now, so I think I have disposed of what I can without [18] hearing argument.

Now, my practice, I think you all know, is to listen to you and interrupt you with impunity, as I need to, to satisfy any questions that I have.

I'm a liberal arts major. I have had experience with these kinds of matters as a judge and as a lawyer, so I'm not ignorant of them, but I will not feel that you are talking down to me. So you should feel free to argue it as you like. I have read your papers, but I

haven't read them 12 times, which would probably be what I would need to do to be completely prepared.

So what I am looking for you to do today is to argue the facts and the law. There are obviously key cases. The world has changed in the Fifth Circuit. At least the timing of when loss causation is argued, and the burden that is placed on plaintiffs, I think is heavier than it used to be. Whether it is insurmountable or not, we'll see.

I know the key cases. I know that you're going to be talking to me about the facts with respect to representations, with respect to corrections, and what the experts say.

Would you, Mr. Boies, before you start tell me how to pronounce the name of your expert?

MR. BOIES: Nettesheim.

THE COURT: Nettesheim?

MS. BOIES: Nettesheim, your Honor.

[19] THE COURT: I have been calling them Jane and Lucy.

MS. BOIES: I do as well.

MR. BOIES: I can pronounce Allen. It was the other one that was giving me problems.

THE COURT: Yes.

All right. Is there anything else that anyone wants me to cover preliminarily?

(No response.)

THE COURT: All right.

MR. BOIES: Thank you, your Honor.

As the Court observed, the burden on plaintiffs in a class-certification stage has increased significantly with two cases in this circuit.

The most recent, Oscar Private Equity Investments against Allegiance Telecom, Inc., a decision last year; and Greenberg v Crossroads Systems, Inc., a decision in 2004.

In the Greenberg case the Fifth Circuit made clear that a plaintiff at the summary-judgment stage must demonstrate loss causation, and that the plaintiff must do so by linking the decline in a company's stock price to the culpable event.

In Greenberg what the plaintiff had done is it had shown corrective disclosures, and a stock price drop, but had not separated out the drop in the company stock price from other market conditions, or other industry conditions.

In the Oscar case the Fifth Circuit applied that rule to [20] the class-certification stage, and also addressed explicitly the situation of what happens when you have multiple negative company specific events.

The two cases together, I believe, place on the plaintiff the following burden.

In order to show loss causation we must establish not only that there was a price decline in the company stock price contemporaneous with a disclosure, but we must first separate out general market conditions and general industry conditions. So that what we're looking at is a market-specific client, or defendant or plaintiff specific, set of facts.

Then once we have separated out, filtered out the effects of the general stock market and of the industry on a company stock price, if there were

multiple negative events disclosed on the same day, we must establish by a preponderance of the evidence that there was a significant effect on the company stock price that came from the so-called culpable event.

I use culpable event here in the sense that the Court of Appeals has used that to refer to a corrective disclosure, or a partial corrective disclosure, of a prior misrepresentation.

What the Oscar court says is that the drop in stock price has to be in some significant way related to the prior misrepresentations. That is what the Greenberg case also holds.

Both the Greenberg decision and the Oscar decision gives [21] some parameters for what related means, but neither defines it with specificity.

The thrust of both opinions is that the Court has to be satisfied that a drop in a company stock price on a particular day, or days, was significantly caused, not entirely caused, but significantly caused by a corrective disclosure, or a partial corrective disclosure.

The Court in Oscar makes clear that quantification is not necessary. The Court—this is at page 271 of the Court's F.3d opinion—makes clear that the Court does not have to, and the plaintiff does not have to, quantify exactly how much of an effect was the result of the corrective disclosure.

But what the plaintiff must do is convince the Court that it's reasonable that some significant part of that drop in the stock price was related to the corrective disclosure.

Now, if that is the burden that we have, let me address in specifics this case, and how we went about trying to fulfill that burden.

First, our expert took those two steps one at a time. The first step is to filter out, separate out, the industry effects, the market general effects.

She did it in the typical way that experts are told to do it, and including are told to do it, as we point out in our briefs, by the colleagues of the defendants' expert who have written articles about what the right steps are to do.

[22] What they do is develop an index of companies that is designed to reflect the industry. They use the stock market averages for the market effects as a whole. You develop a regression analysis that allows you to take those two pieces of information, and in a statistical way separate out the effects of the general stock market, and the effects of the industry that the company is in from what happened to that company's stock price on a particular day.

For example, if the entire stock market goes down 2 or 300 points, as it has done recently, that's going to affect all companies in some way.

In addition, if the industry that you're in, whether it's the banking industry or the construction industry or the asbestos industry, whatever industry you're in, if that industry goes down because of something peculiar to that industry, that's going to affect individual companies.

So if you look at what happens to a company stock price, whether it goes up or down on a particular day, in order to know whether that's something that is peculiar to this company or whether it's caused by

general stock market conditions or by the circumstances of the industry or industries in which that company is a participant, you have to look at this regression analysis that attempts to correlate the effects of what is happening to all stocks in the stock market, and in particular what's happening to stocks of comparable companies.

[23] Now, there is always disagreements as to exactly what the right index is and that's particularly true when you have a lawsuit and you have got plaintiffs and you have got defendants.

What our expert did was follow the normal procedures that are set forth in the literature for establishing what the index was. She tested that—and this is in the rebuttal report. She tested that by criticisms that were made by the defendants' expert to see whether if she made various changes it would have a significant effect. She found out that it did not, and that leads her to conclude that her analysis is in a statistical sense robust.

THE COURT: My recollection is one aspect of that was three missing companies, one of whom was in fact there, the other two, adding them did not make the difference?

MR. BOIES: Exactly, your Honor.

The defendants' expert at the time I took her deposition had not constructed an index of her own. So there is no way for me to cross-examine whether her index was better or not.

Subsequent she put in a report that had various indexes in them. One of them was the Fortune Index, that she called the Fortune Index. We have discussed that in our responsive papers as to why we think that

was not an appropriate intention, nor indeed even consistent with what her New York colleague said was the way an index should be developed.

[24] We believe that the approach that our expert took, and the approach that we have taken, which is to filter out—nobody can ever do this precisely. I will say to the Court no one can ever tell you exactly to the penny what the stock price movement was that was attributed to company-specific information.

That is because if you get two absolutely independent neutral experts, not beholden to either side, simply the Court went out and hired two or three, there would be minor differences, because the way you construct these models involves trying to come up with ways of separating out things that are inherently unable to be perfectly and precisely separated out, which is the effect of what's happening in the stock market, and what's happening in the industry.

What our expert did, and what we have done, is we have filtered those out in a way that is within a broad range of reasonableness, something I think is entirely justified.

The second thing—and I think that that is in some sense the most difficult issue to address. Because whether or not a stock price is going down because of something that's specific to the company or something that's particular to the industry or affects the entire range of companies in the stock market is something that's very difficult to do. It takes a lot of time and effort and that's what our expert did.

The second step is also very important, however, and that [25] is if you have on a given day two or more pieces of adverse news that are company specific, one or some of which relate to corrective disclosures, and

one or some of which do not, in order to determine whether the corrective disclosures are a significant cause of the stock decline, you must try to evaluate how much of that stock decline is company specific, is due to the corrective disclosures, and how much of that decline is company specific is due to the disclosure of adverse information that is not corrective.

Now, I emphasize here, as the Court did in Oscar, that you don't have to try to quantify that at the class-certification stage. The goal here is not to demonstrate how much damage was caused, but only that there was damage.

That is, that there is sufficient nexus between the corrective disclosure and the drop in stock price so that you can say with some confidence that the fraud on the market theory applies, that there is loss causation.

Because the reason that this comes up at the class-certification stage is to be sure that there is loss causation, because loss causation is viewed as an essential ingredient to fraud-on-the-market theory.

The fraud-on-the-market theory is viewed as essential to eliminating the individual reliance that might otherwise prevent class action.

[26] So what is important is to know that a sufficient nexus between the corrective disclosure, and a decline in the company stock price.

Oscar makes it clear that you don't have to determine how much of that decline there is.

Now, to take the next step and address the specific facts of the case that we have—

THE COURT: Well, before you do that, what do you think it means in this context to talk about an empirically-based showing?

MR. BOIES: I think from the standpoint of what the Oscar court says is that it's clear of what it is not than what it is. That is, it is not limited to an event study or a progression analysis, because what the Court says is that we are not going to insist on one of those.

Where the Court talks about doing a post mortem, I think what the Court is saying is that you cannot simply make an assumption, and indeed you cannot simply take a single analyst report that may link it, and say I'm going to rely on that.

What you have got to do is the kind of post mortem or analysis that our expert did, which is to go behind those analysts reports to look at the data that they were relying on, and make a judgment as to whether the effect on the stock market price was or was not significantly related to corrective disclosure.

[27] That is, it must be something that is fact based. It must be something that is analytical. It must be something that relies on what is happening in the market. It cannot be assumptions, however reasonable some of those assumptions may seem.

If you have the disclosure of negative information, and the stock price on the company-specific basis goes down; that is, you have already taken out the general market conditions and industry conditions, you have a disclosure of company-specific information, the stock price goes down, even if you have four or five pieces of negative information, a reasonable assumption would be that each of those had some effect. Each of them is negative. We know that people react to negative information by reducing the price of a company stock. A reasonable assumption would be that that had caused some effect.

I think what the Court is saying is you can't just stop there. You have got to look at what the magnitude of it was.

One of the things that the Greenberg court says is that in some cases the magnitude may be sufficient so that that's all that you have to look at.

The Court will recall that there were some days in the analysis that the Greenberg case was doing—this is at pages 668 and 669 of the F.3d opinion—there were some days where there were multiple pieces of negative information, and the [28] plaintiff in Greenberg had not tried to evaluate what the contribution of any one of those pieces of negative information was.

The Court said we can tell that the drop in stock price here was sufficiently significant, and the nature of what was being disclosed, which is a differential in the estimated earnings, is sufficiently important to shareholders. So without more that can meet the test.

So in some situations you don't need to do the kind of analytical process that our expert did, and that I think is required in the usual case.

THE COURT: As I recall, your brief argues that that same analysis applies in connection with the December drop with respect to the—

MR. BOIES: Yes. That's really—the December 2001 drop is the only one of the nine dates that we have submitted that I would say the Greenberg exception would apply to.

THE COURT: All right. Now, let me ask one other question before you get into the particulars.

I have to say I'm a little mystified and confused about one aspect of this.

I agree with you that what the Court says is that you can prove either that the stock price went up with the misrepresentation, or went down with the corrective disclosure.

[29] But if the stock price is not inflated because of the original misrepresentation, how can it be enough just to show the stock price goes down with the correction?

MR. BOIES: I think that if the stock price were not inflated, then by definition there would be no damages. Because the damages must be based on artificial inflation.

I think that what the Supreme Court in Greenberg and Oscar and Dura at the Supreme Court level, which is also looked at exactly the same way, looking at it from the standpoint of the decline in the stock price, not in the increase of the stock price at the time of the misrepresentation, I think the reason the Courts do that, and I think the reason the plaintiffs do, is that although there is inflation, that is very difficult to pinpoint with a kind of accuracy that you have when you were able to show a decline when there is a corrective disclosure.

If you think about the way the stock market works, and the way companies work, that's understandable. Because what happens—take the asbestos situation.

What happens is that they say our asbestos liability isn't very much, and it is under control. Our reserves are adequate. Besides, insurance is going to cover it.

There comes a point where that's not true. But if the market doesn't know that that's not true, it doesn't necessarily affect the stock price at that

time. It's [30] inflated, it's artificially inflated, but you don't—you can't prove that inflation until it drops.

So what the Courts have said is there are two ways of proving inflation.

One is to try to show it at the time it goes up, and the other is to try to show it at the time it goes down.

There is a reason why courts have articulated those two different ways, and why virtually every court decision that you have, and virtually every plaintiff pursues the second approach, which is to rely on when the stock comes down, is because that pinpoints the effect with greater accuracy. It's easier to demonstrate that by looking at it when it comes down than when it goes up.

Now, there will be times when you get into details of aggression analysis in which you have legitimate debates as to exactly how much did it come down when you take all of the factors into account.

When you get to the actual damage calculations, obviously you will have things that are much more elaborate than is in front of the Court now. But at this stage what is important for us to do is to demonstrate that there is a significant effect, not what the magnitude of that significant effect is. That is particularly easy to do when you're talking about a drop in stock price.

Again, the Court focuses on the December 2001 drop in the [31] stock price. As the Court is aware from our papers, beginning on Tuesday, December 4, 2001, and then continuing again on December 7th of that same week, Halliburton made a number of disclosures about asbestos that were inconsistent with the disclosures that they had made in the past.

Instead of saying that insurance was going to cover it all, and the reserves were adequate, they admitted that the reserve had to be increased, and they were not adequate.

They also revealed in December for the first time that there had been a $65 million asbestos verdict that had been entered in September. The judgment wasn't actually—an official judgment wasn't entered until late November of that year. But in September of 2001 there had been a $65 million verdict against Dresser, part of Halliburton, and that had an important impact in terms of people's view of what their actual exposure was.

In the fall of 2001 the entire reserves that Halliburton was putting up were only about $65 million. You had one verdict that had occurred in September that was $65 million.

That, coupled with the other disclosures that Halliburton made, and coupled with the fact that since—that subsequent to the $65 million verdict, there had been at least two other smaller verdicts. One, a combination of verdicts that added up to about $21 million, and one that was about $30 million. In combination that was news that affected what the market [32] felt about Halliburton.

You can see in the extent of it, the drop. Our expert looked at what happened that first week in December of 2001, and attributed that entire drop to the disclosures about asbestos.

When I cross-examined the defendants' expert she was unable to give me any other explanation for what happened in that week other than asbestos.

Remember what we have to do, is we have to first separate out market effects, industry effects and then we have to, if there are multiple pieces of bad news, we have to separate out the bad news that doesn't relate to corrective disclosures.

In December, separating out the industry effects and the general market effects still leave us with a huge decline in the company stock. In the range of more than 40 percent after industry and market conditions are filtered out.

Neither our expert nor their expert can come forward with anything other than asbestos for the reason that you had that decline in stock price for Halliburton.

Now, let me give you a couple of other examples.

As the Court is aware, we have three basic misrepresentations that we allege.

One is that we allege that they understated their asbestos liability, which is what I have just been talking about.

[33] Second, we allege that Halliburton concealed a change in accounting by which they took into revenue amounts that they said were associated with fixed-price contracts, cost overruns, even though they could not meet the standard of saying that it was probable that those amounts would be collected.

We will have to get to the full merits of discovery before we know the full extent of that, but we know it exceeds $95 million.

We know that more than $95 million of cost overruns on fixed-price contracts were taken into revenue by Halliburton, even though they never received that money, there was no promise by the

company for whom they were doing the work to pay for that money, and there was not even a representation by the company officers or by the auditors that it was probable that they would be able to collect that money.

In December of 2000, they announced this on December 21 late in the day so it didn't affect the market until December 22.

But on the December 21 announcement after the close of the market that affected the market on the following day on December 22, Halliburton admitted that there were $95 million associated with these costs overruns on fixed-price contracts that they were now taking a charge for.

Let me emphasize what it means when a company takes a [34] charge.

When you're taking a charge on the revenue side, you are subtracting out something that you have already previously taken in as revenue.

It's not like the situation where you incur an expense, you incur an expense and you subtract it from your balance sheet.

Here what they did first is add something to the balance sheet, and then take it off. They added in revenue that they never got, and that the evidence now demonstrates, and I believe at trial we can more conclusively demonstrate, that they never had any reasonable expectation of getting. Then in December of 2000 they had to subtract that out.

What the market saw was $95 million of revenue that the company had previously accessed it had disappearing. That caused a decline in the company stock on a company-specific basis.

There is—on December 21 there are two pieces of information that are—two pieces of negative information that are announced. There is a $95 million charge that relates to eliminating revenue that they have previously taken in as revenue that really didn't exist, and there is a $25 million restructuring charge.

Now, in terms of how you demonstrate that there was a significant effect on the company stock as a result of these [35] corrective disclosures, I think that it's particularly useful to look at this day as an example. Because I think there are, and our expert has testified, that there are a number of ways to get to the conclusion that there was a significant effect on the company stock from these corrective disclosures.

The first point is that our position is that the entire corrective disclosure, the entire negative information was a corrective disclosure. It was a corrective disclosure of two elements.

I had said that one of our claims is that they understated their asbestos liability.

The second one that I'm talking about now is that they concealed the change in accounting, and took into revenue money that they never should have taken into revenue.

The third was that they misrepresented that nature of the Dresser integration and synergies that existed. The $25 million restructuring charge is an amount which we believe—we think the evidence shows, and our expert concludes, was a partial corrective disclosure relating to the prior misrepresentations about how well the Dresser integration and synergies were going.

If you have two culpable disclosures—and I don't think that there is any significant other element that happened on that day—you have got these two disclosures, and if both of those are culpable, then it obviously follows that the effect [36] of the culpable disclosures, or partial disclosures, caused the decrease in the company's stock price.

However, let's say the Court were to conclude that I agree with you that the $95 million, which is explicitly stated to be a charge relating to the failure to collect this $95 million of cost overruns in the fixed-price contracts, is a partial disclosure of a prior misrepresentation, but I have got some doubts about the $25 million restructuring charge.

The analysis that the expert does demonstrates that the $95 million charge has a significant effect independent of the $25 million charge. That is, the total of $125 million of charges, $95 million and $25 million combined. $120 million of charges.

What the first culpable disclosure is the $95 million. The second is the $25 million.

Even if we were not right on the misrepresentation of the Dresser integration and synergies point, as long as we are correct on the misrepresentation of the revenue point, that would demonstrate, just as the December 2000—2001 asbestos disclosure demonstrated, that there was a culpable partial disclosure that was significantly related to a drop in the company stock price.

Let me give you an example that directly relates to the third misrepresentation; and that is, the misrepresentation relating to the Dresser integration and synergies. That's the [37] very first date that we have submitted, which is October 5, 1999.

Now, on October 5, 1999 the company disclosed for the first time that the Dresser merger and integration and synergies was not as good as it had previously promised the market.

This is laid out in our briefs. It's laid out in our expert's report.

On that day Halliburton stock declined by 13.2 percent.

Now, that decline was a raw decline, absolute decline, a decline that doesn't take into account anything that was happening with respect to the market or the industry. It is a total decline in the company stock price. It is what you would have lost if you were a shareholder without regard to why the stock price went down.

Applying our expert's filter that filters out the effects of the general stock market and the industry that uses the regression analysis to statistically determine how much of this decline was company specific, the company specific decline is 90 percent. Still a very significant one-day decline in the company stock.

The company makes clear in the press release that this has to do with various business units that are part of the Dresser acquisition. The very business units that they have previously told the market were going to be the subject of [38] these tremendous synergies. They had previously told the market that the integration was going so well.

So, again, what you have is a date on which there is negative information, culpable partial disclosure, you have a decline in the company stock price.

You then filter out that portion of the decline that is related to general industry conditions, or general stock market conditions, and you are then left with the amount that is related to the culpable partial disclosure.

Those are—and we go through these in some detail. We go through all of them in some details in our papers and expert reports and various materials that we have given you, but the ones that I have covered have been the first and the last and the one in the middle. It has been one from each of the three basic misrepresentation claims that we have made.

The arguments against those declines that the defendants make are arguments that I think simply cannot be squared with the language of Oscar and Greenberg.

One of the things they say that the Court has pointed out is, well, if you're talking about decline, you're not talking about increased.

But both Oscar and Greenberg and the United States Supreme Court in Dura has said that is a perfectly acceptable way to go about it, not only at the class certification stage, but even in the final-damages stage.

[39] They say, well, when you have these disclosures the disclosures disclose facts. They don't admit wrongdoing.

One of the things that they say in their papers is that they would have had to actually admit the wrongdoing in order to constitute a disclosure.

THE COURT: Yes, that they would have had to say we committed fraud.

MR. BOIES: Right. I suggest to the Court that that, A, makes no sense, because a company is never going to come out and say we committed fraud.

It is not consistent with any of the precedents, because none of them require that the person or the company actually admit wrong doing, simply that they disclose the facts that have been concealed.

In the Dura case the United States Supreme Court dealt with what had to be disclosed. They're talking about the facts of disclosure. They're not talking about saying we engaged in fraud.

There is nothing in the Greenberg decision or the Oscar decision that says that the company has to admit that they were engaged in fraud as opposed to simply disclose to the market that the representations that have been previously made were not true.

We obviously have the burden of scienter when it comes to the actual trial on the merits of this case, but even at the [40] trial on the merits we don't have to prove scienter by their admissions.

The fact that they don't admit scienter is not a bar to a securities action, nor could it be.

A third argument that they make, I have already addressed, which is they say we have got the wrong index. You should have had a different index.

Their expert didn't have an index. Our expert had an index. Our expert's index is was one that was consistent with the standards that even their expert's colleagues have written is the right way to go about things. She went back and looked at the ways that might be changed, and found it didn't significantly challenge the results.

So from all of the ways that you can test a loss-causation standard at this stage, I submit to the Court that we have accomplished that.

Now, it hasn't just been happenstance. We have had the Oscar and Greenberg decisions to guide us. That is a road map that tells us what we had to do.

But we went out and we did that to meet those standards, and very conscious of the burden that we had, we went out and we did the expert analysis, we got the facts, and we limited our claims to those situations in which we could demonstrate to the Court that there was a decline, that there was a company-specific decline after separating out all of the [41] industry and the market factors, and that either all or a significant portion of that company-specific decline was attributable to a culpable partial disclosure.

As I said, we have submitted nine examples. As the Court is aware, there were many other examples of where there were significant material declines in the company stock during the class period.

We have not asserted those as related to the misrepresentations, because we could not satisfactorily meet the standards of Oscar and Greenberg in demonstrating to the Court that we could tie a significant portion of those declines to the actual partial disclosure, culpable prior partial disclosure. So we didn't put those forward. We're not seeking damages for those.

We're only seeking damages for those we believe we have been able to put before the Court that directly meet the standard.

The standard is a challenging one, and it is an important standard, but it's not an impossible

standard. It wasn't meant to be an impossible standard. There is nothing in the Oscar opinion or the Greenberg opinion that says they don't want to have legitimate securities act cases proceed.

What they're trying to do is filter out, in Oscar at the class-certification stage, cases that will not meet the standard of fraud on the market and loss causation.

[42] So what we have tried to do is we have tried to meet those standards, and we respectfully suggest to the Court that we have.

THE COURT: Let me ask you just a couple of questions of things that you didn't cover that you might cover in rebuttal, but let me cover these with you now.

This issue of the 95 percent confidence rate.

MR. BOIES: Yes.

THE COURT: I am not an economist, but my understanding of that what means, and if you disagree with me, you certainly can say so, is that the conclusion is that 95 percent of the time the expert believes that—well, let me say it differently.

The expert's view is a 95 percent confidence rate with respect to the days reflecting movement in response to the culpable news, it may be that the issue of what the 95 percent is applied to is the issue.

Then the defendants do the math on the 600-plus days and eureka, it's 31 days, which is the same number of days where your expert says those are the days that moved in response to the culpable news.

So I want to hear your explanation for that.

MR. BOIES: Sure.

THE COURT: I also understand that there are days with no news, and similar kind of movement that is not [43] explained by market or industry movement.

So what is that?

MR. BOIES: There are—I believe—I think there are like—I think I'm right, there are six days. I think it's October 27, 1999; January 10 and 12, 2000; June 8, 2000, October 23, 2000, and November 9, 2001 in which there is a material effect on company stock market price that is not attributable to industry or general stock market conditions.

That can be true—that can be the result of several different things.

Some of them, it can be the result of other pieces of news, not known—no culpable news, but not necessarily no news. Some of those six are those situations.

A second thing is that there is an effect that can take place, as their expert admits, not just on a particular day, but there is a carryover or ripple effect.

For example, on December 4, 2001, the first day of the asbestos disclosures in December of 2001, there was a disclosure.

On the next day, December 5, there is no new disclosure, but there is a company-specific decrease in Halliburton stock of 3.8 percent.

One of the things that our expert says is that although she's not taking that into account in terms of her analysis, and we're not advocating that as a tenth day, but one of the [44] things that she does is that it's quite possible that that decline was related to what had been announced the day before as it begins to filter out.

So there are a great many reasons why a company stock may go up or down that can't be explained simply by looking at the industry, or looking at the general market.

The standard that Oscar and Dura, United States Supreme Court as well, in Dura and Greenberg cases place on the plaintiff is a challenge in burden, because it forces the plaintiff to go to only those days where you can point to significant culpable disclosures, even though those culpable disclosures may have had effects going on in time, because it's much harder to statistically analyze and isolate those. They are ones that we're not able to take advantage of at least at the class-certification stage.

So I think the answer to the Court's question is threefold.

One is it's not merely the fact that there was a material change. The first thing to do is to limit it to ones where there is a material change. That's what our expert did, and that's what all of the experts say needs to be done.

The second step is that if there is truly no news, whether culpable or not, then you have to look to other factors that will control.

There are other factors that are there. Including the [45] fact that what happens in a particular day can be a carryover from what was previously announced.

There is no suggestion in the expert report that the defendants put in that any of the days that I have talked about, any of nine days that we have relied on, are days where that is the carryover from a prior announcement of a non-culpable disclosure.

THE COURT: What about the 95 percent?

MR. BOIES: The 95 percent, your Honor, that argument is simply wrong. I can illustrate how it's wrong in a very simple way, and then I'll go into some more statistical analysis.

Under their theory you could never have statistical changes unless they were very widespread; that is, in terms of number. That is, if you had a single event, you had Citicorp disclose that it had a huge sub prime exposure, and they only did that once and their stock took a tremendous dive and an expert came in and said not only do I have 95 percent, I have got 99 percent confidence, I have a 100 percent confidence, that was due to that in significant part. Their analysis would say, oh, no, because throughout a class period you're going to have lots of days where you're going to have some kind of disruption.

THE COURT: I understand that argument.

What in your mind is the significance of your expert [[46] giving a 95 percent confidence? What does that mean?

MR. BOIES: That is saying that in 95 percent of the cases the result will be within the predicted range. That is, if what she is saying, for example, is that on a given day there was a company-specific decline of X amount, that 95 percent of the circumstances would be within whatever range she gave for that.

THE COURT: All right. Thank you.

MR. BOIES: Thank you, your Honor.

THE COURT: Ms. Pulliam, I offered to wait for you. Mr. Voyles insisted on going forward.

MR. VOYLES: Wasn't that a wise choice, since we would have been sitting around for quite some time.

MS. PULLIAM: I did win my argument.

MR. VOYLES: You did win. Congratulations.

Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. VOYLES: Ladies and gentlemen—or ladies of the jury.

I had to chuckle when you mentioned your undergraduate degree. I don't know if you happen to notice that both of the experts, both plaintiff and defendant, undergraduate degrees were in biology. So it just goes to show we can all learn this stuff, I guess. Although they do both have MBAs thereafter in some other things.

[47] You also mentioned earlier that you waded your way, or swam your way, I forget your phrase, through this mound of material.

As you might expect, after your telephone call earlier this week, I had the opportunity to do the same.

What I have tried to do in thinking about this motion is try to bring together a lot of these disconnected concepts into one place, and into various categories that we can talk about it.

Before I do, I would like to talk about the burden of proof. Because while I think Mr. Boies, plaintiffs' counsel, correctly stated, much of the law with respect to burden of proof, I think there are certain things that he left off, as well as an important decision from this district, the Flowserve decision, which helps educate us with respect to at least one judge's view of the

burden of proof, and what's required of the plaintiffs at this stage of the case.

In particular, your Honor, I think that what plaintiffs do, and where they really miss the point, is by grasping on to a phrase called "related to."

They seem to be saying and arguing in their papers, and here this afternoon, that if they can show that a disclosure that causes a drop in the stock price is related to a prior alleged misrepresentation, then they have established a corrective disclosure without providing any definition to what [48] "related to" means.

What I would suggest, your Honor, when you review the Greenberg opinion, if you haven't already, when you look at—when you look at Oscar and you look at Flowserve, you look at who those courts did, and you also look at what they said with respect to what "related to" means.

In fact, in Greenberg when—the very first time they used the phrase "related to," in that same paragraph they said that it had to specifically reveal the falsity of the prior misstatement, or the truth, the true facts.

If you look at Flowserve, Flowserve talks about a direct revelation of the truth, disclosing the scheme to the market.

THE COURT: Do you think that means we committed fraud?

MR. VOYLES: No, ma'am, I do not, and we have never said that, I don't believe.

THE COURT: Well, I wasn't sure what—I wasn't sure whether you were taking that position.

MR. VOYLES: We are not taking that position. You know—and I don't think that would be a correct position, and certainly we have not admitted fraud, and we don't to this very day.

On the other hand, the facts that are disclosed have to reveal the truth. Mr. Boies, I think, said it pretty close himself when—in responding to a question. That the facts [49] that are disclosed in the supposedly corrective disclosure have to reveal the falsity of the prior misstatement. Have to show that the prior facts, or the prior misstatement, was actually a false statement. The facts that were said earlier were untrue.

That's what needs to be shown for it to be a corrective disclosure. That's the burden of proof that they have.

THE COURT: To take a simple example, not relevant to this, if a company said we have had an analysis done of our reserves for asbestos, and they are completely adequate for any contingency that might occur, and in fact they had had no evaluation done, and later on said there was no evaluation done, that would suffice?

MR. VOYLES: Yes.

THE COURT: They wouldn't have to say, and therefore we admitted fraud.

MR. VOYLES: No, they would not.

THE COURT: But it would be the truth of the prior falsity?

MR. VOYLES: Right.

THE COURT: Now, here we are—the objection you're lodging is that the commonality, not used

in the technical 23 sense, of words like Dresser, asbestos, or fixed price doesn't do it?

MR. VOYLES: Absolutely.

[50] In fact, you can see that in—I believe it was the Greenberg opinion where the common word was "routers," and the original alleged misstatement—and I may get these mixed up, but the point will be the same—the alleged misstatement went to the speed of the routers.

The disclosure went to the inter-operability of the routers.

The Greenberg court held those are different things. Just because it's the same subject, routers, doesn't mean it's a disclosure of the prior falsity, or disclosure of the truth.

Why this is important, your Honor, and what I think has been overlooked by the plaintiffs and their expert, is that it's very important that what we look at and what we examine is the actual statements that they claim constituted the misstatements. We contrast those to what they alleged was the disclosed. That someone assist the Court in pointing out in making that link, in making that connection.

Their expert has not done that except in the most general of ways. In her deposition she said she didn't do it, she did not link them directly, because she was not asked to do that.

The Court could do it herself if you were provided the information to do it. In fact, in this case you have been provided very little, believe it or not, in terms of the actual evidence. In terms of what the actual misstatements were in the context in which they were made, and the actual [51] disclosures were, and in the

context of that they were made. You have got some of it, but you don't have all of it.

When it comes to the actual misstatements, you have been provided very little. You have been provided very little by the plaintiffs.

That's—you know, that's really important here, because we can't just go by what their expert says things say, or what counsel in advocacy says they say, because often they don't.

A couple of examples that were presented to you this very afternoon.

Plaintiffs' counsel said that our disclosures in 2001 regarding three asbestos verdicts admitted somehow that our references were inadequate, and admitted somehow that our statements regarding insurance were inadequate. And those verdicts themselves outstripped our reserves.

All of those are wrong.

In none of those disclosures did Halliburton say that its insurance was inadequate. Just the opposite. In those disclosures Halliburton actually says that it expects most of those verdicts, if lost on appeal, to be covered by insurance. Just the opposite.

Nowhere in those disclosures does Halliburton ever say that as a result of these verdicts our reserves are inadequate. It's never said. Nowhere in there.

Absolutely it is incorrect that those very verdicts [52] outstripped Halliburton's reserves, because Halliburton's reserves are net of insurance, which is about 90 percent, and these verdicts were gross of insurance.

THE COURT: Now, do I have evidence of that? This issue comes up in a number of respects in the brief. This whole BRES, E&C, what you are saying to me about that may be true, but I don't think I have evidence.

MR. VOYLES: You do, your Honor, in several ways. But in addition I'm willing to tender to the Court all of the—

THE COURT: Oh, goody.

MR. VOYLES: All of the documents that plaintiffs relies on that the plaintiff has not done.

THE COURT: I withdraw my question.

MR. VOYLES: But you do have that, your Honor, in some other ways.

Number one, this unapproved claims thing has been decided by a court before, by Judge Rosenthal down in Houston, and she has written an opinion on it.

Her opinion makes certain findings with respect to the underlying facts. We rely on that opinion in our briefing to provide the Court evidence with respect to BRES, E&C, as an example.

THE COURT: Well, are they bound by that?

MR. VOYLES: No.

[53] THE COURT: Okay. Well, how can I—I can't think of anyone I have more respect for than Judge Rosenthal, but how can I take that as established when the plaintiffs weren't there?

MR. VOYLES: You don't have to, your Honor, because I'm going to go on from there.

THE COURT: Okay.

MR. VOYLES: You can look at what has been attached to the plaintiffs' own complaint, which is the SEC order that prior counsel waived to this Court many times in connection with the motion to dismiss, and it says exactly the same thing.

You can look at the actual disclosures that they have identified as containing either misstatements, or as containing corrective disclosures, and learn the same thing.

Your Honor, most importantly, I don't have the burden of proof. Halliburton does not have the burden of proof here. The plaintiffs do. It's the plaintiffs' job to ferret those things out.

What's happened here is the plaintiffs' expert—

THE COURT: Well, let me—hold on a second. Let me make sure I'm following you.

I agree that they have the burden of proof. I'm not saying these are the facts, but just for the sake of making sure I'm with you, let me just state these as if they were the [54] fact, and you don't need to correct me.

If the facts were that Halliburton said our reserves are $50 million and there is $100 million judgment and I don't know anything about the insurance, because nobody has given me evidence of what the insurance is, but you come up here and say to me it's not true that we're under water here, because in fact we have $300 million of insurance, have they failed to meet their burden? This is sort of the missing evidence. It's just not here.

MR. VOYLES: Using that example, I don't think they have failed to meet their burden, but there is evidence in front of the Court, and I can offer more, I

have got it, and I will tender it, I believe, but there is evidence in the very disclosures they rely on that Halliburton was 90 percent insured.

THE COURT: Halliburton was 90—

MR. VOYLES: 90 percent.

THE COURT: 90 percent of what?

MR. VOYLES: 90 percent of the asbestos liabilities were insured.

THE COURT: 90 percent of its actual contingent and potential liabilities were insured.

How can anyone say that to be so? I mean, no insurance company would agree to that without knowing what the claim is.

MR. VOYLES: I would have agreed with everything you [55] said until you put the word "potential" in there.

THE COURT: Okay.

MR. VOYLES: Because nowhere does the word "potential" appear in any of these disclosures.

But respect to the reserves, which only go to pending claims, and which was understood by the marketplace they only went to pending claims.

In fact, one of the very analyst reports that is cited by plaintiffs in their briefing, a Smith Barney report, June 22, 2001, contains a complete paragraph in which a Smith Barney analyst discusses Halliburton and its asbestos risks and identifies its risks in a way that clearly indicates that he understands that all Halliburton is reserved for is pending claims, that this situation is going to change as a result of new Harberson Walker claims that were not in the prior

numbers, because they weren't Halliburton's claims, but that the real risk with respect to Halliburton is potential future claims that have not yet been reserved for, and the jury verdicts that may come from those claims, because of the landscape with respect to asbestos liability for all companies is changing. June 22, '01.

I will tender that to the Court as well.

But it makes very clear that there was no misunderstanding with respect to the analysts as to what the reserves were that Halliburton had and what they applied to [56] and what they didn't.

THE COURT: Well, I have got a quotation from—I don't think I have the—I don't know if I have any evidence of this or not. I don't remember if I have something other than what I'm about to say.

But there is a quotation referring to a Jeffries & Company analysis that says, quote, management provided further assurances that current reserves are adequate to cover projected asbestos liability.

MR. VOYLES: That's, I think, almost an exact quote, but you have to look at the conference call that he attended, which we have the transcript, we know exactly what was said, we know what's in the disclosures.

The fact that that analyst used that phrase, we don't know what he meant by it, that used that phrase does not mean that that's what Halliburton represented, nor does it mean that even that analyst believed that Halliburton was reserving for anything more than its projected liability on pending claims.

THE COURT: Well, I can't read minds either. I'm just responding to your point that it is clear that the

analysts understood that this covered only pending claims. I sure can't tell that from this quotation.

MR. VOYLES: I understand that, your Honor. Let me just tell you what I was referring to, if I could.

[57] THE COURT: Sure.

Do you mind if we take about a five-minute break?

MR. VOYLES: I would love it.

MR. WILLIAMS: All rise.

(Brief recess.)

THE COURT: Mr. Voyles, I'm sorry I interrupted you. Take up where you were.

MR. VOYLES: Where was I?

I think actually, your Honor, I was talking about the Smith Barney report, and I may have misspoke, because my notes were wrong. It's not June 22, 2001. It is August 22, 2001.

What this analyst says in a rather lengthy report that discusses Halliburton's asbestos exposure, he says this.

"There is further risk from the company's asbestos liability on two fronts. First, the possibility of a dramatic increase in the number of new claims filed. The first half of 2001 saw 46,000 new claims filed, versus a total of 45,000 during all of 2000, indicating a potential total this year of 92,000 new claims.

"Second, claimants may become more aggressive in terms of the amount of money being sought, as has been the case with other asbestos defendants such as McDermott International.

"While the company's estimated net liability for open claims is only 124 million, this figure does not count any impact from claims yet to be filed."

[58] And he goes on about the uncertainty from that. My point in pulling this out was at least there was one analyst from a reputable firm, I think we would all agree, who wrote in detail on this subject several pages of analysis with respect to Halliburton's asbestos reserves, and fully understood that what they were reserving for was pending open claims, and that there was a risk because the figure does not count any impact from claims yet to be filed.

Your Honor, I have—probably due to my own fault, most likely my own fault, I've kind of got myself away from what I promised I would do, which was try to pull some of this together into one place, and that's what I would like to try to do now.

We have talked some about the burden of proof. I would like to talk about several different points with respect to the evidence that's been presented to the Court in the form of the expert report, because that is the only evidence that's been presented to you.

They are attempting to achieve their burden to prove by a preponderance of the evidence loss causation with their expert report.

The first thing goes to a question that the Court asked the plaintiffs' counsel, which is this point with respect to how can it be, if there were all these misstatements, there is no artificial inflation in the stock as shown by her own [59] tests?

The response that you got to that was that's not our burden to show. We can show it one of two ways. We can show either inflation that occurs when the

misstatement is made, or under the precedent we can show a drop when it is corrected.

That is true. They're absolutely correct in that.

That's not what they chose to do here completely.

What they chose to do here, and what their expert did, for reasons of her own, frankly, because it's hard to understand why she did this, and we are critical of her approach as a result, she tested every single day in the class period.

Despite testing it with the rigorous analysis she said she applied, with the various indexes that she claims she used, out of 600 days in the class period she was only able to identify two days where the price of the stock in reaction to Halliburton's specific company information increased in a statistically significant way.

Both of those days were in 2001, and on neither of those days do plaintiffs claim any falsity or loss causation from those days.

So in fact all the days, the 598 other days, all of which includes when supposedly misstatements occurred, there was no significantly—statistically significantly increase in the stock price of Halliburton stock as a result of those [60] misstatements.

Why is that significant?

THE COURT: Well, hold on a second.

I think I follow you, and I remember this discussion, but let me say it back to you just to make sure.

You're saying only—on only two days during the 600-plus days did the stock price increase on a day when there was positive information, and those two

days did not involve representations related to this case?

MR. VOYLES: Yes. When I say "increased," what I mean is increased in a way that their expert does not explain by market or industry.

THE COURT: Okay. What conclusion am I to draw from that? Because I'm assuming, and you would agree, that there were other days during those 600 days when there was something positive about the company, whether related to these issues or not, and the stock didn't move positively. So what conclusion do I draw from that?

MR. VOYLES: Well, I think the conclusion that you can reach from that, your Honor, is there is something wrong with her analysis. There is something wrong with the statistical analysis she's done, with the indexes that she's prepared. I think that's what you conclude.

If you don't conclude that, if instead you conclude that she's done it correctly, then there is no artificial inflation [61] that occurred during the class period with respect to misstatements or omissions.

Now, that has particular significance in this case, your Honor, and that's because we kind of have an unusual situation here.

We have got a situation where, if you will recall, a large number of misrepresentations and omissions were alleged that are barred by limitations that occurred prior to the beginning of the class period.

So another possible explanation, which plaintiffs' expert has not attempted to analyze, hasn't even talked about, is that the inflation is pre-class period.

If that's the case, if what's coming out from these alleged corrective disclosures is pre-class period inflation, damages from that aren't recoverable, because they relate to barred misstatements, barred omissions.

So the significance of this is twofold.

One is she did this study. Plaintiffs are right that she didn't have to. They don't have to prove that. But she did it nonetheless. She came forward with no evidence of artificial inflation. In fact, just the opposite. She came forward with evidence that there was no artificial inflation. She's not made any effort to explain it. One of the very explanations could be that the artificial inflation occurred from misstatements or omissions that they allege occurred [62] prior to June 3, '99, the beginning of the class period.

On a related point, your Honor, unapproved claims, both the change—alleged change in the practice of booking unapproved claims, as well as the amount, the very substantial amounts of those claims that were booked in both fiscal '98 and fiscal '99. Fiscal meaning—I shouldn't have said that, because Halliburton was on a calendar year—both of those things were disclosed in March of 2000 during the class period.

What we know from plaintiffs' expert analysis is that there was no reaction in the stock price. It did not fall. It did not rise. There was just no reaction of any statistical—statistically significant—I need to just get a stipulation to type that in every time I say that—there was no reaction. That is very significant, your Honor. Now, they allege in their complaint, and they point out that they claim that that particular disclosure was not complete, that there were $30

million more in unapproved claims that should have been disclosed that weren't disclosed at that time because they were in joint ventures and not in the company itself.

Give them that, and listen to everything that was argued here by plaintiffs' counsel here today, if in fact—I mean, that's the closest thing we have got in this case to a real correction, if there is one. They say prior to June of '99 [63] the policy was changed. Prior to June of '99 all these claims were booked.

Here we have got March of 2000, it's all disclosed, no reaction. That's the closest thing we have in this case to a corrective disclosure, if in fact the earlier time was a misstatement, and we have got nothing. We have got no reaction whatsoever. Their own expert has proven that.

Let's talk about class certification. You know, one of the problems with Oscar for the Court, frankly, is that they put a tremendous burden on the Court as well as on plaintiffs' counsel at this stage of the case.

THE COURT: There is the guy to thank for it back there, Mr. Stockholm.

MR. VOYLES: Thank you.

There have been—but certain clear—pretty clear for the law anyway—rules have come out of that that can be applied, I think, very easily to the evidence that's been presented to the Court.

First of all, the Court cannot certify a class with respect to any claims on which the plaintiff hasn't even tried to show a loss causation. That's a pretty basic thing.

Well, there is a whole chunk of claims in this case that they have not even tried. Those are the claims at

paragraphs 245 to 278 of the complaint, what I refer to this court before as the miscellaneous hodgepodge confidential witness [64] accounting claims.

None of those –

THE COURT: Excuse me a minute.

Are you dropping those, Mr. Boies?

MR. BOIES: Your Honor, we're not dropping the evidence. We're asking for class certification based on the events that we have put forward to the Court.

However, in terms of demonstrating the fraud, we are going to rely on all of the evidence in the complaint.

THE COURT: Is it your view that I am not required to find loss causation as to each and all of your claims?

MR. BOIES: You are required to find loss causation as to our claims for damages.

What you're not required to do is to find that every act or piece of evidence that we submit that demonstrates the existence of fraud caused damage or loss causation.

For example, a great deal of evidence that we submit in terms of motivation and what they were doing will not directly translate into damages. We have a damage claim, and then we have the evidence of the fraud.

In terms of the case that we are presenting for damages you're required to find loss causation, but you're not required to find loss causation for every element of our proof in terms of scienter, for example.

THE COURT: Okay. Go ahead.

[65] MR. VOYLES: If I could respond to that real briefly, I don't really understand what he was saying there, but I think the law is pretty clear, your Honor, that the only thing they can recover for under the securities fraud statutes is a misstatement or omission on which they prove each of the elements of their case, including loss causation.

These allegations at 245 and 278 of the complaint is just a hodgepodge of allegations regarding misstatements in financial statements. Claims that the financial statements were somehow misstated in a whole variety of ways.

Well, if none of those misstatements that they allege have ever come to light, there is no loss causation. They have no relevance in this case. They are no longer a 10(b)(5) claim.

There is no dispute that they have made no effort to show any corrective disclosure with respect to those items.

Nor, your Honor, have they made any sort of general claim that the financial statements were misstated at any particular period of time, and that later got disclosed. That's not in this case.

The only way they allege they were misstated are the two cases that Mr. Boies talked about, unapproved claims and asbestos. The asbestos isn't even in the financial statements. It's in the notes.

So these general allegations just go nowhere. There is [66] no loss causation that has been shown. They haven't even tried.

Second, the class can't be certified unless loss causation is shown as to—this is a quote, I believe

from Greenberg, "actionable non-confirmatory misrepresentations."

Plaintiffs' expert herself admits in her report that this is a premise of market efficient. Material information is only new one time.

The plaintiff must isolate actionable non-confirmatory statements to compare to subsequent disclosures.

If you recall the Flowserve opinion, if you have had a chance to review it, but even if you look at Greenberg, what the Court does as a first step is to let's identify the actionable non-confirmatory statements before we go to the next step and analyze loss causation.

Here we submit there should be no class certification with respect to the alleged statements regarding cost savings from the Dresser merger. They're not alleged. They were said.

The two statements that they identify on 7-23 and 9-13-99, both statements talk—project that there will be cost savings from the merger of $500 million.

Well, that same projection was provided before those dates.

More importantly, the September 13, '99 projection [67] repeats the 7-23-99 projection, so in itself it couldn't have any impact, because it's merely confirmatory.

Their expert really doesn't argue this point or make any sort of statistical analysis or express any opinion on this, I don't believe. The only thing we get on that is something from plaintiffs' counsel which says the pre-class period statement about $500 million in savings also said that the savings were coming from

the merger and a downturn in the business. The later statements only refer to a merger.

Well, I believe, your Honor, that's a distinction without substance. They certainly come forward with no analyst and no evidence who recognized that distinction who said, well, the $500 million you're talking about now is different from the one they were talking about before, because the analyst understood it to be the same.

So we have got two things here. We have got, first of all, the statement itself is a projection. It's predictive in nature. But more importantly, it is confirmatory. It merely restates prior statements made prior to the class period, and therefore cannot form the basis for loss causation.

Why is that important?

It's important for an additional reason than this. It's important because every time your Honor reads in their briefing or in their expert reports general statements about the Dresser merger, the efficiency of the Dresser merger, the [68] success of the Dresser merger, every time your Honor reads that you need to remember that this is all they're talking about. These are the only two statements they rely on. So two things with that.

One is they are gone because they are confirmatory. But even if they're not gone, they're specific to savings of $500 million. They never come forward with any corrective disclosure, because it doesn't exist, in which Halliburton has indicated, or an analyst has indicated or anybody has indicated that in fact Halliburton didn't achieve that projection. It just isn't there. There is no corrective disclosure with respect to that issue.

A couple of other things on non-confirmatory statements. Actionable non-confirmatory statements. The time-barred statement we have already discussed. No analysis of that is done by plaintiffs' expert.

Secondly, they were relying on statements made by individuals who this Court has dismissed from the case concluding that they did not come forward with sufficient allegations regarding scienter.

So when they rely on statements by Doug Foshee, for example, those are not actionable statements for this—the purposes of this case, because they are out of the case.

So what does this all mean?

Well, one of the things it means is with respect to [69] unapproved claims allegations, they are basically not in the case, your Honor.

All of the statements regarding unapproved claims—or the misstatements regarding unapproved claims that's alleged in this case occurred prior to June of '99.

When we get to March of 2000 plaintiffs' expert on the evidence shows there is a disclosure of this change in the way they're doing things.

The actual numbers are put out there, $89 million, $98 million, not insignificant numbers, especially when you contrast them to the numbers that plaintiffs are putting before you today, no market reaction.

So to come along later and say that when there are other statements by Halliburton that never mention unapproved claims—and we'll get to that 95 million deal in a minute—but that never mention unapproved claims, and that somehow—somehow analysts in market devines that this indicates that prior

statements regarding unapproved claims were false, that's just speculation.

It's not even expert speculation. It's just the rankest kind of speculation. These statements have nothing about unapproved claims in them at all. And nowhere—even if they did—does plaintiffs' expert try to separate those causes that may relate to statements prior to the class period, and thus barred by limitations, and those that don't.

[70] Next, the case law is pretty clear that a class can only be certified as to those statements that are linked—and that phrase used—linked to subsequent negative truthful information that causes a decrease in the stock market.

Their expert hasn't done that. She hasn't even tried.

She admitted in her deposition that she never tried to link prior statements with corrective disclosures. She says she wasn't asked to do that.

She missed the essential first step. She never isolated and identified the prior misstatements, and understood what they meant.

In fact, one of the big problems with her report, as she disclosed in her rebuttal report, is that she says she assumed the truth of everything that was in the complaint. She never got behind what was in the complaint, and read the actual press releases, the actual conference calls, got into the detail to understand what was said, and what wasn't said.

You know, that's a pretty significant thing in this case, your Honor.

What you will find when you look at these press releases and conference calls and 10Ks—and I was reminded by Ms. Pullium that a number of those were

attached to our appendices, although there are others—what you will find is that her failure to understand what was actually said has led to assumptions on her part that have led to conclusions about [71] loss causation that just make no sense.

We talked a little bit about this BRES versus E&C distinction, for example, your Honor.

One of the very conference calls that plaintiffs point to that supposedly contains some misstatements about unapproved claims and the Dresser—the efficacy of the Dresser merger is on April 26, 2000.

In that very press conference, your Honor, the distinctions between BRES and the engineering and construction business, if not already clearly, were because it was throughout all the press conferences, is made abundantly clear. And what's most telling and what this expert would have realized had she bothered to read the conference call transcripts, she would have realized that BRES in that very call is talked about in the most negative of ways.

Halliburton is not disclosing for the first time, but they're continuing their disclosures that the BRES business—that's Brown & Root Energy Services business—is performing terribly. That it has been performing terribly for some time, as previously disclosed, and that that performance—terrible performance is continuing.

Well, BRES, your Honor, is where the unapproved claims are. That's not really disputed by anyone. That's where the seven projects, the major unapproved claims are, that were booked back in '98 and '99 and talked about in March of 2000, [72] that's where they're located.

THE COURT: All right. Now, on that issue, do I have evidence of that before me?

MR. VOYLES: Yes, your Honor, you do in terms of an attachment—on the issue of that's where the claims were?

THE COURT: No. Yes, that—that, A, that's where the claims were; and B, this conference call.

MR. VOYLES: I think you have the conference call, but I plan to tender to the Court all of these conference calls there were produced to the other side.

THE COURT: I'm not taking it. I'm calling it done. I can go on forever with this. Everybody had an opportunity to file with me what you chose, I have got a lot here, and I'm declaring that over. That's over. So I'm not taking other information. Unless there—if something was here, and it didn't get fully copied, that's something else. But I'm not going to start a whole new round of supplementing the record.

MR. VOYLES: Well, let me check on that, your Honor, because that may actually be the situation, where you have some of the conference call, but not all of it, I just don't know.

THE COURT: If that's the case, then you will explain to me—

MR. VOYLES: I will.

THE COURT: If I am missing—if I have got page 1 [73] of the call, but not page 2 of the call, that I will take, but I'm not going to—I can bet that for every action there is an equal and—I won't say positive, I'll say negative reaction.

MR. VOYLES: Well, your Honor, if I could just point out our position, for lack of a better phrase, on this;

and that is, that to the extent their expert has relied on a conference call, we contend that it's the plaintiffs' burden to provide that information to the Court so the Court herself can review the information to determine whether or not the expert has drawn the proper conclusions.

With respect to BRES itself, your Honor, and its separation from engineering construction and the location of the projects related to unapproved claims, that is set forth in the SEC order that's attached to plaintiffs' complaint.

That very item, your Honor, that 4-26-2000 conference call, I should point out as well, is a conference call that the plaintiffs specifically rely on as containing misstatements. I would submit that they have the burden to present that to the Court.

Now, let me go back, if I could, what I just completed talking about was the importance of focusing on the actual statements that were made, and linking those statements to subsequent disclosures. The Court cannot certify a class unless that is done with respect to the misstatements that [74] they allege here.

Another principle that comes from the case law is that a class cannot be certified where there was no corrective disclosure.

I started my presentation today—and I have gone longer than I had planned to—but I started my presentation today talking about what is a corrective disclosure.

A corrective disclosure, I think it's clear, has to reveal the falsity of the prior information. It has to reveal the truth.

Mr. Boles came pretty close to saying it. He said it has to reveal facts that had been discussed—the true facts that had been discussed in the prior misstatements reveal that the prior statements were not true, I think are the phrases he used. So I don't think we really disagree on that.

But it's very important then to look at what they identify as the corrective disclosures, and evaluate whether or not in fact those reveal the falsity of prior information. The prior information that is actionable, and non-confirmatory.

Their expert hasn't made that link. She's not done that work. What she basically says, your Honor, is really simply put is this.

If it says asbestos in it, it's a corrective disclosure. If it says engineering and construction in it, it is a [75] corrective disclosure, not just of things related to the Dresser merger, but also of unapproved claims.

This leads her to all kinds of strange conclusions. She never explains how any disclosure that she has identified corrects anything.

The October 9—the October 5, '99 disclosure that they rely on, the first in the book ends that was put before you by plaintiffs' counsel, is one of the most extreme examples.

It has absolutely nothing to do with this case. Nothing. It was never alleged in the complaint to have anything do with this case in terms of being a corrective disclosure, and a review of it shows that it simply doesn't.

What it talks about is the fact that they had under performance in the Dresser Equipment Group, which

is important to understand completely, a separate business segment for the company.

The Dresser Equipment Group's performance has been lagging as a result of under performance by some joint ventures that Dresser Equipment Group is a part of, and as a result of that they're going to sell those joint venture interests. That's the gist of the disclosure that their expert points to.

She says, walla, says Dresser must mean the merger is not working right. That's what she says.

She says also it must mean that's a corrective disclosure [76] by unapproved claims. There is nothing in that disclosure that says the merger is not working right.

In fact, I think it says—you do have this in front of your Honor—it says, "The merger integration is proceeding ahead on schedule."

There is nothing in it that says the $500 million in projected savings are not going to be achieved.

There is nothing about that here or anywhere else.

There is nothing in it about unapproved claims. It doesn't have anything to do with anything.

She says it's a corrective disclosure. What she says it's correcting is a prior release with regard to quarterly performance and quarterly earnings.

She hasn't gone and looked at that release. I have. She would know, if she had, that that very release talks specifically about the Dresser Equipment Group, and says it's under performing. It talks specifically about those joint ventures, and says they're not doing well. They're losing money.

So what was disclosed in October 5, 1999 regarding Dresser Equipment Group, not only is not alleged anywhere in the complaint, not only does it not have anything to do with anything. All it does is continue a disclosure that was previously made.

Why do they say that prior disclosure was a [77] misrepresentation?

Because that same disclosure contains information about the Dresser merger, and about the engineering and construction operations.

Their expert, who just kind of attaches things together without any expertise, and without reading them, says they must go together. It must be corrective. It's just not.

THE COURT: Excuse me just a minute.

Mr. Godwin and/or Mr. Ronquillo, will you be arguing as well?

MR. GODWIN: We're going to adopt what Mr. Voyles says, your Honor.

THE COURT: As you prefer.

MR. VOYLES: We'll not be needing a bottle of water.

THE COURT: They are available for purchase. Anyone who is not speaking may buy one as part of the Court fund.

MR. GODWIN: I'm sure it's a good price.

Thank you, your Honor.

MR. VOYLES: I want to address the—all three of the disclosures that—supposedly corrective disclosures that Mr. Boies talked about. I have addressed the first one.

I now want to talk about the one that occurred in December of 2000. Another place where their expert has jumped to the conclusion that this particular disclosure related to both the efficacy of the merger, which as I said before is [78] meaningless, it has to go to the $500 million savings, or nothing at all, and the unapproved claims.

There is nothing, first of all, in that disclosure that says anything about the success of the merger, or that the $500 million in savings that were projected earlier had not been achieved.

Set that one aside.

There is a discussion about problems on fixed-price contracts. This is another thing that she readily admitted she had done.

If she saw a fixed-price contract in a disclosure, and the stock price was down that day, that meant it related to unapproved claims.

Well, it's just not that simple. You have got to read the disclosures and understand what they mean and it's not hard and then draw an expert opinion as to whether or not there is loss causation.

Well, if you look at that disclosure, and the Court has that disclosure, if you look at that disclosure you see that it does not quite say what plaintiffs' counsel indicated it says—and when I say that, I do want to make clear I'm not accusing anybody of anything. In fact, I joked with Mr. Vincent, I believe it was, before the case, the one thing that Mr. Lerach did us wrong here is having a class period that is this long with this many facts, it's very hard to [79] remember them all.

When it comes to this particular disclosure, the Court looks at it, what she will see is that this $95

million number that Mr. Boies referred to, it does not say that it is a write-off of unapproved claims.

What it says instead is two things.

First, it says that with respect to current—the current quarter, a lot of costs have been incurred with respect to some KBR projects, not BRES, KBR projects due to labor strikes and other problems in Nigeria and some other country. That is two-thirds of the amount that's in issue. It is current costs in the current period, and the release makes that very clear. So those are not previously-recorded claims that have been written off. They are current costs.

Now, there is a portion of that write-off—of that charge that's taken in December of 2000 that does relate to unapproved claims. It is a smaller amount, and I don't have the number with me, but it's about—it's less than a third of the amount. And what the disclosure says as to that, is that with respect to previously-book-unapproved claims we are having trouble collecting them, so we're going to take a charge with respect to some of them.

Now, what we know is, your Honor, is that this isn't all of the claims, it's a percentage, and it's a percentage that's [80] probably in the 20 percent range, if memory serves me right.

We have nothing to indicate that we're taking this charge because we shouldn't have booked them in the first place, or because it was a violation of GAAP for us to book them.

That's never said. There is no indication that the initial bookings were false.

If you think about this just kind of on a different plain for a minute, every time you book an accounts

receivable, it's very similar to booking an unapproved claim. You're booking a receivable.

What you're required to do under GAAP is to continuously evaluate those receivables, those claims, and when you determine that some part of them might not be collectible, you're supposed to take a charge. You're supposed to take a reserve. That's all they did.

How do we know that's all they did?

Well, no one has come forward on the plaintiffs' side with evidence of anything different, and no analyst—no one has ever said, aha—I mean, you would think that if a market reaction was due to a conclusion that prior statements were false, or prior financial statements were incorrect, some analyst somewhere would have said that.

We don't have an analyst anywhere that says that about any of the things that plaintiffs are alleging here. At no time did any analyst—you asked about post mortem before, [81] empirical studies. One of the things I think that means is let's look at what analysts say after the fact. What caused that stock price? Let's look at what analysts say after. Not contemporaneous, but after.

No analyst came forward ever and said this December 2000 disclosure with respect to Halliburton shows prior financial statements were false.

There has never been any restatement of prior financial statements. No restatement was ever required by the SEC or anyone else. No one has ever, on the analyst side of things, claimed falsity. So it's not a corrective disclosure.

Lastly, and I have overspent my welcome, I'm sure. Can I have two last—

THE COURT: You can. I just want to be sure I give Mr. Boies the last word on this.

MR. VOYLES: One will be to the point, and another one will be a little bit off point.

To the point is the last disclosure with regard to the asbestos. I think we have pretty well discussed that, but I think it's very important for your Honor to compare the disclosures that were actually made, what the market understood about those disclosures, and what they claim to be the corrective disclosure.

The corrective disclosures come down to just really three things. Maybe four. They come down to, though, disclosure of [82] currents events.

In June of 2001 Halliburton discloses that Harberson Walker has come to it and asked for assistance on claims that had long been disclosed to everybody, Harberson Walker had assumed. That happens contemporaneous. When else was Halliburton supposed to tell anybody about it? It had just occurred. No one ever claimed that that was a disclosure of a prior falsity.

They come to another point where Halliburton records reserves of what they say are 120 million, and they say drop in the stock price, aha, that was a disclosure that—their prior disclosure that they were only going to need $60 million in reserves with respect to Harberson Walker claims was false.

Well, it's not. In fact, it's really pretty simple.

The $60 million that Halliburton originally said it was going to need was after tax. The $120 million, which included not just Harberson Walker, but other reserves, was before tax.

When you put them both together, they're the exact same reserve. In the financial statements they're stated out as $60 million. It wasn't a falsity at all.

Yet their expert was willing to jump out there and conclude false disclosure, prior falsity, drop in stock price, loss causation.

Then lastly they look at three disclosures of lawsuit results, verdicts and/or judgments.

[83] They claim that those somehow disclosed that prior reserves, statements about asbestos, were false.

How can that be?

No one could have predicted—first of all, there is no claim that anybody predicted what was going to happen in those lawsuits. Who could? So no one did that.

And Halliburton's disclosures that plaintiffs points to, or rely on, as containing misstatements, all say, you know, litigation is a tough thing, it's unpredictable what might happen, and any particular lawsuit could have a material effect on our financial position. They all say that. Because they're all forward-looking. They are all projections. Even—you know, reserves, that's what they are, projections. And the fact that lawsuits, three in a row, get disclosed occur is completely consistent with what they said might happen.

No one has ever—in fact, your Honor, I want to say this one thing about asbestos.

Plaintiffs' lawyers—plaintiffs' class action lawyers, if they believe that the disclosure of those lawsuits disclosed a prior falsity, they would have come out of the woodwork to file lawsuits. Analysts would have been all over the place making claims of falsity. That just didn't happen.

In fact, this very case didn't even include asbestos when it was filed. Asbestos got added over a year later. So no [84] one ever thought—concluded that those were corrections.

And the drop in the stock price cannot be explained as loss causation, because that connection is not made by their expert, or by anyone else.

My last point, and that goes to this index, I'm going to let the experts dual out what's statistically appropriate and what's not. I think we have got the better of that argument, but that's for you to decide. But on this index one I do want to make a real important point.

Their index doesn't do it. Their industry index just flat doesn't do it.

What she has done is created an industry index of oil field service companies. That's good as far as it goes, because that's about half of Halliburton's business.

But Halliburton was also in the engineering and construction business. They actually said in their complaint that the engineering and construction business of Halliburton was the largest and most important part of Halliburton's business. They say in paragraph 11.

She should have created an index that took into account both significant parts of the business.

She says, well, you know, I played around with a couple of names they offered and I put those in and it didn't make a difference.

They also criticized a couple of other indexes that our [85] expert came up with in rebuttal as including companies not like Halliburton.

All that's good and fine.

What her job to do however was, as Mr. Boies said, in creating an index was to create an industry index that's reflective of this company, and she didn't do that.

Mr. Boies, I think, slipped, but slipped in a way I liked, when he said, you know, if it's in the asbestos industry, it should have companies in the asbestos industry.

That's another thing she didn't do. She didn't include companies like McDermott and like others who actually had exposure to asbestos so she could account for the changing nature of asbestos litigation that was undeniably going on at the time. She didn't include either of those things.

I think—you know, when you get to your question about why does she have places where she has statistically significant changes in stock price, yet there is no news about Halliburton? Why does that occur?

It occurs because her index isn't complete. This is—this really comes out in her rebuttal report, your Honor, where she tries to explain away some of the additional negative information that is in these disclosures that they claim are corrective.

When she tries to explain those away, she settles with the effected stock price, because that's already included in [86] the industry index. So the effect had to be all X or it had to be all Y or mostly X or Y.

Well, number one, that's not true if you don't have a properly constructed index.

But number two, and I think most telling, is in her report where she lists all of the places where there has

been a statistically significant difference in the stock price, and she can't find any Halliburton news, you know what she says it's caused by?

It must be something in the industry.

She says there was an Houston Chronicle article about the problems in the oil and gas industry. There was this about problems with respect to the oil and gas companies.

Well, if her industry index was working right, that shouldn't be there.

What applies on one side, and is an excuse of hers, should apply equally on the other side where she tries to explain away these aberrations. Yet she doesn't see the inconsistency in those two things.

Bottom line, your Honor, we think class certification should be denied. We don't think they have met their burden of proof. I think the evidence they have presented doesn't meet it. The evidence we have presented shows they don't.

But I want to say this cautiously.

If you are considering class certification in any way, [87] you need to be careful about what you certify.

Just because they might have, in your mind, met their burden on one particular claim, but not others, the certification should only go to what they have met their burden on. It should only go for the time period on which they have met their burden.

Those two things are important. The claims have got to be identified, and the time period has got to be identified.

I apologize for going as long as I did. I appreciate it.

THE COURT: Thank you very much, Mr. Voyles.

MR. GODWIN: Nothing, your Honor.

THE COURT: All right. Thank you.

MR. BOIES: Thank you, your Honor.

THE COURT: I believe you're going to be using a reasonable amount of time, or you will be spending the night.

MR. BOIES: That is true, your Honor. I have a double incentive.

I will begin by saying that there are a great, great many things that counsel says about what is in the record and what our expert said that we disagree with. We think simply do not reflect the record. I'm not going to try to go through all of them, but I would ask the Court to be particularly cautious of what some of the arguments of counsel are.

Counsel obviously is entitled to argue whatever he wishes, but in terms of the evidence in the record upon which [88] the Court must make a decision, that is what the record says, and not what counsel says it says.

I mean, for example, he says that our expert never attempted to link the decline in the stock to misrepresentations.

That is simply not so.

She specifically attempted to link, and we will argue whether she succeeded or not, but she explicitly linked the decline in stock to the misrepresentations.

What she did not do is go through and take each individual restatement of the misrepresentations, and

say which of those did this corrective disclosure apply to, because it applied to all of them.

For example, when you had in December the corrective disclosure about asbestos, they had said several times over the fall of 2001 that the asbestos reserves were adequate.

When they revealed that their asbestos reserves were not adequate, and the stock dropped more than 40 percent in that first week of December 2001, she did not try to say which of the several statements in the fall had been—the statement was corrected, because as she says, they all were being corrected at that point in time.

He says that she didn't go back and read the analyst reports.

That's simply not true. That's contrary to what she says [89] in her expert report, contrary to what's in the deposition. There are a whole series of—he said that things were said about Harberson Walker, I don't know that that's—maybe they were said someplace. They certainly weren't said in this record, and I don't believe they are true, because they are inconsistent with what is in the record.

He says that the charge that was taken with respect to unapproved claims was $30 million or less. I don't know where he gets that. I think that's contrary to what is in the record. There certainly were charges with respect to unapproved. We agree with that. We disagree with respect to the amounts.

Again, I think the record is clear. In December of 2000—December 22, 2000 when the company described the $95 million, it described it as $95 million which relates to additional costs on projected

completion of projects that management believes will not be recovered. Not be recovered.

Now, these are costs that they are being charged against the balance sheet in December of 2000, your Honor. .

With respect to the asbestos issue, I want to go back to the asbestos issue for a second.

He says that you had these disclosures of three lawsuits, and everybody knows lawsuits are unpredictable.

That's not the point, your Honor. The biggest lawsuit—bigger than any of them, and bigger than all the other two [90] combined, they knew what it was because they had the verdict in September. In September they had a verdict for $65 million, Halliburton's share, and they didn't disclose that until the first week in December.

That was not something that was unpredictable. That was something that they failed to disclose, and as they continued to say throughout the fall their asbestos reserves were adequate, they knew that they had that $65 million verdict out there.

So it's not a question, your Honor, of whether they knew it was false or not. The record is they did. But for purposes of what we're doing here, the argument that he makes, well, they never admitted that it was false, and he says it wasn't false, really does is not the issue.

The issue here is did they make a misrepresentation? Did they make a statement that was not accurate? Were there later facts that came out that were inconsistent that constitute a partial disclosure?

That disclosure doesn't have to be that we lied. When they take into income stuff they haven't

received, the so-called unapproved claims, when they say we're going to take those into income, and then they later reverse that, that is a corrective disclosure. They don't have to say we were wrong before. All they have to do is disclose that they're reversing that entry.

[91] THE COURT: I think Mr. Voyles conceded that. I think the issue of lights flashing, we committed fraud, is gone. I don't think they are contending that, and I don't think that's the law either.

MR. BOIES: Indeed, your Honor, I would say that what you have when you have a disclosure of the facts about asbestos, about the unapproved claims, and about the Dresser so-called synergies and integration success, are all situations in which you have a disclosure of the facts. Not merely words.

This is not a label game. This is not merely where the expert said every time I see asbestos I declare that a corrective disclosure. If you look at what happened in December, that's not just saying the word "asbestos." They're talking about what actually was the problem.

If they had simply said the word "asbestos," it wouldn't have driven the stock price down 40 percent. They were disclosing actual facts.

In December of 2000 when they're talking about the unapproved claims, the taking into—as revenue stuff that should not have been taken into revenue, at that point they don't just say unapproved claims.

In fact, as he said, in the December 22 announcement they may not have even mentioned the word "unapproved claims." That's just a label.

[92] What they do is they say we're reversing the charges, we're instituting a charge that reverses what

was taken into revenue. That's the corrective disclosure. The corrective disclosure is to say we took some stuff into revenue that we shouldn't, and now we're reversing it.

THE COURT: But what about the March disclosure without any reaction in the market?

MR. BOIES: No, but—your Honor, thank you. I wrote down—I had a big star that I had to get to that.

The March disclosure simply said they were going to take into revenue the stuff that was probable of payment, that they wouldn't take it into revenue unless there was probable to be collected. That's what was false. That's what was wrong. That was the misstatement. That was a misstatement within the statute of limitations period, and a statement that was directly contradicted.

THE COURT: Meaning that your position is that they took into revenue what was not probable?

MR. BOIES: Yes, your Honor, absolutely right. That is—your Honor, that's been our contention. That's in the complaint. That's in the expert report.

What they took into revenue was stuff that was not probable of collection.

A good illustration of that is they had to reverse themselves nine months later. In March they say we're only [93] going to take into revenue what's probable, and in December they reversed some of the stuff they have taken into revenue.

The argument that says you don't have analysts accusing them of fraud, I don't think has any relevance here. I'm not arguing that because the SEC accused them of false and misleading statements about this, that that ought to control either. But I think it's much

more relevant what the SEC has said about them, than what analysts may have said about them.

I think neither one of them really controls what's in front of the Court, which is do you have a statement of fact, and do you have a subsequent corrective disclosure of that fact?

We have—we have shown that in three cases.

With respect to the burden of proof, we think that we have met that burden of proof with the evidence that we have put in.

They said, well, there is a lot of other things you haven't put in.

They had discovery. They took depositions. They put in the expert rebuttal report. They had every opportunity to put in anything that they thought undercut what our expert was saying.

An expert isn't required to come forward with all the backup, whether they ask for it or not.

The expert came forward with the expert report with [94] backup. If they asked for more backup, they got it. If there was anything they thought was relevant, they could have given it to the Court.

For them now to get up and say, well, there are lots of other facts outside the record, which we wish we had put in, I think is irrelevant.

And to say, well, then the plaintiff should have put them in, I think is simply wrong. Because that is not burden. Our burden is to come forward with an expert report, provide the backup, present her for cross-examination, let them ask her anything they want. She gave them everything. She answered all the questions. We produced all the documents.

Even though I made the general statement, I wanted to sort of disagree with all his assertions about what our experts have said. There are a couple of more that I do need to identify.

He said that the expert did this analysis of increases in Halliburton stock price, and only found two that were explained by specific information related to the company, and neither of those related to the culpable misrepresentations.

First, that was done for purposes of testing the market efficiency issue. That was not part of the damage analysis. That was not part of the analysis of identifying the amount of the inflation or deflation, the amount of the misrepresentations, or the corrective disclosures.

[95] That was part of the market efficiency analysis about which he said at the beginning there is no—we're not—we both agree that there is market efficiency. That is not in dispute. So that part of the analysis doesn't have anything to do with what's before the Court.

The second thing is—take the asbestos case. In September there is this verdict for $65 million, which they don't disclose. They continue to say our asbestos reserves continue to be adequate. Continue to be adequate.

That's false.

But it doesn't move the price up or down, because people at that time don't know that it's false, which is why it doesn't go down.

They don't know anything has changed, which is why it doesn't go up.

You have had this change in reality, and you have had a situation in which a statement that they're making has now become false; that is, the statement that says our reserves are adequate, but nobody outside Halliburton knows that. So the stock price doesn't move then. The stock price moves that December when people find out that it's false.

Again, take the example of what is sometimes called the unapproved claims, taking into revenue stuff that wasn't actually being received, they tell the market we take into revenue only those amounts that are probable of collection.

[96] The stock price doesn't go up or down because that sounds reasonable.

Nobody knows they're not doing that. So the stock price doesn't go down.

Nobody thinks that this is anything different than what a reasonable company might do, so the stock price doesn't go up. The stock price doesn't move right then.

The time the stock price moves is when the market finds out that that statement—that false statement has inflated the stock. It's inflated the stock because without that false statement, if they had told the truth, if they had said what was actually happening, which is we're taking into revenue amounts even when we can't certify their probable collection, the stock price would have gone down.

So it artificially propped up the stock price, and you see the amount of that when you get the actual corrective disclosure.

So, first, what the expert was doing was for a different purpose. It was for a market efficiency purpose.

Second, even if it had been for this purpose, it would have been entirely consistent with her findings on corrective disclosure, and the fact of loss causation.

May I have just a moment, your Honor?

THE COURT: Yes.

MR. BOIES: Let me just spend a moment on index, [97] because counsel said that was important.

First of all, she constructed an index. Their expert didn't even attempt to construct an index.

When they raised questions about her index, she went back and recalculated to see whether their points made any difference. It didn't.

With respect to the question of asbestos, as the deposition record indicates, and as our brief indicates, we included—she included in that index companies that did have asbestos exposure.

Their own expert recognized that in December other companies with equal or greater asbestos exposure had much less of a stock price impact than Halliburton did. Halliburton's decrease was two, three, and four times greater than other companies with asbestos exposure.

This is not an index problem. This is not a problem of did she have exactly the right index.

This is a problem in which the clear connection between the corrective disclosure and the prior misstatements makes it abundantly clear that there is simply no way that you can get away from the fact

there is a significant connection between the corrective disclosure and the drop in stock price.

How much, what the quantification of that is, is something that is obviously left to trial.

I'm not going to stand here and tell you that she [98] calculated, or that I can calculate right now, exactly what percentage of the decline—

THE COURT: I understand. I'm not requiring it.

MR. BOIES: But the significant—the fact that there was a significant decline, I think is apparent from the record.

Thank you.

THE COURT: All right. Thank you.

All right. To the extent you all are celebrating a holiday this weekend, I wish you all a very happy holiday. I thank you for the very fine argument.

MR. WILLIAMS: All rise.

[99] CERTIFCATE:

I, P. Sue Engledow RPR/CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 25th day of March, 2007.

P. SUE ENGLEDOW RPR/CSR No. 1170
Official Court Reporter
The Northern District of Texas
Dallas Division

My CSR license expires: December 31, 2007

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., *et al.*, On Behalf of Itself and All Others Similarly Situated,

Lead Plaintiff,

v.

HALLIBURTON COMPANY, *et al.*,

Defendants.

ORDER

Before the Court are the Motion to Strike the Report of Jane Nettesheim and the Motion to Strike the Expert Report of Lucy Allen. For the reasons stated on the record at the March 21, 2008, hearing, both Motions are DENIED. The Court will consider arguments about Daubert and Federal Rule of Evidence 702 when ruling on the issues of class certification and loss causation.

SO ORDERED.

DATED: March 25, 2008.

/s/
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

SUPPLEMENTAL APPENDIX

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL JOINT APPENDIX

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January 13, 2014

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 2013
CERTIORARI GRANTED NOVEMBER 15, 2013

TABLE OF CONTENTS

Page

Exhibits To Lead Plaintiff's Motion For Class Certification And Incorporated Memorandum Of Points And Authorities In Support Thereof In The United States District Court Northern District Of Texas Dallas Division Filed September 17, 2007:

Exhibit 1 ..... SA1
Exhibit 2 ..... SA7
Exhibit 3 ..... SA9
Exhibit 4 ..... SA28
Exhibit 5 ..... SA33
Exhibit 6 ..... SA35
Exhibit 7 ..... SA45
Exhibit 8 ..... SA47
Exhibit 9 ..... SA49
Exhibit 10 ..... SA52
Exhibit 11 ..... SA54
Exhibit 12 ..... SA70
Exhibit 13 ..... SA87
Exhibit 14 ..... SA89
Exhibit 15 ..... SA91
Exhibit 16 ..... SA93
Exhibit 17 ..... SA96
Exhibit 18 ..... SA110

Excerpts From Appendix To Defendants' Response To Lead Plaintiff's Motion For Class Certification In The United States District Court For The Northern District Of Texas Dallas Division Dated November 16, 2007:

Exhibit 11 ..... SA454
Exhibit 12 ..... SA464
Exhibit 13 ..... SA467
Exhibit 14 ..... SA471

TABLE OF CONTENTS—Continued

Page

Exhibit 15 ..... SA475

Exhibit 16 ..... SA478

Exhibit 17 ..... SA482

Exhibit To Lead Plaintiff's Reply In Support Of Its Motion For Class Certification In The United States Court For The Northern District Of Texas Dated December 21, 2007 ..... SA486

Exhibit 1

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PROFESSIONAL BACKGROUND

Stanford Consulting Group, Inc.
Vice President

Economic consultant and testifying expert specializing in finance, intellectual property and insurance economics. Project experience includes:

Cost of capital and required underwriting margin analyses for property/casualty insurers in various states for use in regulatory hearings into appropriate insurer profitability levels in those states.

Study of economic market structure of workers' compensation insurance and analysis of various rating laws.

Analysis of economic damages alleged in numerous class actions as a result of alleged misrepresentation and fraud.

Analysis of economic damages suffered by parties to business litigation involving issues related to product liability, fraud, wrongful contract termination, unfair competition, and business valuation.

Numerous analyses of economic damages to various involved parties in wrongful death litigation, personal injury litigation, and wrongful termination litigation.

Study of auto physical damage and small group health insurance futures proposed for trading by the Chicago Board of Trade, including analysis of the impact of trading in insurance futures on auto and health insurance industry market structure.

Examination of financial structures of holding companies of savings and loan associations and investment portfolios of savings and loan associations.

Analysis of high-yield debt securities, including examination of financial statements, securities' prospectuses and related filings. Performed valuation analyses of below investment grade debt securities.

Analysis of lost revenues and profits in cases of alleged patent infringement and anti-competitive market behavior. Analyses included definition of relevant markets, examination of product differentiation, and appropriate allocation of costs.

Analysis of merger and acquisition issues of an attempted takeover by large foreign interests of foreign company which owns major U.S. property and casualty insurer; including analysis of risk of insurer's investment portfolio, consequences of the proposed altering of that portfolio into riskier stock and equity securities, and appropriate financial structure of an insurance company.

Development and application of economic theory and technology to calculate damages in several large securities litigation cases. The technology incorporates timing of information releases, materiality of information, class period, class certification, trading behavior, and extent of damages.

Numerous analyses of damages incurred by alleged environmental hazards incorporating past costs and estimates of future costs of maintaining and abating the hazard. Development of econometric models used to estimate change in real asset values due to presence of alleged environmental hazard.

University of San Francisco
Visiting Lecturer of Corporate Finance in M.B.A. program.

London Business School
Course Tutor for Executive Courses on Securities and International Finance. Involved in various consulting projects.

Applied option pricing theory in pricing interest rate swaps. Applied duration and immunization concepts to constructing and hedging a portfolio of interest rate swaps.

Performed cost of capital analysis for a very large and diversified corporation for use in estimating appropriate share price when privatized by the British government.

Analysis of the risk characteristics of an internationally diversified stock portfolio.

City University of London
Visiting Lecturer of Corporate Finance in M.B.A. program.

Institute of Monetary and Banking Studies, Geneva
Course Tutor for Executive Courses on Securities and Portfolio Management.

University of Hawaii
Visiting Lecturer of Managerial Economics, undergraduate.

Bank of Honolulu
Bank operations officer.

United Bank of Boulder
Bank operations supervisor.

EDUCATION

London Business School
Completed coursework requirements in program for Ph.D. in finance, 1986-89.

University of Hawaii
M.B.A., 1985.
Beta Gamma Sigma.

University of Colorado
B.A. in biology, 1978.

MONOGRAPHS

"Report on the Medical Malpractice Insurance Delivery System in Pennsylvania" with Hofflander, A.E. and Nye, B.F., 47 pp. (2001).

"White Paper -- Small Group Health Insurance Futures," with Hofflander, A.E. and Nye, B.F. Chicago Board of Trade, Chicago, 75 pp. (1991).

"White Paper -- Auto Physical Damage Insurance Futures," with Hofflander, A.E., Nye, B.F. and Charlesworth, L.B. Chicago Board of Trade, Chicago, 92 pp. (1991).

PRESENTATIONS

"The Medical Malpractice Insurance Delivery System in Pennsylvania," with Alfred E. Hofflander. Presented in January 2002 in Harrisburg, PA.

"A Comparative Evaluation of Workers' Compensation Rating Laws," with Alfred E. Hofflander and Blaine F. Nye. Presented in August 1992 at the American Risk and Insurance Association Annual Meeting in Washington D.C..

"Hedging Risk with Small Group Health Insurance Futures," with Alfred E. Hofflander and Blaine F. Nye. Presented in June 1991 at the International Insurance Society in San Francisco, California.

"The Impact of Insurance Futures on the Insurance Cash Market," with Alfred E. Hofflander and Blaine F. Nye. Presented in April 1991 at the Risk Theory Seminar at Pennsylvania State University.

"From Three Flowers to Allstate: Evolution of Income Taxation of Captive Insurers," with Alfred E. Hofflander, Blaine F. Nye and M. Rose Kelly. Presented in August 1990 at the American Risk and Insurance Association Annual Meeting in Orlando, Florida.

Testimony of Jane D. Nettesheim

September 11, 2007

Dal B. Garung v. Sheila H. Tsang and Bonnie G. Tsang, Superior Court of the State of California, County of San Francisco, Case No. CGC-06-452511, June 19, 2007 (deposition).

Matthew Serino, et al., v. Kenneth Lipper, et al., Supreme Court of the State of New York, County of New York, Index No. 02/604396, Fredda Levitt, et al., v. Pricewaterhousecoopers, LLP, United States District Court, Southern District of New York, Civ. Action No. 04CV5179, May 23, 2007 (deposition).

Bernadette F. Abramson, et al., v. Gavilan Aviation, Inc., et al., Superior Court of the State of California, County of San Benito, Case No. CV060083, May 10, 2007 (deposition).

Terry Walker, Individually and On Behalf of All Others Similarly Situated, v. Rent-A-Center, Inc., et al., United States District Court, Eastern District of Texas, Texarkana Division, Case No. 5:02cv3 (DF), April 20, 2006 (deposition).

Sheldon Pekin, Independent Executor of the Estate of Joanne Pekin v. Evanston Northwestern Healthcare Corporation, et al., Circuit Court of Cook County, Illinois, No. 01 L 07946, February 17, 2006 (deposition), August 21, 2006 (deposition).

In Re Retek, Inc. Securities Litigation, United States District Court, District of Minnesota, Master File No. 0:02-CV-4209-JRT/SRN, October 6, 2005 (deposition).

Amber Lindsey v. Integrated Archive Systems, Superior Court of the State of California, County of Santa Clara, Case No. 104CV024249, October 4, 2005 (deposition).

Robert Mamon v. Children's Hospital of Oakland, et al., Superior Court of the State of California, County of Oakland, Northern Division, Case No. RG03091442, August 4, 2005 (deposition).

In Re GenesisIntermedia, Inc. Securities Litigation, United States District Court, District of Minnesota, Case No. 03-CV-3471 (RHK/AJB), May 3, 2005 (deposition).

In Re Paxil Products Liability Litigation, United States District Court for the Central District of California, Western Division, Master File No. CV 01-7937 MRP, March 29, 2005 (deposition).

Heidi Betz v. Trainer Wortham & Company, Inc., David P. Como, First Republic Bank, a Nevada Corp., and Robert Vile, United States District Court for the Northern District of California, San Francisco Division, Case No. C-03-3231-SI, February 8, 2005 (deposition).

Paul Vincent Dismukes, et al. v. Tony Y. Tam, Oak Valley Hospital, Oak Valley Hospital District, Superior Court of the State of California, County of Stanislaus, Case No. 339898, February 7, 2005 (deposition), February 9, 2005 (trial).

Kathleen Silva and Haley Silva v. Richard Lindsey, DBA Sunrise Dairy, and Foster Farms Dairy, Superior Court of the State of California, County of Alameda, Northern Division, Case No. 2001-023134, December 17, 2004 (deposition).

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In Re Homestore.com, Inc. Securities Litigation, United States District Court For The Central District of California, Western Division, Master File No. 01-CV-1115 MJP, May 6, 2004 (deposition).

David Del Castillo v. Melinar Express, Inc., San Joaquin County Superior Court, Case No. CV 019216, February 27, 2004 (deposition), April 1, 2004 (trial).

In Re Air Crash at Taipei, Taiwan, on October 31, 2000, United States District Court, Central District of California, MDL Docket No. 1394-GAF, September 3, 2003 (Diaz) (deposition), November 4, 2003 (Yeh) (deposition), May 11, 2004 (Peng) (deposition).

In Re First Alliance Mortgage Company, United States District Court, Central District of California, Case No. SA CV 01-971 DOC, December 17, 2002 (deposition), February 26, March 5 and 6, 2003 (trial).

William E. Elder, Jr. v. British Airways, PLC, United States District Court, Northern District of California, Case No. C-01-2811 SI (EMC), November 20, 2002 (deposition).

Elizabeth W. Vobach v. Goldman Sachs, & Co., et al., NYSE Arbitration Docket No. 2001-009311, July 8, 2002 (arbitration).

Susan Snyder v. Steven Tager, D.P.M., Santa Clara County Superior Court, Case No. CV 794642, April 2, 2002 (deposition), May 3, 2002 (trial).

Carl Miles v. Genie Industries, Inc., et al., United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:00CV1470 RWS, March 11, 2002 (deposition).

Barbara Briglio Finizio, et al. v. Harvest Inn, et al., Napa County Superior Court, Case No. 26-10314, February 22, 2002 (deposition).

Susie Low, et al. v. United Air Lines and The Boeing Company, Orange County Superior Court, Case No. 00CC06600, February 18, 2002 (deposition).

Estate of Kenneth W. Hinsel, et al. v. Raytheon Aircraft Company, United States District Court, District of Alaska, No. A99-0397 CV (JWS), August 31, 2001 (deposition).

Jeffrey R. Freund v. Nycomed Amersham, et al., United States District Court, Southern District of California, No. 99CV 2202IEG POR, April 6, 2001 (trial).

Barbara Porch v. General Motors Acceptance Corp., State of Minnesota, District Court, Fourth Judicial District, No. CT 97-7457, April 7, 2000 (deposition), July 27, 2000 (deposition).

William Dearmon v. Mercury Finance Company of Tennessee, Chancery Court of Williamson County, Tennessee, Case No. 24583, April 5, 2000 (deposition).

Paul C. Acree, et al. v. General Motors Acceptance Corporation, California Superior Court, Sacramento County, July 1995 (trial), December 1997 (reference process).

Charterhouse Realty Group, et al. v. Jones, Day, Reavis & Pogue, et al., California Superior Court, Los Angeles County, April 1996 (trial).

Exhibit 2

Exhibit 2

Halliburton Co. (HAL)
Document List

Document	Date
THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf of Itself and All Others Similarly Situated vs. HALLIBURTON COMPANY, et al., Fourth Consolidated Amended Complaint for Violation of the Securities Act of 1934	4/4/2006
Declaration of Scott D. Hakala in re: Halliburton Company Securities Litigation	8/16/2004
Complaint: SEC v. Halliburton Co., et al.	
Court Decision: Oscar Private Equity Investments v. Allegiance Telecom, Inc. C.A.5 (Tex.), 2007.	5/16/2007
Analyst Reports from Reuters Research	1998-2002
Analyst Reports from Thompson Financial	1998-2002
Daily Stock Price Data for Companies Considered for Industry Index from FactSet Research Systems, Inc.	1998-2002
Halliburton Conference Call Transcript from Counsel	4Q99
Halliburton Conference Call Transcript from Counsel	7/25/2000
Halliburton Conference Call Transcript from Counsel	4/26/2000
Halliburton Conference Call Transcript from Counsel	4/25/2001
Halliburton Conference Call Transcript from Counsel	7/26/2001
Halliburton Conference Call Transcript from Counsel	10/23/2001
Halliburton Press Releases from PR Newswires Association LLC.	1999-2001
Halliburton Short Interest from Bloomberg L.P.	1999-2001
Halliburton Stock Price, Volume, Capital Change, Dividends and Split Data from FactSet Research Systems, Inc.	1998-2002
Insider Trading Report from FactSet Research Systems, Inc.	1999-2002
Institutional Holdings Data from FactSet Research Systems, Inc.	3/99 - 3/02
Intraday Price, Volume, and Quote Data for Halliburton and Industry Competitors from TAQ	1998-2002
News Articles Relating to Halliburton from Factiva	1999-2002
News Articles Relating to Halliburton from WestLaw and Lexis Nexis provided from Counsel	1998-2001
SEC filings for Halliburton and Competitors including, 10Ks, 10Qs, 8Ks, Proxies, and Registration Statements from EDGAR	1995-2003

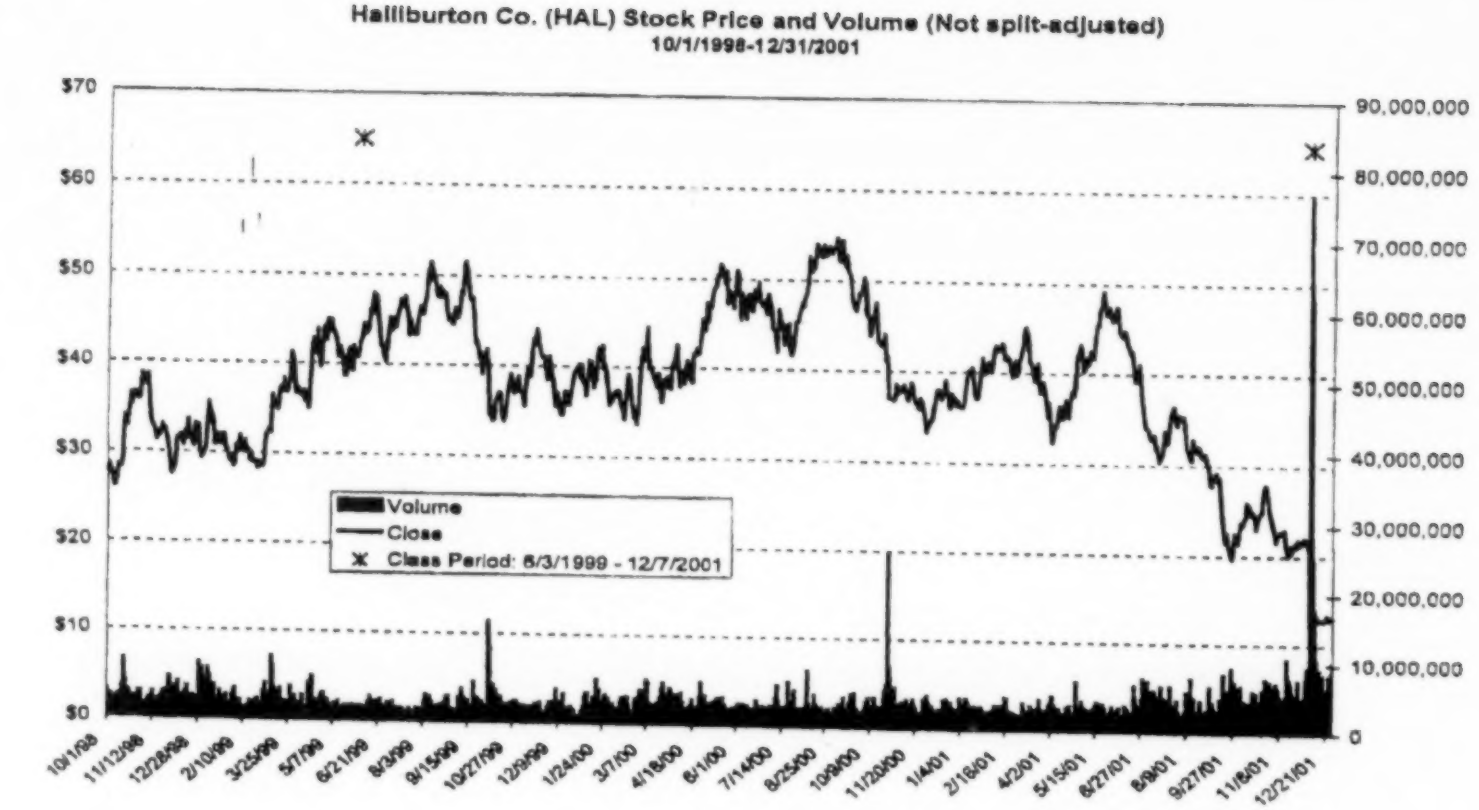
SA8

App. 114

USCAS 6971

Exhibit 3

Exhibit 3



Source: FactSet Research Systems, Inc.

[SCAS 6973]

Exhibit 3

Halliburton Co. (HAL)

Price and Volume Data 10/1/1998 - 12/31/2001 (Not Split-Adjusted)
Class Period: 6/3/1999 - 12/7/2001
Source: FactSet Research Systems, Inc.

Date	Volume	Close
10/1/1998	3,950,300	$27.7500
10/2/1998	3,185,800	$28.5000
10/5/1998	2,494,300	$27.5625
10/6/1998	3,295,700	$27.6875
10/7/1998	2,067,700	$26.1875
10/8/1998	2,788,300	$26.1875
10/9/1998	1,393,600	$27.1250
10/12/1998	3,180,900	$28.5000
10/13/1998	3,349,200	$28.1875
10/14/1998	3,255,800	$28.3125
10/15/1998	4,716,300	$29.9375
10/16/1998	8,526,000	$34.0000
10/19/1998	5,267,800	$33.7500
10/20/1998	3,543,800	$32.7500
10/21/1998	3,958,800	$34.5000
10/22/1998	3,578,100	$36.3750
10/23/1998	2,799,900	$35.1250
10/26/1998	2,417,400	$36.4375
10/27/1998	3,012,900	$36.5625
10/28/1998	2,625,300	$36.0000
10/29/1998	1,773,900	$35.7500
10/30/1998	3,775,500	$36.0000
11/2/1998	3,814,200	$38.5625
11/3/1998	1,979,500	$37.8125
11/4/1998	1,780,900	$37.4375
11/5/1998	1,583,400	$38.3750
11/6/1998	2,147,000	$38.5000
11/9/1998	2,485,900	$36.1875
11/10/1998	2,801,600	$33.8750
11/11/1998	2,867,800	$33.0625
11/12/1998	3,759,200	$32.7500
11/13/1998	2,643,500	$32.3125
11/16/1998	2,580,000	$31.3125
11/17/1998	2,126,200	$32.1875
11/18/1998	2,807,100	$31.7500
11/19/1998	1,644,300	$32.0000
11/20/1998	3,298,500	$33.0625
11/23/1998	3,748,800	$32.6875
11/24/1998	3,982,000	$32.5625
11/25/1998	2,362,900	$32.0625
11/27/1998	2,034,600	$31.1250
11/30/1998	6,024,400	$29.3750

Exhibit 3

Date	Volume	Close
12/1/1998	5,744,400	$27.6250
12/2/1998	3,954,300	$28.0000
12/3/1998	4,532,600	$28.3125
12/4/1998	3,181,300	$29.6875
12/7/1998	3,938,500	$31.6250
12/8/1998	5,181,500	$31.5625
12/9/1998	2,602,400	$31.8125
12/10/1998	3,011,100	$31.1875
12/11/1998	1,919,400	$30.7500
12/14/1998	3,367,700	$32.2500
12/15/1998	3,729,300	$31.5000
12/16/1998	4,675,500	$33.6250
12/17/1998	3,166,800	$31.7500
12/18/1998	2,709,500	$31.8125
12/21/1998	2,533,300	$31.0000
12/22/1998	3,234,600	$30.6250
12/23/1998	2,977,900	$33.1250
12/24/1998	959,300	$33.0000
12/28/1998	1,653,600	$32.9375
12/29/1998	8,155,800	$30.3750
12/30/1998	3,783,800	$29.3750
12/31/1998	7,334,300	$29.6250
1/4/1999	4,607,500	$30.1875
1/5/1999	2,810,900	$30.3750
1/6/1999	5,702,600	$32.6875
1/7/1999	7,333,700	$35.5000
1/8/1999	6,199,200	$34.3750
1/11/1999	4,605,100	$34.1250
1/12/1999	3,087,800	$33.2500
1/13/1999	4,917,800	$30.8125
1/14/1999	2,907,400	$31.0625
1/15/1999	1,776,000	$31.5625
1/19/1999	2,023,300	$32.0000
1/20/1999	4,103,200	$30.8125
1/21/1999	2,992,500	$31.6250
1/22/1999	2,651,400	$32.0000
1/25/1999	1,944,100	$30.5000
1/26/1999	3,488,500	$30.3125
1/27/1999	2,188,600	$29.3125
1/28/1999	2,216,900	$29.0625
1/29/1999	2,287,800	$29.6875
2/1/1999	3,298,100	$28.5000
2/2/1999	4,099,500	$28.7500
2/3/1999	4,434,200	$30.7500
2/4/1999	2,417,900	$30.0000
2/5/1999	2,759,400	$31.0000
2/8/1999	2,604,800	$31.8125
2/9/1999	1,515,300	$30.5000
2/10/1999	1,614,400	$30.0625
2/11/1999	1,330,300	$31.3125

Exhibit 3

Date	Volume	Close
2/12/1999	1,412,500	$30.3125
2/16/1999	1,777,700	$30.2500
2/17/1999	1,752,900	$29.0625
2/18/1999	2,565,200	$29.9375
2/19/1999	1,895,800	$28.8750
2/22/1999	1,640,600	$28.9375
2/23/1999	2,466,900	$29.0625
2/24/1999	2,794,300	$28.2500
2/25/1999	2,925,100	$28.9375
2/26/1999	2,082,300	$28.5000
3/1/1999	1,358,100	$28.4375
3/2/1999	1,120,400	$28.6875
3/3/1999	4,009,200	$30.4219
3/4/1999	5,146,300	$32.0625
3/5/1999	3,632,400	$32.2500
3/8/1999	2,870,800	$32.6250
3/9/1999	2,997,500	$32.2500
3/10/1999	9,072,000	$36.4375
3/11/1999	7,761,300	$35.1250
3/12/1999	4,479,700	$35.7500
3/15/1999	2,125,000	$35.8125
3/16/1999	2,040,900	$34.8750
3/17/1999	4,258,900	$37.1250
3/18/1999	4,470,500	$37.3750
3/19/1999	2,743,200	$36.8750
3/22/1999	2,235,300	$38.2500
3/23/1999	2,569,800	$37.5000
3/24/1999	2,285,200	$36.7500
3/25/1999	2,271,700	$37.5000
3/26/1999	2,537,800	$38.1250
3/29/1999	4,654,100	$41.1875
3/30/1999	3,194,100	$40.3750
3/31/1999	2,659,100	$38.5000
4/1/1999	3,314,400	$36.6250
4/5/1999	2,460,700	$37.2500
4/6/1999	2,044,200	$36.8750
4/7/1999	2,288,500	$36.5000
4/8/1999	2,104,000	$36.3125
4/9/1999	3,459,800	$36.9375
4/12/1999	1,898,600	$35.7500
4/13/1999	1,453,800	$36.7500
4/14/1999	1,733,200	$35.0000
4/15/1999	5,266,600	$37.6875
4/16/1999	5,443,200	$41.3750
4/19/1999	6,398,400	$42.8750
4/20/1999	2,840,400	$41.1250
4/21/1999	2,705,000	$41.3750
4/22/1999	2,909,300	$43.8750
4/23/1999	2,094,800	$41.1875
4/26/1999	1,454,600	$39.6250

Exhibit 3

Date	Volume	Close
4/27/1999	3,391,500	$40.7500
4/28/1999	3,783,400	$43.8750
4/29/1999	3,892,000	$44.2500
4/30/1999	2,110,900	$42.6250
5/3/1999	3,078,400	$45.0000
5/4/1999	2,803,700	$44.0000
5/5/1999	2,373,300	$44.8750
5/6/1999	2,025,600	$43.5000
5/7/1999	1,992,200	$43.6250
5/10/1999	2,484,000	$43.1250
5/11/1999	1,930,300	$42.3125
5/12/1999	2,152,600	$40.7500
5/13/1999	2,815,300	$41.8125
5/14/1999	1,842,400	$41.1250
5/17/1999	1,450,800	$40.6250
5/18/1999	1,816,700	$38.6250
5/19/1999	2,193,900	$39.0000
5/20/1999	2,019,600	$40.2500
5/21/1999	2,069,600	$41.7500
5/24/1999	1,752,200	$39.8750
5/25/1999	2,070,500	$39.2500
5/26/1999	2,330,400	$42.0000
5/27/1999	2,121,800	$41.3125
5/28/1999	1,214,700	$41.3750
6/1/1999	1,330,300	$40.7500
6/2/1999	1,777,500	$41.5000
6/3/1999	2,127,100	$42.8750
6/4/1999	1,354,200	$43.0000
6/7/1999	2,117,300	$44.4375
6/8/1999	1,801,800	$43.4375
6/9/1999	1,459,100	$43.5000
6/10/1999	1,452,600	$43.8750
6/11/1999	2,657,500	$46.0625
6/14/1999	3,579,100	$46.1875
6/15/1999	2,880,000	$47.9375
6/16/1999	2,611,200	$45.6875
6/17/1999	2,358,800	$47.6250
6/18/1999	2,918,300	$45.8750
6/21/1999	1,407,300	$43.8125
6/22/1999	2,232,800	$42.0625
6/23/1999	3,098,200	$42.1875
6/24/1999	2,309,500	$41.1250
6/25/1999	2,069,600	$40.3750
6/28/1999	2,123,900	$41.6250
6/29/1999	1,512,500	$43.3750
6/30/1999	2,675,100	$45.2500
7/1/1999	2,050,100	$43.7500
7/2/1999	1,046,900	$44.5000
7/6/1999	2,841,600	$45.2500
7/7/1999	1,648,500	$44.1250

Exhibit 3

Date	Volume	Close
7/8/1999	1,942,200	$45.6875
7/9/1999	1,311,700	$45.9375
7/12/1999	1,397,600	$47.2500
7/13/1999	1,948,400	$46.5000
7/14/1999	1,805,000	$47.1875
7/15/1999	1,801,900	$47.5625
7/16/1999	1,057,900	$46.5000
7/19/1999	914,200	$45.7500
7/20/1999	1,349,400	$43.3125
7/21/1999	1,869,500	$44.8375
7/22/1999	1,272,300	$44.0000
7/23/1999	1,419,200	$44.0625
7/26/1999	991,400	$43.3125
7/27/1999	1,234,600	$43.5625
7/28/1999	1,992,800	$45.4375
7/29/1999	1,940,100	$46.5000
7/30/1999	1,308,100	$46.1250
8/2/1999	1,813,000	$45.7500
8/3/1999	1,619,000	$46.8125
8/4/1999	2,756,700	$47.7500
8/5/1999	3,880,300	$50.5000
8/6/1999	2,916,300	$49.3125
8/9/1999	3,692,300	$51.4375
8/10/1999	3,468,100	$50.2500
8/11/1999	2,748,500	$50.0000
8/12/1999	1,841,300	$49.1250
8/13/1999	2,160,300	$47.9375
8/16/1999	1,562,800	$47.6250
8/17/1999	2,376,300	$48.7500
8/18/1999	1,846,300	$47.5625
8/19/1999	2,556,400	$48.3750
8/20/1999	1,971,000	$48.0000
8/23/1999	2,406,700	$48.0000
8/24/1999	2,742,000	$46.5000
8/25/1999	3,400,300	$45.0000
8/26/1999	3,771,600	$45.1875
8/27/1999	1,295,800	$45.4375
8/30/1999	1,494,400	$44.6250
8/31/1999	1,876,900	$46.3750
9/1/1999	1,616,000	$45.9375
9/2/1999	1,111,000	$45.3125
9/3/1999	925,400	$46.0000
9/7/1999	3,508,500	$48.3125
9/8/1999	2,419,100	$47.8750
9/9/1999	4,705,100	$50.7500
9/10/1999	3,499,300	$51.4375
9/13/1999	2,239,400	$50.3125
9/14/1999	2,550,100	$49.0625
9/15/1999	3,145,000	$47.3750
9/16/1999	1,902,400	$47.5625

Exhibit 3

Date	Volume	Close
9/17/1999	1,777,700	$47.5000
9/20/1999	2,223,400	$45.0000
9/21/1999	5,839,200	$42.5000
9/22/1999	3,772,500	$42.7500
9/23/1999	2,461,500	$42.1250
9/24/1999	3,489,000	$40.6875
9/27/1999	2,169,100	$41.4375
9/28/1999	3,145,000	$39.0625
9/29/1999	2,936,600	$40.7500
9/30/1999	2,304,000	$41.0000
10/1/1999	1,586,800	$41.8125
10/4/1999	1,524,000	$39.7500
10/5/1999	14,721,200	$34.5000
10/6/1999	10,898,900	$35.4375
10/7/1999	4,928,100	$33.9375
10/8/1999	5,444,000	$34.1250
10/11/1999	4,288,600	$38.1875
10/12/1999	4,703,100	$38.6875
10/13/1999	3,337,600	$37.0625
10/14/1999	2,208,200	$36.7500
10/15/1999	3,823,400	$34.6250
10/18/1999	2,471,100	$33.8750
10/19/1999	2,035,400	$34.4375
10/20/1999	2,720,200	$35.7500
10/21/1999	2,307,300	$37.2500
10/22/1999	2,344,400	$38.6250
10/25/1999	2,627,300	$39.0000
10/26/1999	2,857,200	$38.3125
10/27/1999	2,854,700	$37.0000
10/28/1999	3,188,700	$37.0625
10/29/1999	2,745,900	$37.6875
11/1/1999	3,168,300	$38.7500
11/2/1999	1,612,200	$37.1875
11/3/1999	2,571,000	$37.1875
11/4/1999	1,332,500	$36.7500
11/5/1999	2,629,800	$35.5625
11/8/1999	1,999,900	$37.7500
11/9/1999	2,511,500	$39.3750
11/10/1999	2,417,900	$39.8750
11/11/1999	2,138,200	$38.8750
11/12/1999	2,237,000	$41.6875
11/15/1999	2,487,800	$43.0000
11/16/1999	2,387,300	$42.5625
11/17/1999	2,822,300	$44.1250
11/18/1999	1,996,600	$42.8125
11/19/1999	2,226,300	$42.0625
11/22/1999	3,079,600	$41.3125
11/23/1999	1,721,400	$40.9375
11/24/1999	1,491,100	$41.0625
11/26/1999	593,200	$40.0625

Exhibit 3

Date	Volume	Close
11/29/1999	1,557,800	$38.5625
11/30/1999	2,307,000	$38.6250
12/1/1999	1,944,400	$41.1250
12/2/1999	3,109,900	$39.5000
12/3/1999	1,844,000	$38.4375
12/6/1999	2,434,700	$37.0625
12/7/1999	3,184,200	$35.5625
12/8/1999	4,884,500	$37.0000
12/9/1999	3,245,600	$36.1250
12/10/1999	2,268,400	$34.9375
12/13/1999	2,040,600	$34.5625
12/14/1999	2,836,100	$35.0625
12/15/1999	4,228,700	$37.1875
12/16/1999	2,201,300	$37.1250
12/17/1999	2,261,300	$36.7500
12/20/1999	1,305,800	$35.7500
12/21/1999	1,865,900	$37.1875
12/22/1999	2,551,200	$38.3125
12/23/1999	1,674,100	$39.3125
12/27/1999	1,985,700	$39.5000
12/28/1999	1,072,300	$39.8750
12/29/1999	1,130,800	$40.2500
12/30/1999	773,200	$38.7500
12/31/1999	805,900	$40.2500
1/3/2000	1,745,100	$38.3125
1/4/2000	2,484,100	$38.5000
1/5/2000	3,762,300	$36.8125
1/6/2000	4,434,300	$38.3125
1/7/2000	4,368,700	$40.6875
1/10/2000	2,720,500	$39.0625
1/11/2000	2,876,000	$40.5000
1/12/2000	2,920,300	$37.7500
1/13/2000	3,852,600	$38.2500
1/14/2000	3,541,500	$38.5625
1/18/2000	6,354,200	$41.6875
1/19/2000	3,856,000	$42.1875
1/20/2000	4,899,000	$40.8125
1/21/2000	3,227,800	$42.3750
1/24/2000	3,026,100	$39.6750
1/25/2000	2,874,000	$40.0000
1/26/2000	4,110,400	$38.6875
1/27/2000	3,352,000	$37.5000
1/28/2000	3,666,700	$35.8125
1/31/2000	2,967,700	$36.1250
2/1/2000	2,995,800	$36.3750
2/2/2000	3,056,700	$37.1250
2/3/2000	2,135,900	$37.3750
2/4/2000	2,338,100	$36.8125
2/7/2000	1,941,700	$37.3750
2/8/2000	2,279,800	$36.8750

Exhibit 3

Date	Volume	Close
2/9/2000	3,264,400	$35.5000
2/10/2000	3,803,200	$35.4375
2/11/2000	3,103,600	$34.2500
2/14/2000	3,095,600	$35.9375
2/15/2000	3,989,300	$38.5000
2/16/2000	3,824,200	$39.1250
2/17/2000	2,701,500	$38.5000
2/18/2000	1,796,900	$36.6875
2/22/2000	1,893,100	$35.5000
2/23/2000	1,844,400	$34.3125
2/24/2000	3,161,600	$35.4375
2/25/2000	3,724,000	$33.6875
2/28/2000	2,634,700	$35.0000
2/29/2000	3,912,100	$38.1875
3/1/2000	4,952,600	$40.9375
3/2/2000	4,768,100	$42.1875
3/3/2000	3,880,700	$40.8750
3/6/2000	2,872,700	$41.2500
3/7/2000	6,504,100	$44.5000
3/8/2000	5,965,000	$39.8750
3/9/2000	3,038,500	$40.1250
3/10/2000	2,182,400	$39.5625
3/13/2000	2,587,400	$38.8750
3/14/2000	2,894,500	$38.4375
3/15/2000	1,718,300	$37.8750
3/16/2000	3,031,200	$39.3750
3/17/2000	3,231,500	$38.3750
3/20/2000	3,868,100	$36.1875
3/21/2000	5,147,100	$37.5000
3/22/2000	6,013,500	$38.6875
3/23/2000	4,305,600	$37.8750
3/24/2000	3,593,600	$39.0000
3/27/2000	3,490,500	$38.1250
3/28/2000	5,176,000	$37.6875
3/29/2000	4,944,700	$40.2500
3/30/2000	4,372,300	$40.5625
3/31/2000	2,498,800	$41.1250
4/3/2000	2,452,800	$42.5000
4/4/2000	4,340,700	$40.0000
4/5/2000	2,697,300	$38.0000
4/6/2000	3,241,300	$39.1875
4/7/2000	4,632,400	$39.8250
4/10/2000	3,265,200	$38.3125
4/11/2000	2,448,100	$40.1875
4/12/2000	2,172,000	$40.8125
4/13/2000	2,217,800	$39.3125
4/14/2000	2,603,600	$38.8750
4/17/2000	2,843,900	$38.4375
4/18/2000	3,619,400	$41.6875
4/19/2000	2,602,000	$41.4375

Exhibit 3

Date	Volume	Close
4/20/2000	2,501,500	$42.2500
4/24/2000	2,149,100	$41.6250
4/25/2000	2,772,700	$41.7500
4/26/2000	4,061,900	$43.6250
4/27/2000	6,211,200	$45.5000
4/28/2000	2,726,800	$44.1875
5/1/2000	2,564,600	$44.2500
5/2/2000	4,271,000	$47.3750
5/3/2000	3,227,100	$45.2500
5/4/2000	2,462,900	$47.0000
5/5/2000	2,919,400	$46.8750
5/8/2000	3,223,000	$48.3750
5/9/2000	2,845,900	$48.9375
5/10/2000	3,447,500	$49.1875
5/11/2000	3,282,700	$50.3750
5/12/2000	3,716,800	$50.0859
5/15/2000	3,953,300	$51.5625
5/16/2000	3,477,600	$51.5000
5/17/2000	4,051,700	$51.0000
5/18/2000	4,052,000	$49.6250
5/19/2000	2,898,600	$50.8750
5/22/2000	2,964,900	$47.3750
5/23/2000	2,154,900	$48.7500
5/24/2000	2,451,600	$48.5000
5/25/2000	2,107,200	$48.3125
5/26/2000	1,090,200	$48.8750
5/30/2000	2,695,300	$49.0000
5/31/2000	2,626,300	$50.9375
6/1/2000	2,617,800	$50.7500
6/2/2000	3,156,000	$48.2500
6/5/2000	3,201,300	$45.5625
6/6/2000	2,809,400	$48.5000
6/7/2000	2,133,400	$47.5000
6/8/2000	3,202,100	$46.6250
6/9/2000	2,567,000	$45.6875
6/12/2000	2,181,600	$48.3125
6/13/2000	2,982,400	$48.4375
6/14/2000	1,868,800	$47.6875
6/15/2000	2,486,200	$48.5000
6/16/2000	2,485,700	$48.9375
6/19/2000	1,916,800	$48.0000
6/20/2000	2,519,600	$47.6875
6/21/2000	3,680,800	$49.7500
6/22/2000	2,867,100	$47.5625
6/23/2000	1,719,000	$47.5625
6/26/2000	2,061,600	$47.0625
6/27/2000	2,896,700	$47.6875
6/28/2000	2,537,600	$46.1875
6/29/2000	2,767,400	$48.4375
6/30/2000	2,488,900	$47.1875

Exhibit 3

Date	Volume	Close
7/3/2000	481,800	$46.9375
7/5/2000	2,991,700	$44.5625
7/6/2000	2,741,600	$44.4375
7/7/2000	2,484,000	$43.6875
7/10/2000	4,095,200	$42.0000
7/11/2000	5,876,700	$48.7500
7/12/2000	3,642,800	$45.9375
7/13/2000	2,495,300	$45.3125
7/14/2000	2,312,200	$44.8125
7/17/2000	2,680,700	$42.8750
7/18/2000	2,921,600	$44.8750
7/19/2000	1,671,500	$44.9375
7/20/2000	2,014,400	$45.1250
7/21/2000	6,383,100	$42.2500
7/24/2000	2,631,600	$41.6875
7/25/2000	3,464,700	$42.2500
7/26/2000	3,068,100	$43.5625
7/27/2000	5,171,000	$45.3750
7/28/2000	2,194,900	$45.4375
7/31/2000	2,241,200	$46.1250
8/1/2000	2,656,600	$46.8125
8/2/2000	2,763,900	$47.5625
8/3/2000	2,726,700	$47.1250
8/4/2000	2,728,800	$48.2500
8/7/2000	2,029,700	$48.6875
8/8/2000	3,249,600	$49.8125
8/9/2000	8,175,100	$52.6250
8/10/2000	3,280,900	$52.1250
8/11/2000	2,034,700	$51.0000
8/14/2000	2,803,000	$52.2500
8/15/2000	2,115,400	$51.4375
8/16/2000	4,677,300	$54.0000
8/17/2000	3,153,000	$53.7500
8/18/2000	2,585,400	$52.6875
8/21/2000	1,837,100	$53.4375
8/22/2000	2,687,700	$52.5625
8/23/2000	2,898,600	$53.8750
8/24/2000	1,616,700	$53.1250
8/25/2000	1,554,000	$52.6875
8/28/2000	2,168,500	$53.6250
8/29/2000	2,617,200	$53.7500
8/30/2000	2,619,300	$53.0625
8/31/2000	1,983,400	$53.0000
9/1/2000	837,600	$53.6250
9/5/2000	1,905,400	$53.6250
9/6/2000	2,821,400	$54.6875
9/7/2000	1,468,100	$53.4375
9/8/2000	1,850,200	$52.0625
9/11/2000	3,331,300	$54.2500
9/12/2000	2,529,200	$54.3750

Exhibit 3

Date	Volume	Close
9/13/2000	1,806,100	$52.1875
9/14/2000	4,278,100	$51.5000
9/15/2000	2,626,500	$52.6875
9/18/2000	1,688,000	$51.0000
9/19/2000	2,081,800	$50.5625
9/20/2000	3,720,400	$48.6250
9/21/2000	4,869,300	$47.5625
9/22/2000	2,586,100	$47.0625
9/25/2000	5,007,100	$46.7500
9/26/2000	1,915,500	$47.6250
9/27/2000	2,851,200	$48.6875
9/28/2000	1,811,200	$48.6250
9/29/2000	2,122,500	$48.9375
10/2/2000	2,320,700	$50.3750
10/3/2000	1,997,200	$49.6250
10/4/2000	2,721,900	$46.3750
10/5/2000	3,790,000	$46.2500
10/6/2000	4,358,100	$43.9375
10/9/2000	2,971,500	$44.3750
10/10/2000	2,527,800	$46.0000
10/11/2000	2,443,600	$46.4375
10/12/2000	4,378,700	$47.6250
10/13/2000	3,124,600	$45.2500
10/16/2000	2,928,800	$43.1875
10/17/2000	2,906,200	$43.3750
10/18/2000	3,153,800	$42.8750
10/19/2000	2,805,100	$42.8125
10/20/2000	3,026,700	$44.0625
10/23/2000	5,307,800	$41.1875
10/24/2000	6,252,200	$41.6250
10/25/2000	25,345,200	$37.0625
10/26/2000	8,901,500	$37.1250
10/27/2000	5,615,600	$37.0000
10/30/2000	5,936,500	$36.7500
10/31/2000	4,845,500	$37.0625
11/1/2000	5,854,600	$38.5625
11/2/2000	3,270,300	$37.6875
11/3/2000	3,399,100	$37.6875
11/6/2000	3,569,500	$38.2500
11/7/2000	3,838,200	$38.0000
11/8/2000	3,189,200	$38.5000
11/9/2000	3,767,900	$37.9375
11/10/2000	2,710,800	$37.1250
11/13/2000	4,237,300	$38.7500
11/14/2000	3,065,800	$37.8250
11/15/2000	3,537,200	$38.7500
11/16/2000	3,303,500	$38.1875
11/17/2000	4,316,800	$37.1875
11/20/2000	3,381,300	$36.5000
11/21/2000	2,995,900	$36.3125

Exhibit 3

Date	Volume	Close
11/22/2000	2,259,100	$35.8750
11/24/2000	920,100	$37.0000
11/27/2000	1,630,100	$36.6875
11/28/2000	2,461,400	$35.8125
11/29/2000	4,147,200	$34.7500
11/30/2000	4,437,200	$33.3750
12/1/2000	4,744,100	$33.8750
12/4/2000	3,779,200	$34.1875
12/5/2000	2,786,800	$34.6875
12/6/2000	3,401,100	$34.7500
12/7/2000	3,157,600	$35.8750
12/8/2000	2,428,500	$36.7500
12/11/2000	2,716,700	$37.9375
12/12/2000	1,730,700	$38.0625
12/13/2000	2,828,100	$37.6250
12/14/2000	2,612,100	$36.9375
12/15/2000	2,810,300	$37.2500
12/18/2000	4,179,600	$38.7500
12/19/2000	4,180,700	$39.0625
12/20/2000	4,414,400	$37.7500
12/21/2000	3,080,200	$37.0000
12/22/2000	3,002,500	$36.0000
12/26/2000	3,928,500	$37.6250
12/27/2000	2,351,900	$37.0000
12/28/2000	2,979,500	$37.1250
12/29/2000	2,811,200	$36.2500
1/2/2001	2,427,800	$36.8125
1/3/2001	2,989,200	$36.3125
1/4/2001	4,554,200	$36.1875
1/5/2001	2,984,800	$36.0625
1/8/2001	3,122,000	$36.5625
1/9/2001	3,805,700	$38.0625
1/10/2001	4,506,100	$39.3125
1/11/2001	3,902,100	$40.1250
1/12/2001	2,773,700	$40.0625
1/16/2001	2,879,500	$40.5625
1/17/2001	3,252,000	$39.0000
1/18/2001	3,405,500	$37.5625
1/19/2001	3,266,100	$37.1250
1/22/2001	1,794,700	$37.3125
1/23/2001	2,457,500	$38.6250
1/24/2001	3,319,800	$39.8125
1/25/2001	3,301,000	$41.6250
1/26/2001	2,812,900	$40.7500
1/29/2001	1,462,800	$39.9000
1/30/2001	1,931,900	$40.2600
1/31/2001	2,635,600	$41.1900
2/1/2001	1,834,400	$40.2000
2/2/2001	2,711,600	$40.1100
2/5/2001	2,521,500	$41.1000

Exhibit 3

Date	Volume	Close
2/6/2001	2,893,400	$42.6500
2/7/2001	3,563,100	$43.0000
2/8/2001	3,283,100	$42.8000
2/9/2001	1,815,300	$42.4700
2/12/2001	2,988,100	$42.6500
2/13/2001	3,469,000	$43.2500
2/14/2001	3,329,600	$43.1400
2/15/2001	3,177,400	$41.5300
2/16/2001	4,678,300	$41.9000
2/20/2001	4,636,300	$41.6900
2/21/2001	2,428,400	$41.5000
2/22/2001	2,759,900	$40.0800
2/23/2001	1,890,800	$39.5500
2/26/2001	2,641,300	$40.7600
2/27/2001	2,362,700	$41.4500
2/28/2001	2,299,000	$39.8200
3/1/2001	1,703,900	$40.2100
3/2/2001	2,173,800	$41.3200
3/5/2001	1,623,200	$42.1200
3/6/2001	2,407,600	$42.8500
3/7/2001	3,966,100	$44.7500
3/8/2001	3,101,000	$45.1600
3/9/2001	2,768,900	$44.5100
3/12/2001	2,526,500	$43.0600
3/13/2001	2,816,900	$41.1800
3/14/2001	3,596,200	$40.8600
3/15/2001	3,056,800	$39.9900
3/16/2001	2,877,700	$39.1000
3/19/2001	3,041,000	$40.6100
3/20/2001	3,145,200	$41.1000
3/21/2001	3,320,800	$38.7900
3/22/2001	4,495,900	$37.8600
3/23/2001	2,957,900	$38.8500
3/26/2001	2,664,700	$38.9700
3/27/2001	3,092,200	$38.0000
3/28/2001	2,857,600	$36.7900
3/29/2001	3,030,200	$35.1300
3/30/2001	3,686,300	$36.7500
4/2/2001	4,008,700	$34.2000
4/3/2001	5,114,000	$32.4100
4/4/2001	4,892,300	$32.8900
4/5/2001	3,789,800	$34.2500
4/6/2001	3,240,000	$34.1800
4/9/2001	2,201,100	$35.3900
4/10/2001	3,249,000	$36.4000
4/11/2001	2,600,200	$35.1800
4/12/2001	2,521,900	$35.0400
4/16/2001	2,235,800	$36.3000
4/17/2001	2,564,000	$37.1300
4/18/2001	3,500,200	$36.1300

Exhibit 3

Date	Volume	Close
4/19/2001	2,672,400	$35.2300
4/20/2001	3,761,100	$37.0300
4/23/2001	2,457,000	$38.0500
4/24/2001	2,373,300	$37.5600
4/25/2001	1,558,600	$38.6200
4/26/2001	7,227,700	$42.1300
4/27/2001	3,533,200	$42.1100
4/30/2001	2,793,800	$43.2100
5/1/2001	2,232,200	$42.4600
5/2/2001	4,331,900	$40.3000
5/3/2001	3,474,300	$40.5000
5/4/2001	3,244,900	$41.7600
5/7/2001	1,859,000	$41.0800
5/8/2001	2,048,200	$41.2300
5/9/2001	3,169,400	$42.5100
5/10/2001	2,191,600	$42.6000
5/11/2001	2,163,100	$41.7900
5/14/2001	3,406,000	$43.9500
5/15/2001	3,831,400	$45.3500
5/16/2001	4,259,400	$45.4100
5/17/2001	4,048,000	$47.3100
5/18/2001	3,780,500	$47.8100
5/21/2001	3,762,900	$49.2000
5/22/2001	4,019,000	$47.9900
5/23/2001	3,347,700	$46.6200
5/24/2001	2,488,800	$46.5900
5/25/2001	2,105,600	$47.5100
5/29/2001	2,037,800	$47.0500
5/30/2001	2,869,700	$45.9700
5/31/2001	3,660,300	$46.7400
6/1/2001	2,795,600	$46.1200
6/4/2001	3,036,100	$47.5100
6/5/2001	2,383,000	$47.4000
6/6/2001	3,261,700	$45.0000
6/7/2001	3,498,800	$44.4200
6/8/2001	1,502,800	$44.8000
6/11/2001	2,331,600	$44.0700
6/12/2001	2,063,800	$44.7700
6/13/2001	3,813,100	$44.3000
6/14/2001	3,303,100	$43.2700
6/15/2001	3,388,200	$43.1200
6/18/2001	1,924,800	$42.3900
6/19/2001	1,845,000	$42.5800
6/20/2001	2,738,600	$41.5000
6/21/2001	6,754,700	$39.2400
6/22/2001	5,103,100	$39.2600
6/25/2001	3,685,500	$39.5900
6/26/2001	3,756,700	$41.1300
6/27/2001	3,618,300	$38.6500
6/28/2001	4,739,300	$37.1700

Exhibit 3

Date	Volume	Close
6/29/2001	7,630,500	$35.6000
7/2/2001	5,892,700	$34.1500
7/3/2001	3,975,400	$34.0500
7/5/2001	7,347,000	$33.9400
7/6/2001	5,854,700	$33.1700
7/9/2001	4,116,200	$32.8000
7/10/2001	5,189,200	$33.2900
7/11/2001	6,043,100	$33.2200
7/12/2001	5,796,900	$31.7700
7/13/2001	4,963,000	$32.1500
7/16/2001	4,605,800	$30.4000
7/17/2001	5,059,600	$30.6600
7/18/2001	6,669,400	$31.0100
7/19/2001	4,260,000	$31.5600
7/20/2001	4,941,900	$33.7400
7/23/2001	3,236,300	$33.6400
7/24/2001	2,627,500	$32.4400
7/25/2001	4,537,000	$34.2500
7/26/2001	6,659,300	$35.5000
7/27/2001	3,532,000	$36.1000
7/30/2001	3,669,600	$36.4500
7/31/2001	2,901,200	$35.0100
8/1/2001	4,695,000	$34.4500
8/2/2001	3,049,700	$35.4900
8/3/2001	2,372,700	$35.1600
8/6/2001	1,729,200	$35.3000
8/7/2001	2,500,500	$35.3800
8/8/2001	2,953,200	$33.5000
8/9/2001	5,756,400	$32.0000
8/10/2001	5,404,200	$31.5000
8/13/2001	5,586,800	$30.8000
8/14/2001	7,851,800	$30.5400
8/15/2001	5,016,900	$32.8400
8/16/2001	4,973,500	$32.3000
8/17/2001	1,891,200	$31.9200
8/20/2001	1,783,800	$31.4800
8/21/2001	2,875,600	$32.0500
8/22/2001	4,648,000	$31.4400
8/23/2001	2,831,800	$30.8400
8/24/2001	2,611,400	$31.0800
8/27/2001	2,031,200	$31.3000
8/28/2001	3,249,800	$30.4500
8/29/2001	2,650,000	$30.1500
8/30/2001	6,568,100	$28.0000
8/31/2001	4,332,500	$27.8600
9/4/2001	4,349,900	$28.8600
9/5/2001	3,483,400	$29.0100
9/6/2001	3,102,000	$29.2100
9/7/2001	2,615,900	$28.2800
9/10/2001	2,375,700	$28.7300

Exhibit 3

Date	Volume	Close
9/17/2001	4,877,400	$26.6500
9/18/2001	4,361,400	$24.5000
9/19/2001	8,493,800	$22.6500
9/20/2001	5,912,400	$21.5600
9/21/2001	6,136,200	$22.5800
9/24/2001	5,241,400	$21.2000
9/25/2001	5,899,100	$20.0600
9/26/2001	9,319,500	$19.7000
9/27/2001	6,337,700	$20.9000
9/28/2001	7,327,100	$22.5500
10/1/2001	8,243,500	$21.9000
10/2/2001	3,802,800	$21.4200
10/3/2001	4,620,800	$22.3300
10/4/2001	6,777,900	$23.7500
10/5/2001	4,408,300	$23.3900
10/8/2001	4,648,400	$24.0000
10/9/2001	3,158,400	$24.2800
10/10/2001	4,041,000	$25.9500
10/11/2001	4,331,100	$25.7400
10/12/2001	3,980,400	$25.3400
10/15/2001	2,953,700	$24.5700
10/16/2001	6,101,600	$24.8700
10/17/2001	4,534,000	$24.3600
10/18/2001	5,742,700	$23.0500
10/19/2001	4,447,800	$24.0000
10/22/2001	3,601,500	$24.5500
10/23/2001	4,522,000	$24.8800
10/24/2001	6,229,800	$24.9500
10/25/2001	5,048,300	$27.3500
10/26/2001	7,776,600	$27.9200
10/29/2001	4,240,800	$27.8000
10/30/2001	4,798,200	$26.3500
10/31/2001	7,446,000	$24.6900
11/1/2001	6,659,800	$23.9800
11/2/2001	3,608,400	$23.3600
11/5/2001	5,190,300	$22.5900
11/6/2001	7,184,200	$21.7200
11/7/2001	6,431,300	$22.1500
11/8/2001	5,342,700	$22.7200
11/9/2001	4,779,100	$22.7600
11/12/2001	3,518,800	$22.7900
11/13/2001	3,939,600	$23.0000
11/14/2001	5,360,700	$21.6000
11/15/2001	10,773,000	$20.0500
11/16/2001	7,668,300	$20.2600
11/19/2001	7,189,000	$20.3500
11/20/2001	5,785,600	$21.3000
11/21/2001	3,880,000	$20.9000
11/23/2001	2,258,000	$21.4800
11/26/2001	5,448,000	$21.0900

Exhibit 3

Date	Volume	Close
11/27/2001	7,653,600	$21.8600
11/28/2001	4,822,300	$21.3100
11/29/2001	3,720,000	$21.7000
11/30/2001	3,429,700	$21.4300
12/3/2001	5,183,700	$22.0600
12/4/2001	7,705,900	$21.9000
12/5/2001	9,427,900	$22.0000
12/6/2001	7,512,700	$20.8500
12/7/2001	76,955,504	$12.0000
12/10/2001	62,095,200	$14.0000
12/11/2001	24,911,200	$14.0000
12/12/2001	18,156,000	$13.2700
12/13/2001	10,471,200	$13.3600
12/14/2001	8,576,000	$12.9900
12/17/2001	9,229,600	$12.8300
12/18/2001	7,327,600	$12.8300
12/19/2001	8,454,100	$12.8300
12/20/2001	6,382,500	$12.8200
12/21/2001	6,288,600	$13.0000
12/24/2001	4,069,100	$13.3400
12/26/2001	8,373,200	$12.9500
12/27/2001	7,812,900	$12.9800
12/28/2001	8,771,900	$13.1900
12/31/2001	10,215,900	$13.1000

Exhibit 4

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Halliburton Co. (HAL)

Weekly Trading Volume and Share Turnover

Week Ending	Number of Trading Days in Week	Volume of Shares Traded	Weekly Dollar Value of Trades [1]	Volume as % of Shares Outstanding
6/4/99	2	3,481,300	$149,430,013	0.79%
6/11/99	5	9,456,300	$421,967,975	2.15%
6/18/99	5	14,357,400	$669,363,119	3.26%
6/25/99	5	11,118,400	$494,880,269	2.52%
7/2/99	5	9,408,500	$411,339,225	2.14%
7/9/99	4	7,744,000	$350,312,944	1.76%
7/16/99	5	8,010,800	$378,705,856	1.82%
7/23/99	5	6,624,800	$302,798,894	1.68%
7/30/99	5	7,467,000	$337,820,888	1.69%
8/6/99	5	12,985,300	$630,131,806	2.94%
8/13/99	5	13,710,600	$686,807,950	3.11%
8/20/99	5	10,312,600	$496,361,469	2.34%
8/27/99	5	13,616,400	$625,345,186	3.08%
9/3/99	5	7,023,700	$320,874,425	1.59%
9/10/99	4	14,132,000	$704,097,888	3.20%
9/17/99	5	11,614,600	$561,702,119	2.63%
9/24/99	5	17,765,600	$758,142,750	4.03%
10/1/99	5	12,141,900	$483,212,189	2.75%
10/8/99	5	37,618,200	$1,307,714,063	8.50%
10/15/99	5	18,380,900	$664,975,069	4.16%
10/22/99	5	11,976,400	$427,549,125	2.69%
10/29/99	5	14,271,800	$539,148,260	3.23%
11/5/99	5	11,311,800	$420,748,513	2.56%
11/12/99	5	11,302,600	$447,100,013	2.56%
11/19/99	5	11,920,300	$512,242,025	2.70%
11/26/99	4	6,895,300	$282,869,186	1.56%
12/3/99	5	10,783,100	$422,683,788	2.44%
12/10/99	5	16,017,400	$566,700,206	3.63%
12/17/99	5	13,568,000	$496,586,063	3.09%
12/23/99	4	7,367,000	$279,626,413	1.67%
12/31/99	5	5,797,800	$228,106,788	1.31%
1/7/00	5	16,794,800	$648,637,263	3.80%
1/14/00	5	15,910,900	$618,919,900	3.60%
1/21/00	4	18,337,000	$764,264,175	4.15%

Shares Outstanding	
Date	Shares Outstanding
4/30/1999	440,998,000
7/30/1999	441,220,000
10/24/1999	441,754,000
4/30/2000	443,933,045
7/31/2000	445,531,000
10/31/2000	442,404,000
4/30/2001	429,084,000
7/31/2001	429,791,394
10/31/2001	429,381,251
4/24/2002	436,636,164
7/24/2002	436,381,938

Share Turnover during Class Period	
Class Period Total Volume	2,187,028,604
Time Period (yrs)	2.513
Turnover Compared to Shares Outstanding	202.7% [2]

Statistics for Weeks Fully Contained in Class Period			
	Weekly Volume of Shares Traded	Weekly Dollar Value of Trades	Weekly Volume as % of Shares Outstanding
Average	18,796,802	$823,166,937	3.85%
Minimum	5,797,800	$228,106,788	1.31%
Maximum	108,785,704	$1,956,436,463	24.87%
Total	2,183,645,304	$81,011,961,513	

[1] Dollar Value of Trades = Daily Closing Price x Daily Volume

Source: Factset Research Systems, Inc.

[2] Turnover Compared to Shares Outstanding is calculated as Class Period Total Volume divided by Shares Outstanding at end of Class Period (using 10/31/01) divided by Time Period (in years).

Source: Halliburton's SEC Forms 10-K and 10-Qs

Exhibit 4

Week Ending	Number of Trading Days in Week	Volume of Shares Traded	Weekly Dollar Value of Trades	Volume as % of Shares Outstanding
1/28/00	5	17,029,200	$851,660,531	3.55%
2/4/00	5	13,494,000	$695,583,669	3.05%
2/11/00	5	14,392,700	$813,699,083	3.26%
2/18/00	5	16,407,800	$884,389,519	3.48%
2/25/00	4	10,623,100	$567,982,475	2.40%
3/3/00	5	20,148,200	$804,132,713	4.55%
3/10/00	5	20,582,700	$854,046,713	4.65%
3/17/00	5	13,462,800	$520,285,444	3.05%
3/24/00	5	22,927,900	$869,885,400	5.19%
3/31/00	5	20,462,300	$807,284,556	4.64%
4/7/00	5	17,324,300	$689,418,194	3.92%
4/14/00	5	12,704,700	$500,447,581	2.88%
4/20/00	4	11,996,800	$473,704,694	2.82%
4/28/00	5	17,921,700	$785,516,975	4.06%
5/5/00	5	15,445,000	$714,451,625	3.48%
5/12/00	5	16,515,900	$810,293,189	3.72%
5/19/00	5	18,433,200	$936,121,906	4.15%
5/26/00	5	10,786,800	$517,323,338	2.43%
6/2/00	4	11,098,400	$550,977,206	2.50%
6/9/00	5	13,913,200	$650,029,588	3.13%
6/16/00	5	12,004,700	$576,229,194	2.70%
6/23/00	5	12,703,300	$613,408,006	2.86%
6/30/00	5	12,752,200	$603,666,738	2.87%
7/7/00	4	8,699,100	$388,281,719	1.96%
7/14/00	5	18,422,200	$830,768,994	4.15%
7/21/00	5	16,671,300	$661,740,619	3.53%
7/28/00	5	16,830,300	$724,107,400	3.72%
8/4/00	5	13,115,200	$618,289,268	2.94%
8/11/00	5	18,770,000	$966,892,969	4.21%
8/18/00	5	16,334,100	$813,833,860	3.44%
8/25/00	5	10,894,100	$563,367,600	2.38%
9/1/00	5	10,226,000	$545,883,419	2.30%
9/8/00	4	8,048,100	$431,250,018	1.81%
9/15/00	5	14,571,200	$771,206,986	3.27%
9/22/00	5	14,945,600	$725,887,875	3.36%
9/29/00	5	13,707,500	$656,064,856	3.08%
10/6/00	5	16,187,900	$709,015,944	3.41%
10/13/00	5	15,446,200	$711,837,925	3.47%
10/20/00	5	14,820,600	$641,220,463	3.33%
10/27/00	5	51,422,100	$1,956,456,463	11.54%
11/3/00	5	23,308,000	$874,873,744	5.27%
11/10/00	5	17,076,600	$648,752,351	3.86%

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Week Ending	Number of Trading Days in Week	Volume of Shares Traded	Weekly Dollar Value of Trades	Volume as % of Shares Outstanding
11/17/00	5	18,460,600	$884,821,406	4.17%
11/24/00	4	9,556,400	$347,284,981	2.16%
12/1/00	5	17,420,000	$600,966,319	3.94%
12/8/00	5	15,553,200	$546,583,025	3.52%
12/15/00	5	12,697,900	$476,514,656	2.87%
12/22/00	5	18,857,400	$713,859,094	4.26%
12/29/00	4	12,071,100	$447,350,050	2.73%
1/5/01	4	12,958,000	$470,363,178	2.93%
1/12/01	5	18,109,600	$703,841,756	4.09%
1/19/01	4	12,603,100	$492,800,773	2.85%
1/26/01	5	13,585,700	$546,077,056	3.09%
2/2/01	5	10,879,300	$427,209,834	2.39%
2/9/01	5	14,076,400	$597,662,831	3.18%
2/16/01	5	17,642,400	$749,093,851	3.99%
2/23/01	4	11,718,400	$479,493,878	2.65%
3/2/01	5	11,180,700	$466,474,716	2.53%
3/9/01	5	13,866,500	$612,302,716	3.13%
3/16/01	5	14,874,100	$606,491,266	3.36%
3/23/01	5	16,960,800	$686,705,751	3.83%
3/30/01	5	15,331,000	$568,400,814	3.47%
4/6/01	5	21,044,800	$704,293,877	4.76%
4/12/01	4	10,672,200	$376,002,941	2.36%
4/20/01	5	14,733,500	$536,245,271	3.33%
4/27/01	5	17,148,800	$696,109,183	3.88%
5/4/01	5	16,077,100	$666,291,054	3.75%
5/11/01	5	11,431,300	$479,304,309	2.68%
5/18/01	5	19,325,300	$869,123,829	4.50%
5/25/01	5	15,724,000	$750,066,512	3.66%
6/1/01	4	11,363,400	$527,614,093	2.65%
6/8/01	5	13,882,400	$626,717,947	3.19%
6/15/01	5	14,997,600	$652,969,396	3.47%
6/22/01	5	18,366,200	$739,206,406	4.28%
6/29/01	5	23,430,300	$888,674,692	5.46%
7/6/01	4	23,969,600	$780,186,654	5.36%
7/13/01	5	29,106,400	$852,238,873	6.09%
7/20/01	5	25,836,700	$803,104,456	5.95%
7/27/01	5	20,562,105	$713,407,832	4.80%
8/3/01	5	16,886,200	$586,728,667	3.86%
8/10/01	5	18,343,800	$602,627,740	4.27%
8/17/01	5	25,320,200	$797,633,582	5.89%
8/24/01	5	14,730,600	$462,318,549	3.43%
8/31/01	5	18,831,400	$647,034,630	4.38%

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Exhibit 4

Week Ending	Number of Trading Days in Week	Volume of Shares Traded	Weekly Dollar Value of Trades	Volume as % of Shares Outstanding
9/7/01	4	13,661,200	$391,176,620	3.16%
9/21/01	4	32,166,900	$763,502,181	7.46%
9/28/01	5	34,124,800	$710,731,611	7.94%
10/5/01	5	25,865,300	$585,412,269	6.02%
10/12/01	5	20,159,300	$505,569,772	4.69%
10/19/01	5	23,779,800	$573,663,576	5.53%
10/26/01	5	27,178,200	$711,460,932	6.32%
11/2/01	5	26,764,200	$672,156,136	6.23%
11/9/01	5	28,927,600	$645,901,456	6.74%
11/16/01	5	31,260,200	$667,949,222	7.28%
11/23/01	4	19,112,600	$398,123,270	4.45%
11/30/01	5	25,073,600	$539,191,700	5.84%
12/7/01	5	106,785,704	$1,570,631,278	24.87%

Exhibit 5

Exhibit 5

Halliburton Co. (HAL)
Shares Outstanding

Source: SEC Filings: Forms 10Q and 10K

Shares Outstanding as of	Shares Outstanding
4/30/1999	440,598,000
7/30/1999	441,220,000
10/24/1999	441,754,000
4/30/2000	443,933,045
7/31/2000	445,531,000
10/31/2000	442,404,000
4/30/2001	429,054,000
7/31/2001	429,791,394
10/31/2001	429,361,251

Exhibit 6

Exhibit 6

Halliburton Co. (HAL)

List of Analyst Reports during the Class Period

Source: Thomson Research (from Thomson Financial, www.investext.com) and Reuters Research (from FactSet)
(Thomson Research query: "Halliburton CO" in the Company Field, 6/3/99 - 12/7/01; FactSet query: Ticker: HAL, 6/3/99 - 12/7/01)

	Date	Title	Contributer	Author	Source
1	6/3/1999	HALLIBURTON CO.	STEPHENS INC.	HENZI, R.M.	Thompson Research
2	6/7/1999	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
3	6/12/1999	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
4	6/21/1999	GEOGRAPHIX, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
5	6/23/1999	Oilfield Service Stocks Weak on Inventory Concerns	SunTrust Robinson Humphrey Capital Markets	Thomas A. Ussery CFA	Reuters Research
6	6/24/1999	BROWN & ROOT, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
7	6/27/1999	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
8	7/7/1999	DRESSER EQUIPMENT GROUP / DRESSER ENERGY VALVE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
9	7/7/1999	DRESSER EQUIPMENT GROUP / DRESSER INSTRUMENT DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
10	7/7/1999	DRESSER-RAND CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
11	7/7/1999	DRESSER-RAND CO. / ENERGY SYSTEMS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
12	7/7/1999	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
13	7/8/1999	CLIP MOCK OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
14	7/8/1999	DRESSER EQUIPMENT GROUP / WAUKESHA ENGINE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
15	7/8/1999	DRESSER-RAND CO. / ELECTRIC MACHINERY OPERATION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
16	7/9/1999	DRESSER-RAND CO. / TURBO PRODUCTS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
17	7/9/1999	ENERGY SYSTEMS GROUP / SPERRY-SUN DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
18	7/9/1999	TOM WHEATLEY VALVE CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
19	7/9/1999	WELLSTREAM, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
20	7/9/1999	WHEATLEY GASO OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
21	7/15/1999	DRESSER EQUIPMENT GROUP / WAYNE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
22	7/15/1999	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
23	7/15/1999	LANDMARK GRAPHICS CORP.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
24	7/23/1999	HAL: 2Q Operating Results In Line; Adjusting Estimates Slightly	CIBC World Markets	Allen Brooks, Robert Ford, Laura Herzog	Reuters Research
25	7/23/1999	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A., ET AL	Thompson Research
26	7/23/1999	Halliburton Company - 2Q99 EPS In Line With Our Estimate; 1999 Estimates Lowered	Deutsche Bank Research	Wesley N. Mead	Reuters Research
27	7/23/1999	HAL, Neutral: Halliburton Report Better Than Expected	RBC Capital Markets	James K. Wicklund	Reuters Research
28	7/23/1999	HALLIBURTON CO	SUN TRUST ROBINSON HUMPHREY CAPITAL MARKETS	ESCOTT, T.	Thompson Research
29	7/23/1999	HAL - June Q $0.19 $0.01 Above Forecast, $0.02 Above Consensus	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
30	7/26/1999	HALLIBURTON CO	PRUDENTIAL EQUITY GROUP, INC	FREEDMAN, J.H.	Thompson Research
31	7/26/1999	Halliburton Co.	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA, Michael Rehaut	Reuters Research
32	7/30/1999	HALLIBURTON CO	SUN TRUST ROBINSON HUMPHREY CAPITAL MARKETS	ESCOTT, T.	Thompson Research
33	8/5/1999	HAL - Target Price Raised from $60.00 to $66.00	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
34	8/6/1999	Market Strategy Weekly Market, Sector Stock Comment	SunTrust Robinson Humphrey Capital Markets	Robert B. Robbins	Reuters Research
35	8/9/1999	Tiny Weeds at RH, What Is Working Now	SunTrust Robinson Humphrey Capital Markets	David A. Lee CFA	Reuters Research
36	8/12/1999	HAL - Price Target Raised from $66 to $68	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
37	8/13/1999	Halliburton: Forced Sale/Purchase of Interests in DHR and IDP JVs a Longer-Term Strategic Positive	Deutsche Bank Research	Wesley N. Mead	Reuters Research
38	8/16/1999	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
39	8/19/1999	HALLIBURTON CO.	SOUTHWEST SECURITIES	MUTALIBOV, F.	Thompson Research
40	8/23/1999	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KISBURTZ, G., ET AL	Thompson Research
41	8/31/1999	HAL: INITIATING COVERAGE WITH BUY/BUY RATINGS	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
42	9/13/1999	DRESSER EQUIPMENT GROUP / WAUKESHA ENGINE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
43	9/13/1999	DRESSER EQUIPMENT GROUP / WAYNE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
44	9/13/1999	ELECTRIC MACHINERY COMPANY	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
45	9/13/1999	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
46	9/14/1999	HAL: Neutral: DKW Energy Conference Presentation Highlights	RBC Capital Markets	James K. Wicklund	Reuters Research
47	9/15/1999	HAL - Management Expects Larger Cost Savings that Originally Planned	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
48	9/15/1999	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
49	9/15/1999	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
50	9/23/1999	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
51	9/23/1999	HALLIBURTON CO.	UBS (US)	DUNN, S.A.	Thompson Research

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Exhibit 8

	Date	Title	Contributor	Author	Source
52	9/24/1999	HAL - 1998 cuts trimmed to reflect sluggish foreign activity	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
53	10/1/1999	HALLIBURTON CO.	STEPHENS INC.	HENZI, R.M.	Thompson Research
54	10/5/1999	HAL: REDUCING 1999 EPS ESTIMATE; MAINTAINING BUY/BUY RATINGS	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
58	10/5/1999	HAL: Sells Interest in Two Joint Ventures	CIBC World Markets	Allen Brooks Robert Ford, Laura Herzog	Reuters Research
59	10/5/1999	Halliburton: Sales of D-R/KOP Businesses a Positive, But Reducing 1999/2000 EPS Estimates	Deutsche Bank Research	Wesley N. Mast	Reuters Research
57	10/5/1999	HALLIBURTON CO.	JEFFERIES & COMPANY, INC.	ALBRIGHT, S.E.	Thompson Research
59	10/5/1999	HAL: Neutral; Halliburton Selling Joint-Venture Interests; Expects To Miss Previous Third-Quarter Guidance	RBC Capital Markets	James K. Wicklund	Reuters Research
59	10/5/1999	HAL - Energy Equip. JVs to be Sold; Earnings Shortfall Announced	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
60	10/5/1999	Halliburton Company: Stock Collapses On Profit Warning; Underperforming Assets To Be Sold	Jefferies & Company, Inc.	Sam Z. Albright CFA	Reuters Research
61	10/5/1999	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
62	10/11/1999	HALLIBURTON CO.	WACHOVIA SECURITIES	SIEGEL, Y.C.	Thompson Research
63	10/19/1999	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
64	10/21/1999	HAL: 3Q99 Results In Line with Pre-announcement	CIBC World Markets	Allen Brooks Robert Ford, Laura Herzog	Reuters Research
65	10/22/1999	Halliburton, Reported 3Q99 in Line w/Estimate; 1999 Estimate Raised	Deutsche Bank Research	Wesley N. Mast	Reuters Research
66	10/22/1999	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
67	10/23/1999	HAL: Neutral; Halliburton Announces Results In Line With Previous Guidance	RBC Capital Markets	James K. Wicklund	Reuters Research
68	10/23/1999	HAL - Sept Q Earnings at $0.13; In-line with Pre-Release	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
69	10/27/1999	HAL: REDUCING ESTIMATES; MAINTAINING BUY	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
70	10/28/1999	HALLIBURTON CO.	BROWN BROTHERS HARRIMAN & CO.	LAU, C.Y.	Thompson Research
71	10/29/1999	HALLIBURTON COMPANY	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
72	11/1/1999	HALLIBURTON CO.	STEPHENS INC.	HENZI, R.M.	Thompson Research
73	11/8/1999	HAL - Estimates Reduced on Sluggish Foreign Activity	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
74	11/10/1999	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIESLURTZ, G., ET AL	Thompson Research
75	11/19/1999	HALLIBURTON CO.	SUN TRUST ROBINSON HUMPHREY CAPITAL MARKETS	ESCOTT, T.	Thompson Research
76	11/22/1999	HALLIBURTON CO.	PRUDENTIAL EQUITY GROUP, INC.	FREEDMAN, J.R., ET AL	Thompson Research
77	12/6/1999	HAL - New rating system established - HAL rated Buy	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
78	12/6/1999	DRESSER EQUIPMENT GROUP / DRESSER ENERGY VALVE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
79	12/6/1999	DRESSER EQUIPMENT GROUP / DRESSER INSTRUMENT DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
80	12/6/1999	DRESSER EQUIPMENT GROUP / ROOTS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
81	12/6/1999	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
82	12/6/1999	LANDMARK GRAPHICS CORP.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
83	12/11/1999	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
84	12/27/1999	DRESSER-RAND CO. / ENERGY SYSTEMS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
85	12/27/1999	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
86	12/28/1999	BROWN & ROOT, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
87	12/28/1999	DRESSER EQUIPMENT GROUP / WAUKESHA ENGINE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
88	12/28/1999	DRESSER EQUIPMENT GROUP / WAYNE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
89	12/28/1999	DRESSER-RAND CO. / TURBO PRODUCTS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
90	12/28/1999	ELECTRIC MACHINERY COMPANY	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
91	12/28/1999	ENERGY SYSTEMS GROUP / SPERRY-SUN DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
92	12/28/1999	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
93	12/28/1999	HALLIBURTON MEASUREMENTS SYSTEMS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
94	12/28/1999	TOM WHEATLEY VALVE CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
95	12/28/1999	WELLSTREAM, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
96	12/28/1999	WHEATLEY GABO OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
97	1/3/2000	HAL:N;HALLIBURTON ANNOUNCES CLOSING OF SALE OF JOINT-VENTURE STAKE	RBC Capital Markets	James K. Wicklund	Reuters Research
98	1/4/2000	Oil Sector Guidepost in Early 2000	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
99	1/6/2000	HAL: REDUCING ESTIMATES; MAINTAINING BUY RATINGS	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
100	1/19/2000	Halliburton Company - North America Continues to Lead-Positive SJE EPS Pre-announcement.	A.G. Edwards & Sons	Pee Free	Reuters Research
101	1/19/2000	Oil Services Industry - SJE Pre-Release & Positive Implications	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
102	1/11/2000	Halliburton; Reducing 3Q00 and 2001 EPS Estimates	Deutsche Bank Research	Wesley N. Mast	Reuters Research
103	1/24/2000	HALLIBURTON CO.	BEAR, STEARNS & CO., INC.	SHOEMAKER, R.E.	Thompson Research
104	1/24/2000	HAL:N;HALLIBURTON UNIT WINS $1.8 BILLION CONTRACT	RBC Capital Markets	James K. Wicklund	Reuters Research
105	1/27/2000	Halliburton Company - 4Q99 EPS BENEFITS FROM JV PICKUP - NORTH AMERICA CONTINUES TO LEAD RECOVERY	A.G. Edwards & Sons	Pee Free	Reuters Research

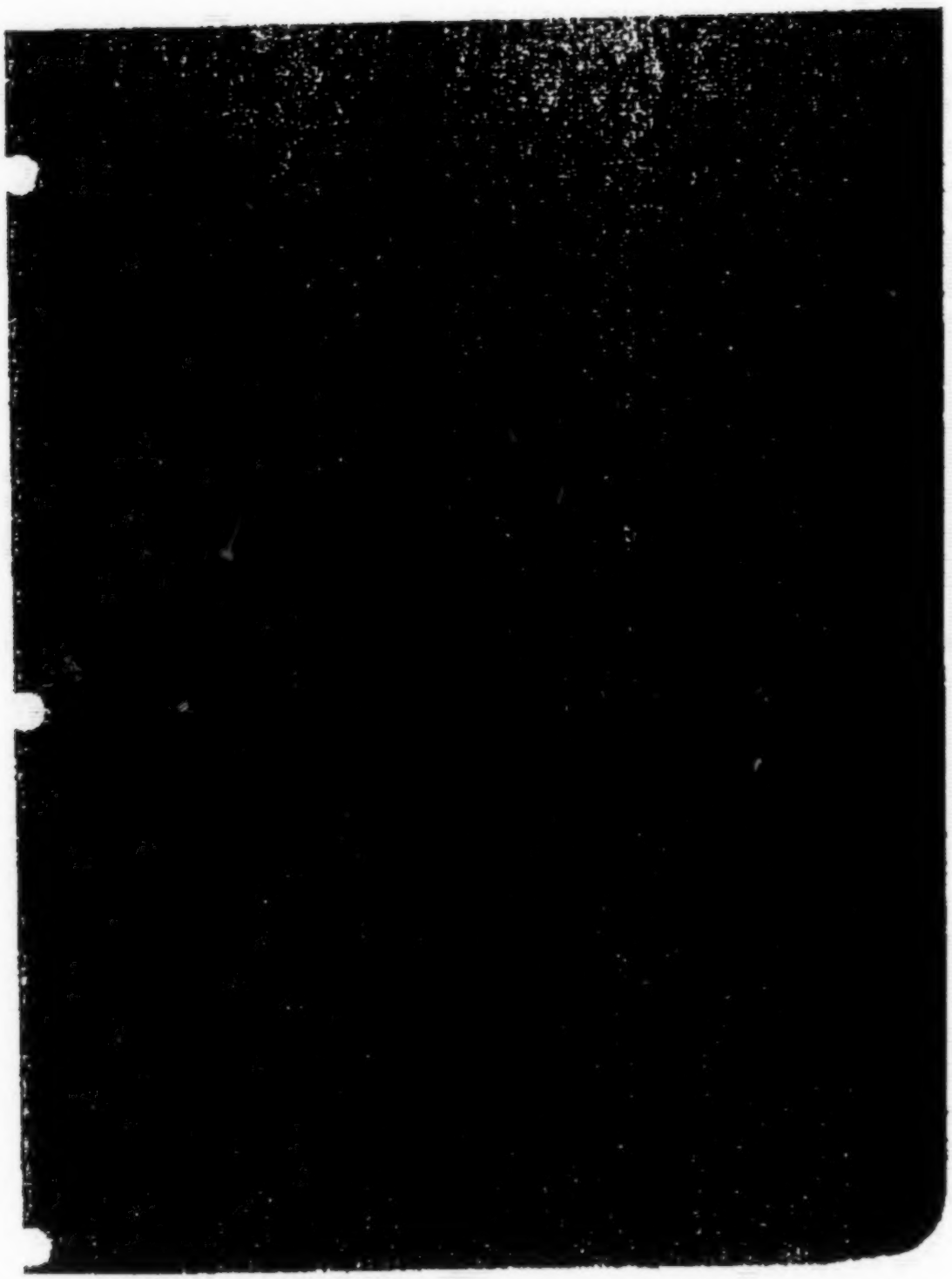

Exhibit 6

	Date	Title	Contributor	Author	Source
106	1/27/2000	HAL: 4Q99 EPS Slightly Ahead, Awaiting the International Recovery	CIBC World Markets	Allen Brooks, Robert Ford, Laura Hartog	Reuters Research
107	1/28/2000	HAL: REITERATING BUY RATINGS; TRIMMING 2000 EPS ESTIMATE	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
108	1/28/2000	HAL 4Q 1999 EPS MODESTLY ABOVE OUR ESTIMATE--2000/2001ESTIMATES TWEAKED--MARKET PERFORM	Deutsche Bank Research	Wesley N. Mast, Jason Howard, Daniel G. Gotvald	Reuters Research
109	1/28/2000	HAL/N:;HAL POSTS STRONGER QUARTER, ENERGY SERVICES OUTLOOK IMPROVING	RBC Capital Markets	James K. Wicklund	Reuters Research
110	1/28/2000	HAL - December Q Beats Estimates	SunTrust Robinson Humphrey Capital Markets	Thomas A. Essert CFA	Reuters Research
111	1/29/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
112	2/1/2000	HALLIBURTON CO.	JOHNSON, RICE & CO.	AGULAR, J.	Thompson Research
113	2/2/2000	Halliburton Company Report	Johnson Rice & Company	Joe R. Aguilar, Marc Bondeson, Anne Falgoust	Reuters Research
114	2/3/2000	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
115	2/10/2000	HALLIBURTON CO.	IHS FINANCIAL MARKETS HISTORY USA	GENGARO, S.D.	Thompson Research
116	2/12/2000	GEOPHYSICAL MICRO-GEOPHYSICAL LANDMARK GRAPHICS CANADA (BRIEF	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
117	2/16/2000	HALLIBURTON CO.	STEPHENS INC.	HENZI, R.M.	Thompson Research
118	2/6/2000	HAL/N: FIRST-QUARTER RESULTS SHOULD BE SIGNIFICANTLY WEAKER THAN CONSENSUS	RBC Capital Markets	James K. Wicklund	Reuters Research
119	3/13/2000	BROWN & ROOT, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
120	3/13/2000	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
121	3/13/2000	WHEATLEY GASC OMEGA OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
122	3/13/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
123	3/16/2000	BAKER HUGHES/HALLIBURTON/SCHLUMBERGER LTD.	UBS (US)	GUNN, B.A.	Thompson Research
124	3/23/2000	HAL - Rating Downgraded to Outperform Amid Q1 Earnings Weakness	SunTrust Robinson Humphrey Capital Markets	Thomas A. Essert CFA	Reuters Research
125	3/24/2000	HALLIBURTON CO - INITIATING COVERAGE	JEFFERIES & COMPANY, INC	KELLSTROM, M.	Thompson Research
126	3/24/2000	Halliburton Company: Double Leverage To Higher Spending By The Major International Oil Companies	Jefferies & Company, Inc.	Kellstrom	Reuters Research
127	3/28/2000	Halliburton Company - BUSINESS MIX TEMPERS NEAR-TERM EARNINGS OUTLOOK - VALUATION REMAINS ATTRACTIVE	A.G. Edwards & Sons	Pat Frith	Reuters Research
128	3/31/2000	HAL/N: ESTIMATE REVISION DOWN AS PRICING/ACTIVITY RESULTS MODERATE	RBC Capital Markets	James K. Wicklund	Reuters Research
129	4/3/2000	HAL: FIRST-QUARTER PREVIEW	Brown Brothers Harriman & Co	Carol Y. Lau	Reuters Research
130	4/6/2000	Oil Service Group Industry Update: In Light Of The Market Sector And Volume In The Broad Markets, We Would Purchase The Following Names On Weakness	Jefferies & Company, Inc.	Kellstrom	Reuters Research
131	4/11/2000	HAL - Conference Presentation Cautious Near-Term; Positive Long-Term	SunTrust Robinson Humphrey Capital Markets	Thomas A. Essert CFA	Reuters Research
132	4/27/2000	Halliburton Company - MAJOR RESTRUCTURING ANNOUNCED/WEAK INTERNATIONAL MARKETS DELAY EARNINGS RECOVERY	A.G. Edwards & Sons	Pat Frith	Reuters Research
133	4/27/2000	HAL: 1Q00EPS In Line, Announces Intention to Sell Dresser Equipment Group	CIBC World Markets	Allen Brooks, Robert Ford, Laura Hartog	Reuters Research
134	4/27/2000	HAL: 1Q00 EPS IN LINE WITH OUR ESTIMATE--REDUCING 2000/2001 ESTIMATES--MARKET PERFORM	Deutsche Bank Research	Wesley N. Mast, Jason Howard, Daniel G. Gotvald	Reuters Research
135	4/27/2000	Halliburton Company: HAL's 1st Q In Line;HAL announces division sale and major share repurchase	Jefferies & Company, Inc.	Kellstrom	Reuters Research
136	4/27/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	GEARY, M.H.	Thompson Research
137	4/27/2000	HAL/N:/PT 1 OF 2: 1Q00 RESULTS IN LINE; REFOCUSING ALONG CORE BUSINESS LINES	RBC Capital Markets	James K. Wicklund	Reuters Research
138	4/27/2000	HAL/N:/PT 2 OF 2: 1Q00 RESULTS IN LINE; REFOCUSING ALONG CORE BUSINESS LINES	RBC Capital Markets	James K. Wicklund	Reuters Research
139	4/27/2000	HAL - Q1 EPS Solid, Co. Plans Dresser Equipment Sale, Reiterate Outperform	SunTrust Robinson Humphrey Capital Markets	Thomas A. Essert CFA	Reuters Research
140	5/3/2000	HALLIBURTON CO.	PRUDENTIAL EQUITY GROUP, INC.	FREEDMAN, J.R., ET AL	Thompson Research
141	5/8/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIESURTZ, G., ET AL	Thompson Research
142	5/4/2000	HALLIBURTON CO.	DEUTSCHE BANK SECURITIES INC.	MAAT, W.N., ET AL	Thompson Research
143	5/5/2000	HAL: TRIMMING ESTIMATES, MAINTAIN BUY/BUY RATINGS	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
144	5/8/2000	HALLIBURTON COMPANY	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
145	5/17/2000	HAL - Increasing Price Target Due to Expected Foreign Recovery	SunTrust Robinson Humphrey Capital Markets	Thomas A. Essert CFA	Reuters Research
146	5/24/2000	HAL: QUARTERLY INCOME STATEMENT	Brown Brothers Harriman & Co.	Carol Y. Lau	Reuters Research
147	5/30/2000	HALLIBURTON CO.	JEFFERIES & COMPANY, INC.	KELLSTROM, M.	Thompson Research
148	6/21/2000	Halliburton Company: Raising Price Target To $36	Jefferies & Company, Inc.	Kellstrom	Reuters Research
149	6/9/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
150	6/13/2000	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
151	6/15/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
152	6/16/2000	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research

SA39

App. 144

LSCAS 7901

Exhibit 8

	Date	Title	Contributor	Author	Source
153	6/26/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
154	7/6/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
155	7/24/2000	Halliburton Company: Halliburton Chairman/CEO Dick Cheney a Leading Contender for Bush VP	Jefferies & Company, Inc.	Kellstrom	Reuters Research
156	7/26/2000	HALLIBURTON CO.	ARGUS RESEARCH CORPORATION	HOVIS, G.F.	Thompson Research
157	7/26/2000	HAL: 2Q00 EPS in Line; North America Strong; International Improving	CIBC World Markets	Allen Brooks, Laura Herzog	Reuters Research
158	7/26/2000	HALLIBURTON CO.	JEFFERIES & COMPANY, INC.	KELLSTROM, M.	Thompson Research
159	7/26/2000	HALLIBURTON CO.	PAINEWEBBER INC.	STONE, J.H.	Thompson Research
160	7/26/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
161	7/27/2000	Halliburton Company - North American Pickup Drives Earnings Surprise - International Markets Poised for Strong Gains	A.G. Edwards & Sons	Poe Frati	Reuters Research
162	7/27/2000	Upgrading Rating to Buy From Market Perform, 2000/2001 Estimates Raised	Deutsche Bank Research	Jason Howard, Wesley H. Mast	Reuters Research
163	7/27/2000	HALLIBURTON CO.	ING FINANCIAL MARKETS HISTORY USA	GENGARO, S.D.	Thompson Research
164	7/27/2000	Halliburton Company: HAL Announces Favorable Second Quarter EPS Of $0.17	Jefferies & Company, Inc.	Kellstrom	Reuters Research
165	7/27/2000	Halliburton Co. (NYSE - HAL - $43.56) Raising Estimates	RBC Capital Markets	Roderick Mefarlane	Reuters Research
166	7/27/2000	HAL - June Q Above Expectations, Driven by Strength in Energy Services	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
167	7/28/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	JORDAN, J.J.	Thompson Research
168	7/28/2000	HAL N:HALLIBURTON BEATS ESTIMATES, UPSTREAM BUSINESS STRONG	RBC Capital Markets	James K. Wicklund	Reuters Research
169	7/28/2000	HALLIBURTON CO.	UBS (US)	DUNN, B.A.	Thompson Research
170	8/1/2000	Birinyi Associates, Inc. - Market Breadth - 32 pages	Deutsche Bank Research	Birinyi Associates	Reuters Research
171	8/3/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
172	8/9/2000	HALLIBURTON CO.	PRUDENTIAL EQUITY GROUP, INC.	FREEDMAN, J.R., ET AL	Thompson Research
173	8/17/2000	Halliburton Company - STRONG PRICE PERFORMANCE CREATES LESS FAVORABLE RISK/REWARD - DOWNGRADING TO ACCUMULATE/AGGRESSIVE	A.G. Edwards & Sons	Poe Frati	Reuters Research
174	8/21/2000	DRESSER EQUIPMENT GROUP / DRESSER ENERGY VALVE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
175	8/21/2000	DRESSER EQUIPMENT GROUP / DRESSER INSTRUMENT DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
176	8/21/2000	DRESSER EQUIPMENT GROUP / ROOTS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
177	8/21/2000	DRESSER EQUIPMENT GROUP / WAUKESHA ENGINE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
178	8/21/2000	DRESSER EQUIPMENT GROUP / WAYNE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
179	8/21/2000	ENERGY SYSTEMS GROUP / SPERRY-SUN DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
180	8/21/2000	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
181	8/31/2000	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
182	8/21/2000	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
183	8/21/2000	HALLIBURTON MEASUREMENTS SYSTEMS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
184	8/21/2000	KELLOGG BROWN & ROOT	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
185	8/21/2000	LANDMARK GRAPHICS CORP.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
186	8/21/2000	TOM WHEATLEY VALVE CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
187	8/21/2000	WELLSTREAM, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
188	8/21/2000	WHEATLEY GASO OMEGA OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
189	8/31/2000	Halliburton Company: Double-Leveraged to Increase in Spending; Buy	ABN AMRO Global Research	Asit K., Sen, Longsley Zaphron	Reuters Research
190	8/31/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
191	9/1/2000	HALLIBURTON CO.	SUN TRUST ROBINSON HUMPHREY CAPITAL MARKETS	ESCOTT, T.	Thompson Research
192	9/1/2000	Halliburton Company	SunTrust Robinson Humphrey Capital Markets	Thomas A. Escott CFA	Reuters Research
193	9/5/2000	HALLIBURTON CO.	ABN AMRO BANK N.V. U.S.A	SEN, A.K., ET AL	Thompson Research
194	9/5/2000	Halliburton Company - Double-Leveraged to Increase in Spending	ABN AMRO Global Research	Asit K., Sen, Longsley Zaphron	Reuters Research
195	9/5/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
196	9/19/2000	HAL N:HIGHLIGHTS FROM THE DRW ENERGY CONFERENCE: HALLIBURTON COMPANY	RBC Capital Markets	James K. Wicklund	Reuters Research
197	9/25/2000	Halliburton Company: Halliburton raised to Buy from Accumulate after 14% pull back in stock	Jefferies & Company, Inc.	Kellstrom	Reuters Research
198	10/6/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
199	10/9/2000	HALLIBURTON CO.	JEFFERIES & COMPANY, INC.	KELLSTROM, M.	Thompson Research
200	10/10/2000	Halliburton Company: Recent Sell Off Over Asbestos Liabilities Appears Overdone; Buy HAL On Weakness	Jefferies & Company, Inc.	Kellstrom	Reuters Research
201	10/10/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
202	10/24/2000	HAL: Weak E&C Outlook Prompts Restructuring, Reducing Estimates	CIBC World Markets	Allen Brooks, Laura Herzog, Jordan Horseches CFA	Reuters Research
203	10/25/2000	Halliburton Company - North America Drives Positive Earnings Surprise - Lowering Estimates to Reflect Weaker E&C Business	A.G. Edwards & Sons	Poe Frati	Reuters Research

App. 145

USCAS 7002

SA40

Exhibit 8

	Date	Title	Contributor	Author	Source
204	10/25/2000	Halliburton Company: HAL: Bruised But Not Broken - Sensitivity Analysis	ABN AMRO Global Research	Asit K. Sen	Reuters Research
205	10/26/2000	Halliburton Company: HAL: Lowering 2000 and 2001 Earnings Estimates	ABN AMRO Global Research	Asit K. Sen	Reuters Research
206	10/26/2000	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A., ET AL	Thompson Research
207	10/26/2000	Halliburton Company	Jefferies & Company, Inc.	Kellstrom	Reuters Research
208	10/29/2000	HALLIBURTON CO.	PAINEWEBBER INC.	STONE, J.H.	Thompson Research
209	10/26/2000	HAL.N-HALLIBURTON REPORTS ANNOUNCES MAJOR RESTRUCTURING INITIATIVE	RBC Capital Markets	James K. Wicklund	Reuters Research
210	10/25/2000	HALLIBURTON CO	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
211	10/26/2000	HALLIBURTON CO.	SOUTHWEST SECURITIES	MUTALIBOV, F.	Thompson Research
212	10/26/2000	Halliburton Company: Halliburton's Stock May Be Oversold; Weakness Creates Buying Opportunity	Jefferies & Company, Inc.	Kellstrom	Reuters Research
213	10/26/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
214	10/26/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
215	10/27/2000	HALLIBURTON CO.	ING FINANCIAL MARKETS HISTORY USA	GENGARO, S.D.	Thompson Research
216	10/31/2000	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
217	11/7/2000	Initiating Coverage on Halliburton Company with a Strong Buy Rating	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
218	11/1/2000	Surveying the Prospects: Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
219	11/13/2000	Halliburton Company: HAL Files Third Quarter 10-Q; Asbestos Liabilities Remain In Check	Jefferies & Company, Inc.	Kellstrom	Reuters Research
220	11/13/2000	Morning Meeting Notes for (Monday), November 13, 2000	Jefferies & Company, Inc.	Research Department	Reuters Research
221	11/21/2000	Lagging Large-Cap with Compelling Valuation	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
222	11/29/2000	Surveying the Prospects: Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
223	11/28/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
224	11/30/2000	Oilfield Services & Equipment Industry: Group Sells Off on Myriad Unspecific Concerns - Risk/Reward is Quite Compelling	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
225	12/4/2000	Deutsche Bank Oilfield Services - Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
226	12/13/2000	HAL.N-;CURRENT QUARTER UPDATE	RBC Capital Markets	James K. Wicklund	Reuters Research
227	12/14/2000	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
228	12/19/2000	COLLEGE O'NEILL /BROWN & ROOT PTY LTD (BRIEF)	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
229	12/21/2000	Halliburton Company - E&C Business Restructuring Formally Announced - 4Q2000 EPS on Track	A.G. Edwards & Sons	Pos Pratt	Reuters Research
230	12/21/2000	HAL: 4Q Outlook In Line With Prior Guidance; Restructuring Charge Announced	CIBC World Markets	Allen Brooks, Laura Herzog, Jordan Horoschak CFA	Reuters Research
231	12/21/2000	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
232	12/21/2000	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
233	12/22/2000	Halliburton Company: Halliburton Provides Details on E&C Restructuring, No Chan	ABN AMRO Global Research	Asit K. Sen	Reuters Research
234	12/22/2000	HAL: 4Q00 Outlook In Line With Prior Guidance; Restructuring Charge Announced	CIBC World Markets	Allen Brooks, Laura Herzog, Jordan Horoschak CFA	Reuters Research
235	12/22/2000	HAL Provides Details on E&C Restructuring, Earnings Outlook and Stock Repurchase - Estimates and Rating Unchanged, but Potential for Upside Improving	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
236	12/22/2000	Halliburton Company: HAL Pre-Announces 4Q Earnings And Updates E&C Restructuring Efforts	Jefferies & Company, Inc.	Kellstrom	Reuters Research
237	12/26/2000	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
238	1/2/2001	Fourth-Quarter Earnings Preview and Performance Review: Oilfield Service Stocks Outperform for Eighth Straight Quarter, Q4 Earnings Likely to Show Strong Growth and Upside	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
239	1/2/2001	HAL Announces Acquisition of Petrobank Data Management	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
240	1/2/2001	Halliburton Company - ACQUISITION OF DATA MANAGEMENT OPERATION IS POSITIVE	A.G. Edwards & Sons	Pos Pratt	Reuters Research
241	1/30/2001	HAL: 4Q00 Positive EPS Surprise, International Spending Up	CIBC World Markets	Allen Brooks, Laura Herzog, Jordan Horoschak CFA	Reuters Research
242	1/31/2001	Halliburton Company - 4Q2000 EPS Ahead of Expectations - Increasing 2001 E Estimates to Reflect Strong North American Drilling Market	A.G. Edwards & Sons	Pos Pratt	Reuters Research
243	1/31/2001	Halliburton Company - Dresser Equipment Group Sale Announced for $1.55 Billion - Impact Should be Very Positive	A.G. Edwards & Sons	Pos Pratt	Reuters Research
244	1/31/2001	Halliburton Company: HAL: Maintaining Our 2001 EPS Estimate of $1.15	ABN AMRO Global Research	Asit K. Sen	Reuters Research
245	1/31/2001	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A., ET AL	Thompson Research
246	1/31/2001	Oil Service Group - Halliburton Company (1/31/01)	Jefferies & Company, Inc.	Mark W. Kellstrom CFA	Reuters Research
247	1/31/2001	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research

Exhibit 8

	Date	Title	Contributor	Author	Source
248	1/31/2001	HAL N: HALLIBURTON ANNOUNCES AGREEMENT TO SELL DRESSER EQUIPMENT GROUP	RBC Capital Markets	James K. Wicklund	Reuters Research
248	1/31/2001	HAL N: HALLIBURTON REPORTS EARNINGS EXCEEDING EXPECTATIONS	RBC Capital Markets	James K. Wicklund	Reuters Research
260	1/31/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIESBURTZ, G.	Thompson Research
261	1/31/2001	HAL - Dec. Q EPS of $0.28 vs. $0.17, Two Cents Above Estimate	SunTrust Robinson Humphrey Capital Markets	Thomas Escott	Reuters Research
262	1/31/2001	HAL - Selling Equipment Group for $1.56 Billion	SunTrust Robinson Humphrey Capital Markets	Thomas Escott	Reuters Research
263	1/31/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
264	2/1/2001	HAL: DECREASING 2001 ESTIMATES	Capital One Southcoast, Inc	Robert Trace	Reuters Research
266	2/1/2001	Q4 Results Exceed Expectations, Maintaining Bets, on Improved Oilfield, but Underlin E&C Outlook, Reiterate Strong Buy	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
266	2/5/2001	Deutsche Bank Oilfield Services - Surveying the Prospects: Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
267	2/6/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
268	2/13/2001	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
269	2/20/2001	HALLIBURTON CO.	A.G. EDWARDS & SONS, INC.	PRATT, P.	Thompson Research
260	2/27/2001	DRESSER EQUIPMENT GROUP / DRESSER ENERGY VALVE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
261	2/27/2001	DRESSER EQUIPMENT GROUP / DRESSER INSTRUMENT DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
262	2/27/2001	ENERGY SYSTEMS GROUP / SPERRY-SUN DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC		Thompson Research
263	2/27/2001	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
264	2/27/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
266	2/27/2001	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
266	2/27/2001	HALLIBURTON MEASUREMENTS SYSTEMS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
267	2/27/2001	KELLOGG BROWN & ROOT	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
268	2/27/2001	WHEATLEY GABO OMEGA OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
269	2/27/2001	OILFIELD SERVICES AND EQUIPMENT - Continue to Favor Later Cycle Names, Which are Starting to Outperform	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
270	3/6/2001	HAL - Introducing Preliminary 2002 EPS Estimate	SunTrust Robinson Humphrey Capital Markets	Thomas Escott	Reuters Research
271	3/15/2001	Memphis Oilfield Service Industry Comment	A.G. Edwards & Sons	Poe Pratt	Reuters Research
272	3/16/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
273	3/23/2001	HAL N: HALLIBURTON LOSES FIRST ROUND OF ASBESTOS LITIGATION	RBC Capital Markets	James K. Wicklund	Reuters Research
274	3/30/2001	HALLIBURTON CO	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
275	4/11/2001	HAL N: HALLIBURTON CONCLUDES SALE OF DRESSER EQUIPMENT GROUP	RBC Capital Markets	James K. Wicklund	Reuters Research
276	4/19/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
277	4/20/2001	HAL: 1Q01 EPS in Line; Broadening Recovery Under Way	CIBC World Markets	Allen Brooks, Jordan Hymowitz CFA	Reuters Research
278	4/23/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIESBURTZ, G.	Thompson Research
279	4/26/2001	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A.	Thompson Research
280	4/26/2001	Q1 Results Fall Short, Lowering Street High 2001 Ests, but Maintaining 2002 Ests, Target Price and Strong Buy Rating Because Of Rapidly Improving Fundamentals	Deutsche Bank Research	Arvind B. Sanger CFA, Michael W. Urban	Reuters Research
281	4/26/2001	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
282	4/26/2001	HAL N: HALLIBURTON REPORTS STRONG FIRST QUARTER	RBC Capital Markets	James K. Wicklund	Reuters Research
283	4/26/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
284	4/27/2001	Halliburton - 1Q2001 EPS BELOW EXPECTATIONS, BUT OUTLOOK IMPROVING - NORTH AMERICAN DRILLING MARKET REMAINS STRONG AND BROADER RECOVERY EXPECTED	A.G. Edwards & Sons	Poe Pratt	Reuters Research
285	4/27/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
286	4/27/2001	HALLIBURTON ENERGY SERVICES	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC		Thompson Research
287	4/27/2001	WELLSTREAM, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC		Thompson Research
288	4/26/2001	DRESSER EQUIPMENT GROUP INVESTOR GROUP	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
289	4/30/2001	Halliburton Company: Upgrading Rating to Add from Hold	ABN AMRO Global Research	Stephen Gengaro, Matthew Corbin, Megan Sloss	Reuters Research
290	4/30/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
291	5/3/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
292	5/4/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind B. Sanger CFA, Michael W. Urban	Reuters Research
293	5/11/2001	HAL: Estimates Raised; Rating Boosted to OUTPERFORM	SunTrust Robinson Humphrey Capital Markets	Thomas Escott	Reuters Research
294	5/15/2001	HALLIBURTON CO.	INSTITUTIONAL SHAREHOLDER SERVICES	ANON	Thompson Research
295	5/16/2001	Several Catalysts Should Continue To Drive Stock Higher, but Lowering Rating From Strong Buy to Buy to Reflect Recent Appreciation - Web Version	Deutsche Bank Research	Arvind B. Sanger CFA	Reuters Research
296	5/23/2001	HALLIBURTON CO.	SUN TRUST ROBINSON HUMPHREY CAPITAL MARKETS	SCOTT, T	Thompson Research
297	5/25/2001	Halliburton Company	SunTrust Robinson Humphrey Capital Markets	Thomas Escott	Reuters Research

App. 147

15 CFR 700

Exhibit 9

	Date	Title	Contributor	Author	Source
268	9/28/2001	DRESSER EQUIPMENT GROUP / DRESSER ENERGY VALVE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
269	9/28/2001	DRESSER EQUIPMENT GROUP / DRESSER INSTRUMENT DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
300	9/28/2001	DRESSER EQUIPMENT GROUP / WAUKESHA ENGINE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
301	9/28/2001	DRESSER EQUIPMENT GROUP / WAYNE DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
302	9/28/2001	DRESSER EQUIPMENT GROUP, INC. / ROOTS DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
303	9/28/2001	ENERGY SYSTEMS GROUP / SPERRY-SUN DIVISION	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC		Thompson Research
304	9/28/2001	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
305	9/28/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
306	9/28/2001	HALLIBURTON MEASUREMENTS SYSTEMS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
307	9/28/2001	KELLOGG BROWN & ROOT	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
308	9/28/2001	TOM WHEATLEY VALVE CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
309	9/28/2001	WELLSTREAM, INC.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
310	9/28/2001	WHEATLEY GASO OMEGA OPERATIONS	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
311	9/29/2001	Surveying the Prospects - Offfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
312	9/31/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
313	9/9/2001	HALLIBURTON CO. (HOLDING CO.) - HISTORY & DEBT	MERGENT FIS - HISTORY & DEBT	FINANCIAL INFORMATION SERVICES	Thompson Research
314	9/7/2001	HALLIBURTON CO.	PRUDENTIAL EQUITY GROUP, INC.,	FREEDMAN, J.R.	Thompson Research
315	9/29/2001	Halliburton Impresses Asbestos Reserve, Reiterate Buy, but Renewed Concerns Could Impact Valuation	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
316	9/29/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
317	7/17/2001	Lowering Estimates But Highlighting Some North America Names For Attractive Valuations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
318	7/19/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
319	7/24/2001	HAL: Reducing Estimates	SunTrust Robinson Humphrey Capital Markets	Thomas Ecott	Reuters Research
320	7/26/2001	HAL: Higher 3Q01 EPS Guidance Makes Sutten Management A Maverick	CIBC World Markets	Allen Brooks, Jordan Hersedrah CFA	Reuters Research
321	7/28/2001	HALLIBURTON CO.	DEUTSCHE BANK SECURITIES INC.	SANGER, A.S.	Thompson Research
322	7/25/2001	Halliburton Company : Book Profits around $40	First Global	Girish Pai	Reuters Research
323	7/28/2001	HAL: Outlook Accelerating Near Term; Raising to BUY Rating	SunTrust Robinson Humphrey Capital Markets	Thomas Ecott	Reuters Research
324	7/26/2001	Halliburton Company: International Strength Drives Upside Surprise	ABN AMRO Global Research	Stephen Gengaro, Matthew Conlan, Katherine M. Spinola, Megan Bissell	Reuters Research
325	7/26/2001	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A.	Thompson Research
326	7/26/2001	Q2 Earnings Higher Than Expected; Raising Ests, but Maintaining 2002 Ests, Target Price and Strong Buy Rating Because of Rapidly Improving Fundamentals	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
327	7/26/2001	HAL - Impressive Q2 offfield results, E&C outlook strengthening	Johnson Rice & Company	Joe R. Aguiar, Daniel Burke, Anne Feigoust	Reuters Research
328	7/26/2001	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
329	7/26/2001	HAL:N-HALLIBURTON 2Q01 EPS EXCEEDS EXPECTATIONS	RBC Capital Markets	Kevin G. Pollard	Reuters Research
330	7/26/2001	HALLIBURTON CO.	SANFORD C. BERNSTEIN & CO., INC.	DOWD, J.	Thompson Research
331	7/26/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
332	7/26/2001	HAL+HYSEHAL SHARES UPGRADED FROM ACCUMULATE TO BUY.	Southwest Securities	Fred Mueller	Reuters Research
333	7/26/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
334	7/27/2001	HAL: 2Q RESULTS; INCREASING 2001 ESTIMATES	Capital One Southcrest, Inc	Robert S. Trest	Reuters Research
335	7/26/2001	FLEX TECHNOLOGIES LTD /LANDMARK GRAPHICS CORP (BRIEF)	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
336	7/30/2001	Trading Ideas USA 30.07.2001	Hamburger Pfeiffer AG	Research Team	Reuters Research
337	9/9/2001	OILFIELD SERVICES WEEKLY	Southwest Securities	Fred Mueller	Reuters Research
338	9/10/2001	Halliburton - Not Liability for Asbestos Claims Rises - More Complex Situation Appears Manageable But Uncertainty Increased	A.G. Edwards & Sons	Pee Frell	Reuters Research
339	9/10/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
340	9/14/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
341	8/23/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
342	8/31/2001	GEOGRAPHIX	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC		Thompson Research
343	8/31/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
344	8/31/2001	KELLOGG BROWN & ROOT	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
345	8/1/2001	COMMERCIAL RESIN DE MEXICO SA /(BREDERO-SHAW (BRIEF)	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
346	8/8/2001	Halliburton Company - Halliburton: Initiating Coverage With An Accumulate Rating; Target $38	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
347	9/19/2001	Energy Group - Industry Update (09/17/01)	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
348	10/1/2001	Surveying the Prospects - Offfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
349	10/3/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research

Exhibit 8

	Date	Title	Contributor	Author	Source
350	10/1/2001	Through Valuation Analysis, Bad News Largely Discounted in the Stocks, But Potential for a Recovery Isn't, Significant Upside Potential in Next 9-12 Months	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
351	10/4/2001	Halliburton - Weak Natural Gas Market Tempers Positive Impact of International Recovery	A.G. Edwards & Sons	Poe Pratt	Reuters Research
352	10/9/2001	HAL Provides Better Definition on Asbestos Liability Issue at DSAB Fall Energy Conference	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
353	10/8/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
354	10/22/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
355	10/22/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
356	10/23/2001	HAL: Management Delivers, But The Industry World€™t Cooperate	CIBC World Markets	Allen Brooks, Jordan Hanoshek CFA	Reuters Research
357	10/23/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
358	10/23/2001	HAL: Sept. Q In Line; Reducing Outlook	SunTrust Robinson Humphrey Capital Markets	Thomas Ecott	Reuters Research
359	10/24/2001	Halliburton - 3Q2001 EPS IN LINE AND ASBESTOS CLAIMS SLOW -WEAKER MACRO OUTLOOK, BUT VALUATION ATTRACTIVE	A.G. Edwards & Sons	Poe Pratt	Reuters Research
360	10/24/2001	Halliburton Company: In-Line Results; Outlook Remains Cloudy	ABN AMRO Global Research	Stephen Gengaro, Matthew Conlan, Katherine M. Spence, Megan Bissell	Reuters Research
361	10/24/2001	HALLIBURTON CO.	BEAR, STEARNS & CO., INC.	SHOEMAKER, R.E.	Thompson Research
362	10/24/2001	HALLIBURTON CO.	CIBC WORLD MARKETS CORP.	BROOKS, G.A.	Thompson Research
363	10/24/2001	Strong Q3 Earns., Growing E&C Backlog, Softer Asbestos News Offsets Weaker US Outlook	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
364	10/24/2001	Halliburton Company: HAL Lowering 2002 EPS Estimate To $1.40 From $1.75, Trimming Target	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
365	10/24/2001	HAL.N:,HALLIBURTON REPORTS IN LINE, REDUCING EXPECTATIONS GOING FORWARD	RBC Capital Markets	Kevin G. Pollard	Reuters Research
366	10/24/2001	HALLIBURTON CO.	SANFORD C. BERNSTEIN & CO., INC.	DOWD, J.	Thompson Research
367	10/24/2001	HAL-NYS&R/E/ITERATING BUY RATING DESPITE DOWNWARD EARNINGS REVISIONS	Southwest Securities	Fred Mutallov	Reuters Research
368	10/24/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
369	10/25/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
370	10/29/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
371	10/29/2001	HAL - Q3'01 Update	Johnson Rice & Company	Joe R. Aguiar, Daniel Burke	Reuters Research
372	10/30/2001	HALLIBURTON - MISSISSIPPI JURY AWARDS $150MM TO ASBESTOS PLAINTIFFS - VIGOROUS APPEAL EXPECTED	A.G. Edwards & Sons	Poe Pratt	Reuters Research
373	10/31/2001	Halliburton - Asbestos Case in Small Mississippi Town Yields $150 Million Jury Award Against HAL, MMM and Others - Vigorous Appeal Expected	A.G. Edwards & Sons	Poe Pratt	Reuters Research
374	10/31/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
375	11/5/2001	Surveying the Prospects: Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
376	11/6/2001	HALLIBURTON CO.	CORPORATE TECHNOLOGY INFORMATION SERVICES, INC.		Thompson Research
377	11/7/2001	HAL: 3Q Results; Revising Estimates, Price Target	Capital One Southcrest, Inc	Robert B. Trace	Reuters Research
378	11/8/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
379	11/12/2001	Surveying the Prospects: Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
380	11/17/2001	QVA CONSULTANTS AB(CELSIUS AB) /KELLOGG BROWN & ROOT [BRIEF]	THOMSON FINANCIAL SECURITIES DATA - M&A		Thompson Research
381	11/19/2001	Surveying the Prospects - Oilfield Services Weekly Ruminations	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
382	11/21/2001	Halliburton Company: HAL: Lowering 4Q01 and 2002 EPS Estimates	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
383	11/26/2001	Oil Services - API Inventory Analysis & Weekly Perspective	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
384	12/3/2001	HALLIBURTON COMPANY PROFILE	DATAMONITOR		Thompson Research
385	12/4/2001	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
386	12/4/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research
387	12/6/2001	Halliburton - Asbestos News Continues to Develop - North America Drilling Market Week and 2001-2 EPS Estimates Lowered	A.G. Edwards & Sons	Poe Pratt	Reuters Research
388	12/5/2001	Better Asbestos Disclosure Does Not Help Stock Price	Deutsche Bank Research	Arvind S. Sanger CFA	Reuters Research
389	12/6/2001	HAL: Litigation News Not Instrumental	SunTrust Robinson Humphrey Capital Markets	Thomas Ecott	Reuters Research
390	12/6/2001	HALLIBURTON CO. (HOLDING CO.)	MERGENT, INC. - COMPANY REPORT	FINANCIAL INFORMATION SERVICES	Thompson Research
391	12/7/2001	Special Intraday Note	ABN AMRO Global Research	Product Marketing Desk	Reuters Research
392	12/7/2001	HAL: Downgrading HAL's Rating From BUY/STRONG BUY to HOLD/BUY	Capital One Southcrest, Inc	Robert B. Trace	Reuters Research
393	12/7/2001	Halliburton Company: Halliburton Update On Asbestos Litigation: Stay Cautious	Jefferies & Company, Inc.	Asit Sen CFA	Reuters Research
394	12/7/2001	HALLIBURTON CO.	PNC INSTITUTIONAL INVESTMENT SERVICE	CARPENTER, D.L.	Thompson Research
395	12/7/2001	HALLIBURTON CO.	SMITH BARNEY CITIGROUP (US RESEARCH)	KIEBURTZ, G.	Thompson Research
396	12/7/2001	HAL: Asbestos Reaction Exaggerated	SunTrust Robinson Humphrey Capital Markets	Thomas Ecott	Reuters Research
397	12/7/2001	HALLIBURTON CO.	UBS (US)	STONE, J.H.	Thompson Research

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Exhibit 7

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Exhibit 7

Halliburton Co. (HAL)

Reported Short Interest and Shares Outstanding

Source: FactSet Research Systems, Inc., Halliburton's SEC Form 10-Ks and 10-Qs

Settlement Date	Reported Short Interest	Change from Prior Month	Reported Shares Outstanding at Most Recent Date Prior to Settlement Date	Short Interest/Shares Outstanding
6/15/1999	8,362,222		440,598,000	1.9%
7/15/1999	8,286,660	(75,562)	440,598,000	1.9%
8/15/1999	9,054,461	767,801	441,220,000	2.1%
9/15/1999	8,273,062	(781,399)	441,220,000	1.9%
10/15/1999	6,858,906	(1,414,156)	441,220,000	1.6%
11/15/1999	7,721,216	862,310	441,754,000	1.7%
12/15/1999	6,655,954	(1,065,262)	441,754,000	1.5%
1/15/2000	7,350,574	694,620	441,754,000	1.7%
2/15/2000	6,538,454	(812,120)	441,754,000	1.5%
3/15/2000	8,252,467	1,714,013	441,754,000	1.9%
4/15/2000	8,360,042	107,575	443,724,145	1.9%
5/15/2000	11,844,556	3,484,514	443,933,045	2.7%
6/15/2000	11,723,042	(121,514)	443,933,045	2.6%
7/15/2000	11,188,755	(534,287)	443,933,045	2.5%
8/15/2000	15,034,147	3,845,392	445,531,000	3.4%
9/15/2000	14,500,624	(533,523)	445,531,000	3.3%
10/15/2000	12,906,037	(1,594,587)	445,531,000	2.9%
11/15/2000	11,274,829	(1,631,208)	442,404,000	2.5%
12/15/2000	11,394,175	119,346	442,404,000	2.6%
1/15/2001	8,482,125	(2,912,050)	442,404,000	1.9%
2/15/2001	11,560,790	3,078,665	442,404,000	2.6%
3/15/2001	12,609,752	1,048,962	442,404,000	2.9%
4/15/2001	9,990,174	(2,619,578)	429,030,141	2.3%
5/15/2001	13,524,820	3,534,646	429,054,000	3.2%
6/15/2001	16,408,396	2,883,576	429,054,000	3.8%
7/15/2001	9,857,637	(6,550,759)	429,054,000	2.3%
8/15/2001	11,350,913	1,493,276	429,791,394	2.6%
9/15/2001	7,776,290	(3,574,623)	429,791,394	1.8%
10/15/2001	9,496,075	1,719,785	429,791,394	2.2%
11/15/2001	10,884,217	1,388,142	429,361,251	2.5%
12/15/2001	9,825,255	(1,058,962)	429,361,251	2.3%
Average	10,236,988		438,775,842	2.3%

Exhibit 8

Exhibit 8

Halliburton Co. (HAL)

Market Capitalization

Class Period: 6/3/1999 - 12/7/2001

Shares Outstanding as of	Shares Outstanding [1]	Stock Price [2]	Market Capitalization
4/30/1999	440,598,000	$42.63	$18,780,489,750
7/30/1999	441,220,000	$46.13	$20,351,272,500
10/24/1999	441,754,000	$38.63	$17,062,748,250
2/29/2000	443,582,904	$38.19	$16,939,322,147
4/30/2000	443,933,045	$44.19	$19,616,291,426
7/31/2000	445,531,000	$46.13	$20,550,117,375
10/31/2000	442,404,000	$37.06	$16,396,598,250
2/28/2001	428,468,110	$39.82	$17,061,600,140
4/30/2001	429,054,000	$43.21	$18,539,423,340
7/31/2001	429,791,394	$35.01	$15,046,996,704
10/31/2001	429,361,251	$24.69	$10,600,929,287

Statistics for Days in Class Period	Min	Max	Average
1999	$14,946,327,500	$22,695,253,750	$18,698,128,329
2000	$14,765,233,500	$24,364,976,563	$19,154,726,960
2001	$5,152,335,014	$21,109,458,800	$14,867,428,277

[1] Source: HAL SEC Filings: Forms 10-Q and 10-K

[2] Source: FactSet Research Systems, Inc.

Exhibit 9

Exhibit 9

Halliburton Co. (HAL)

Bid/Ask Spreads for Halliburton Co. Common Stock Compared to Halliburton Peers

Timeframe: Class Period 6/3/99 - 12/7/01

Source: NYSE TAQ Database. Excludes quotes outside of normal trading hours (9:30a.m. - 4:00p.m. EST). The companies included in the peer group for this analysis were obtained from Halliburton's 10K's, annual proxy statements and analysts' reports.

Bid/Ask Spreads
Using All Quotes From Listing Exchange

			Bid/Ask Spread ($)		Bid/Ask Spread as Percent of Bid/Ask Midprice	
Company	Ticker	Listing Exchange	Mean	Median	Mean	Median
Halliburton Co	HAL	NYSE	$0.0837	$0.0625	0.22%	0.17%
Baker Hughs Incorporated	BHI	NYSE	$0.0819	$0.0625	0.25%	0.19%
BJ Services Company	BJS	NYSE	$0.1097	$0.0900	0.23%	0.19%
Cameron International Corporation	CAM	NYSE	$0.1628	$0.1250	0.28%	0.23%
SEACOR Holdings Inc.	CKH	NYSE	$0.2289	$0.1875	0.51%	0.42%
Helix Energy Solutions Group, Inc.	HELX	NASD	$0.2027	$0.1250	0.60%	0.48%
Key Energy Services, Inc.	KEG	NYSE	$0.0692	$0.0625	0.61%	0.65%
Noble Corporation	NE	NYSE	$0.0807	$0.0625	0.23%	0.19%
National Oilwell	NOI	NYSE	$0.0903	$0.0625	0.37%	0.26%
Rowan Cos. Inc.	RDC	NYSE	$0.0817	$0.0625	0.35%	0.26%
Transocean Inc.	RIG	NYSE	$0.0954	$0.0625	0.23%	0.19%
Smith International Inc.	SII	NYSE	$0.1524	$0.1250	0.25%	0.20%
Schlumberger Ltd.	SLB	NYSE	$0.0919	$0.0800	0.14%	0.14%
Tidewater Inc.	TDW	NYSE	$0.1093	$0.1000	0.31%	0.26%
Varco International, Inc.	VRC	NYSE	$0.0819	$0.0625	0.53%	0.43%
Weatherford International Ltd.	WFT	NYSE	$0.1414	$0.1250	0.34%	0.31%
Average of Halliburton's Competitors			$0.1130	$0.0930	0.36%	0.30%

Exhibit 9

Bid/Ask Spreads Using All Quotes From All TAQ Database Exchanges[1]						
			Bid/Ask Spread ($)		Bid/Ask Spread as Percent of Bid/Ask Midprice	
Company	Ticker	Listing Exchange	Mean	Median	Mean	Median
Halliburton Co	HAL	NYSE	$0.6402	$0.2500	1.62%	0.72%
Baker Hughs Incorporated	BHI	NYSE	$0.6273	$0.2500	1.67%	0.78%
B.J Services Company	BJS	NYSE	$0.7902	$0.3300	1.50%	0.66%
Cameron International Corporation	CAM	NYSE	$1.1722	$0.3750	1.90%	0.71%
SEACOR Holdings Inc.	CKH	NYSE	$0.8842	$0.3750	1.32%	0.83%
Helix Energy Solutions Group, Inc.	HELX	NASD	$0.2027	$0.1250	0.80%	0.48%
Key Energy Services, Inc.	KEG	NYSE	$0.3877	$0.2200	4.08%	2.17%
Noble Corporation	NE	NYSE	$0.6814	$0.2800	1.70%	0.78%
National Oilwell	NOI	NYSE	$0.8668	$0.2800	2.02%	1.15%
Rowan Cos. Inc.	RDC	NYSE	$0.5710	$0.2500	2.26%	1.03%
Transocean Inc.	RIG	NYSE	$0.9861	$0.2700	2.23%	0.72%
Smith International Inc.	SII	NYSE	$1.2084	$0.3500	1.69%	0.56%
Schlumberger Ltd.	SLB	NYSE	$1.2501	$0.3000	2.01%	0.48%
Tidewater Inc.	TDW	NYSE	$0.8107	$0.2900	1.92%	0.75%
Varco International, Inc.	VRC	NYSE	$0.5108	$0.2200	2.73%	1.26%
Weatherford International Ltd.	WFT	NYSE	$0.4465	$0.3750	1.01%	0.82%
Average of Halliburton's Competitors			$0.7157	$0.2867	1.91%	0.85%

[1] NYSE TAQ database exchanges include: AMEX, Boston, Cincinnati, Chicago, NYSE, Pacific, NASD, Philadelphia, Instinet, and CBOE.

Exhibit 10

Exhibit 10

Halliburton Co.

Public Float

(Reported Shares Outstanding minus Total Insider Holdings)

Reporting Date	Reported Shares Outstanding[1]	Total Insider Holdings[2]	Float (Shares)	Float (%)
3/22/1999	440,337,421	3,640,797	436,696,624	99.17%
3/20/2000	443,724,145	3,540,165	440,183,980	99.20%
3/19/2001	429,030,141	2,039,801	426,990,340	99.52%

[1] Source: Halliburton's 10Ks, 10Qs, and Proxy Statements filed with SEC

[2] Source: Halliburton's Proxy Statements filed with the SEC
Transactional data from FactSet Research Systems, Inc.

Exhibit 11

Exhibit 11

Halliburton Co. (HAL)

Institutional Shareholdings of Halliburton Common Stock

Source: FactSet Research Systems, Halliburton's SEC Filings

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Total Institutional Holdings	284,512,988	287,368,378	296,063,077	308,313,370	311,841,078	313,382,747	297,681,843	308,932,314	312,339,430	304,734,118	275,883,781
Reported Shares Outstanding	440,898,000	441,210,000	441,754,000	445,734,148	445,839,648	446,231,000	442,402,000	439,039,141	428,064,000	429,781,384	430,381,251
% Institutional Holdings	64.5%	64.5%	65.5%	69.2%	70.0%	70.5%	67.3%	73.0%	72.8%	70.9%	63.7%
Number of Institutions	418	428	448	485	488	497	486	512	539	505	480
Total Number of Institutions with Holdings during the Close Period											513
Totals											
1st Source Corp. Investment Advisors, Inc.	9,700	10,500	10,500	9,950	9,950	10,150	10,150	10,150	10,150	10,150	89,950
3 Banken-General Investment GmbH	-	-	-	-	-	-	-	-	-	600	600
A.G. Edwards & Sons, Inc.	13,112	13,260	14,610	16,298	11,238	13,612	14,147	16,698	16,748	17,958	22,564
Aberdeen Asset Managers Ltd.	7,000	-	-	-	-	-	-	8,000	-	-	-
ABN AMRO Asset Management (Amsterdam)	-	-	-	-	-	-	8,931	8,931	11,000	11,000	21,700
ABN AMRO Bank NV (Belgium)	-	-	-	-	-	-	-	-	1,200	1,200	-
Acadia Trust, N.A.	75,068	79,013	66,163	61,757	45,949	-	-	-	-	-	222,998
Adage Capital Advisors LLC	-	-	-	-	-	-	-	-	-	-	-
Advanced Investment Partners LLC	-	-	-	-	-	-	-	-	-	263,500	-
Advantus Capital Management, Inc.	98,700	68,500	62,525	17,649	98,084	146,849	65,227	54,942	47,089	49,933	49,928
Affinity Wealth Management, Inc.	33,517	31,937	31,007	28,857	20,620	19,667	-	-	-	-	-
AG Asset Management LLC	620,400	1,023,180	548,668	611,190	27,326	54,900	6,400	-	-	-	-
AGF Funds, Inc.	-	-	-	-	-	-	-	-	-	-	-
AGF International Advisors Co. Ltd.	-	-	-	-	-	-	-	-	32,800	2,000	2,900
AIB Investment Managers Ltd.	480,317	482,899	524,736	573,585	584,154	593,379	611,349	898,788	12,436	12,436	12,788
AIG Global Investment Group	16,600	18,300	14,200	14,200	18,200	13,100	13,100	12,400	408,385	298,951	42,284
AIG Private Bank Ltd.	-	-	-	-	4,000	4,000	-	-	12,000	7,100	242,893
Alerus Financial, N.A.	-	-	-	19,969	24,784	26,279	26,731	28,366	28,366	28,366	52,016
Aletti Gestielle SGR SpA	-	-	-	-	-	-	100,856	100,856	100,856	100,856	30,213
Alex Brown Investment Management LLC	21,900	19,100	14,900	13,800	11,800	11,900	11,500	11,900	9,300	409,300	-
Allegient Asset Management Co.	321,482	282,482	286,029	489,261	848,973	291,011	273,475	192,247	170,823	153,783	117,884
Alliance Bernstein LP	2,832,794	2,288,990	884,659	3,330,263	2,186,280	1,016,799	1,902,728	930,871	901,489	878,899	997,897
Allianz Global Investors Kapitalanlagegesellschaft	650,620	584,320	573,220	590,720	498,150	849,880	470,488	290,480	248,830	286,322	23,360
Allianz of America, Inc.	-	-	-	-	748,650	624,378	-	-	-	-	-
Allied Asset Advisors, Inc.	-	-	-	-	-	-	1,600	1,900	1,900	1,900	1,600
Allstate Investment Management Co.	182,200	182,100	157,300	118,100	181,100	99,800	88,400	79,700	36,100	38,100	-
Alte Leipziger Trust Investment GmbH	-	-	-	-	-	-	-	-	-	-	1,000
American Century Investment Management, Inc.	617,300	989,900	989,600	2,248,900	2,247,000	2,073,000	18,000	18,098	10,000	1,002	309,252
AmeriCap Advisors LLC	-	-	-	98,000	98,000	108,000	81,000	138,200	-	268,500	-
AMF Pensionsforsakring AB	-	-	-	-	-	-	-	-	260,000	260,000	-
Amica Mutual Insurance Co., Inc.	111,000	111,000	111,000	111,000	111,000	111,000	111,000	111,000	128,728	140,075	140,079
Analytic Investors, Inc	311	188	-	-	-	-	-	-	-	146,021	181,988
Ann Advisors, Inc.	11,034	-	-	-	-	-	-	-	-	-	-
Appleton Partners, Inc.	37,300	37,300	62,660	79,560	79,345	78,420	77,320	80,820	80,820	79,460	159,279
AR Asset Management, Inc.	-	-	-	12,200	12,200	12,300	12,200	12,200	12,200	-	-
Archie Gray Allen, Jr.	-	-	800	800	800	800	800	800	800	800	800
Ardsley Partners	-	-	-	-	-	-	-	-	-	-	790,000
Ark Asset Management Co., Inc.	3,253,900	-	12,800	571,300	868,900	648,800	1,211,300	524,000	13,300	19,600	19,300
Armstrong Shaw Associates, Inc.	240,878	26,000	62,800	680,020	680,850	-	39,900	-	-	-	-
Aronson & Johnson & Ortiz LP	-	-	-	-	-	-	-	-	-	-	-
Artisan Partners LP	11,800	-	-	-	-	-	-	-	-	114,900	214,600
Ashburton (Jersey) Ltd	-	-	-	-	-	-	-	-	-	-	55,200
Ashfield Capital Partners LLC	166,875	163,108	172,992	163,019	216,379	232,389	199,975	231,706	32,800	33,800	-
Atlantic Investment Management, Inc.	-	-	-	-	-	-	-	-	232,804	192,643	-
Atlantic Trust Stein Roe	8,026	8,026	8,026	6,126	-	-	-	-	-	-	440,000
Atwood & Palmer, Inc.	7,305	-	-	-	-	-	-	140,018	138,288	134,138	84,060
											-

Exhibit 11

Quarter Ended	6/30/1998	9/30/1998	12/31/1998	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Aviva Gestion d'Actifs SA	-	-	-	-	-	-	-	-	80,000	80,000	80,000
Aviva Vida y Pensiones SA de Seguros y Reaseg.	-	-	-	-	-	-	-	-	-	80,000	-
AXA Framington Investment Management Ltd.	-	-	-	-	-	-	-	-	-	-	-
AXA Investment Managers Paris SA	98,300	100,900	80,000	84,680	84,680	85,680	85,680	18,283	7,000	7,000	-
AXA Rosenberg Investment Management LLC	-	3,800	-	-	-	-	-	-	18,283	28,480	38,710
Ayco Asset Management	123,898	132,182	188,804	187,139	210,430	287,230	384,880	389,097	100	-	700
Azzad Asset Management, Inc.	-	-	-	-	-	-	500	300	483,583	522,119	-
Babson Capital Management LLC	89,270	88,820	82,480	87,880	58,330	83,330	41,000	82,318	300	300	300
Banco International Investors LLC	43,280	-	-	-	-	-	-	-	60,518	63,500	43,400
Baird Investment Management	6,781	7,729	9,120	25,115	9,214	9,210	12,368	11,782	-	-	-
Baker Bayer National Bank Asset Management	70,028	70,129	-	-	21,626	28,780	-	-	11,049	10,918	48,634
Baldwin Brothers, Inc.	42,628	52,463	55,883	53,263	43,883	38,788	32,282	31,592	-	-	-
Banco del Gotardo (Switzerland)	-	-	-	-	-	16,000	16,000	16,000	31,592	11,700	-
Banca Finnat Euramerica SpA (Asset Managemer	-	-	-	-	-	-	-	-	16,000	76,000	76,000
BancorpSouth, Inc. Asset Management	3,100	1,600	1,428	680	680	680	680	1,480	-	-	800
Bank Julius Baer & Co. AG	-	-	-	-	-	-	-	-	-	-	-
Bank Morgan Stanley AG	37,400	10,300	22,660	21,400	27,310	55,700	88,173	84,388	91,837	109,228	30,000
Bank of Hawaii Asset Management Group	8,837	12,771	-	-	-	-	-	-	-	-	38,100
Bank of New York Co. NA (MA)	10,884	10,884	10,884	11,384	11,384	10,384	10,884	10,884	9,884	10,884	-
Bank of New York Trust Co. N.A.	23,808	24,980	28,013	24,888	28,488	28,818	13,810	7,010	7,010	8,710	8,710
Bank of the West Investment & Trust Department	10,800	10,200	7,278	7,178	-	4,180	-	-	-	-	-
Bankhaus Carl Spaengler & Co (Asset Managem	-	-	-	-	-	-	-	2,800	2,800	10,800	10,800
Banque Degroof SA	-	-	-	-	-	-	-	9,000	9,800	8,800	8,800
Barclays Fondos SA SGIIC	-	-	-	-	-	-	-	-	-	-	12,189
Barclays Global Investors NA (CA)	12,612,337	12,488,888	12,290,948	13,720,718	13,128,748	13,259,275	13,632,182	13,117,039	12,700,837	12,788,874	14,242,034
Baring Asset Management, Inc.	-	-	-	-	16,200	15,700	-	-	-	-	-
Barrett Associates, Inc.	88,300	78,800	102,800	149,870	173,220	180,320	172,870	186,818	178,888	184,888	-
Barrow, Hanley, Mewhinney & Strauss, Inc.	22,388,880	20,803,380	17,878,700	18,728,800	18,214,880	14,880,410	17,373,810	18,702,810	17,072,810	-	-
Bartlett & Co., Inc.	21,163	19,783	34,882	33,182	31,382	18,883	17,883	17,883	17,883	17,883	16,883
Batterymarch Financial Management, Inc.	41,800	-	-	-	-	-	-	-	-	-	-
BB&T Asset Management LLC	4,880	-	-	7,140	7,340	7,540	18,878	20,221	27,283	11,918	13,148
BBVA Gestion SGIIC SA	-	-	-	-	-	48,178	48,178	99,748	99,748	89,748	88,088
BBVA Patrimonios	-	-	-	-	-	-	-	-	-	-	38,583
Beacon Trust Co.	-	-	-	127,248	140,448	142,384	163,880	183,408	197,480	-	-
Bear Stearns Asset Management, Inc.	-	-	-	309,000	387,200	424,800	880,200	850,200	850,200	-	-
Bear, Stearns & Co., Inc.	628,288	142,873	184,788	497,938	542,483	520,872	188,082	131,200	129,311	129,811	204,235
Beartull Asset Management Ltd.	-	-	-	-	-	-	20,000	20,000	19,300	19,300	19,300
Beaty, Haynes & Patterson, Inc.	-	-	-	28,980	28,630	28,980	22,020	14,020	13,020	9,280	-
Becker Capital Management, Inc.	388,938	373,023	388,073	375,088	310,888	282,588	270,088	283,888	288,988	273,088	384,848
Bel Air Investment Advisors LLC	348,488	348,488	233,818	25,008	404,408	418,288	404,408	-	-	-	-
Berkeley Capital Management LLC	800	800	800	800	800	800	888	840	400	400	400
Bessemer Investment Management LLC	33,798	33,898	32,288	32,800	32,900	24,370	32,310	19,242	21,353	84,881	23,838
Beutel Goodman Investment Counsel	28,148	28,430	18,538	22,920	22,920	22,820	22,820	22,820	22,820	22,820	22,820
Biblioteca Gestioni SGR SpA	-	-	-	-	-	-	238,002	238,002	238,002	238,002	-
Bilfinyl Associates, Inc.	7,000	7,000	[illegible]00	7,128	7,128	8,128	13,128	11,000	-	-	-
Bishop Street Capital Management, Ins.	242,300	193,180	211,800	173,200	170,880	153,880	131,880	82,780	93,980	87,000	12,181
Blumen, Barry & Associates	34,800	171,980	22,880	28,428	28,428	18,928	17,428	17,928	17,948	24,248	32,800
BlackRock Advisors, Inc.	-	-	-	-	-	-	-	-	307,900	433,900	-
Blackrock Investment Management (UK) Ltd.	20,000	20,000	717,327	1,083,412	1,938,278	2,828,888	3,921,487	3,288,103	3,387,478	1,834,883	113,388
BlackRock Japan Co. Ltd.	-	-	883,880	820,250	580,710	819,480	828,230	491,880	818,070	81,300	48,400
BMO Capital Markets (CA)	323	325	823	88,838	88,838	88,848	12,888	20,827	22,208	23,104	7,483
BNP Paribas Arbitrage SNC	-	-	-	-	-	-	-	-	-	-	18,407
BNP Paribas Asset Management (France)	-	-	-	-	488,818	823,238	884,748	882,408	870,283	898,703	887,992
BNY Investment Advisors	427,884	428,738	387,818	388,888	282,808	357,280	378,188	338,081	302,847	282,380	242,788
Bonness Enterprises, Inc.	-	-	32,800	32,800	32,800	32,800	32,800	32,800	-	-	-
Boone County National Bank	-	-	3,078	2,988	2,988	2,858	2,748	2,888	2,888	2,888	2,490
Boston Advisors, Inc.	7,480	7,480	8,800	8,500	8,500	-	-	-	-	-	-

SA56

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Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Boston Private Value Investors, Inc.	-	-	-	-	-	-	-	286,948	281,806	283,940	99,190
Boston Trust & Investment Management, Inc.	7,667	7,767	7,667	7,667	7,667	7,667	7,921	8,581	4,400	4,400	-
Bowman Financial Management	61,150	58,880	64,880	66,340	63,710	62,810	62,810	62,820	62,810	99,710	40,780
Boys, Arnold & Co., Inc.	-	-	-	-	-	5,800	5,962	5,800	5,800	-	-
BP Investment Management Ltd.	-	58,000	58,000	59,000	58,000	58,000	58,000	58,000	58,000	58,000	-
Brandywine Global Investment Management LLC	450	-	-	-	-	-	-	-	-	-	80
Bremer Investment Advisory Services	-	5,850	-	-	-	-	-	-	-	-	-
Bridges Investment Counsel, Inc.	6,000	6,000	6,000	6,200	6,200	6,200	5,800	5,800	5,800	-	-
Bridgeway Capital Management, Inc.	-	-	-	-	-	-	-	-	-	-	328,000
Brown Brothers Harriman & Co.	1,062,804	886,080	806,740	860,589	325,487	289,341	308,619	283,378	286,138	21,443	21,443
Brown Investment Advisory, Inc.	320,690	298,146	403,622	427,692	381,133	410,065	282,210	278,586	301,848	270,186	66,809
BSI Service Holding SA	-	-	-	-	-	-	-	3,000	3,000	3,000	3,000
BTR Capital Management, Inc.	38,874	36,874	36,798	29,448	16,848	16,798	14,998	14,998	32,068	60,068	-
Burke, Lawton, Brewer & Burke Investment Manag	-	-	-	-	8,880	8,140	8,190	8,190	8,190	-	13,668
Burroughs Hutchinson, Inc.	44,686	36,409	33,569	29,875	27,928	27,928	27,628	21,278	18,878	20,476	18,325
C. S. McKee LP	575,980	403,980	208,160	91,380	91,300	69,400	-	-	-	-	-
CAAM SGR SpA	-	-	-	-	-	-	18,000	18,000	18,000	18,000	60,000
Cadence Capital Management LLC	-	-	-	-	-	-	-	288,700	634,833	-	-
California State Teachers Retirement System	1,222,066	1,186,216	1,372,612	1,372,612	1,263,625	1,175,725	1,240,472	1,271,972	1,213,972	1,321,351	1,308,024
Cambiar Investors, Inc.	-	-	-	-	132,000	-	-	-	-	-	-
Cambridge Investments Ltd.	1,141,966	1,133,886	1,090,791	849,791	1,168,691	1,152,299	587,666	-	-	-	-
Canandaigua National Bank & Trust Co.	8,940	8,940	10,440	-	-	-	-	6,400	8,500	-	-
Cantabria Pondos	-	-	-	-	-	-	-	-	-	-	1,198
Cape Ann Savings Bank	-	-	-	-	-	-	-	-	600	600	600
Capital Advisors, Inc. (OK)	10,428	8,068	-	-	-	-	-	-	-	-	-
Capital City Trust Co.	-	-	8,850	9,300	9,200	6,025	4,275	3,878	400	600	-
Capital Growth Management LP	-	2,644,000	-	-	4,678,300	658,500	-	-	-	-	-
Capital Guardian Trust Co.	-	-	-	8,200	350	350	-	-	-	-	-
Capital Management Associates, Inc. (FL)	3,080	3,080	2,620	2,640	3,960	2,280	2,280	2,280	3,805	-	-
Capital One Asset Management LLC	-	12,208	12,008	11,808	11,508	10,638	11,135	12,010	12,968	12,881	17,461
Capital Research & Management Co.	6,534,700	3,200,000	3,200,000	1,200,000	-	-	4,000,000	4,390,000	4,640,000	5,640,000	5,640,000
Capitalia Asset Management SGR SpA	-	-	-	-	-	-	-	-	-	-	4,800
Capstone Asset Management Co., Inc.	63,612	64,662	64,947	56,907	51,940	52,328	56,258	65,719	66,008	64,559	56,079
Carlson Capital LP	66,000	66,000	66,000	294,600	-	-	-	-	-	-	-
Carrel Asset Management LLC	29,800	90,800	128,407	112,624	114,174	118,474	236,631	219,281	221,781	226,962	36,396
CastleArk Management LLC/02 Asset Manageme	-	-	-	-	219,000	122,000	-	-	-	-	-
Catawba Capital Management, Inc.	36,610	33,900	36,790	37,050	36,070	36,970	36,020	33,669	36,269	36,169	34,614
Cedar Associates LLC	-	407,200	83,100	262,900	-	-	-	-	-	-	2,698,800
CCM Partners LP	-	-	8,048	8,494	8,494	8,494	5,494	5,494	5,494	5,494	5,494
CedarPoint Capital Management, Inc.	-	-	-	-	-	108,000	108,000	108,000	-	-	-
Central Trust Bank (MO)	-	-	-	2,808	2,808	2,808	2,808	2,808	3,008	3,108	200
Charles Schwab Investment Management, Inc.	535,136	668,736	575,535	666,536	577,249	583,944	594,044	595,744	599,884	599,904	600,604
Charles Stewart Mott Foundation	-	-	73,000	73,800	73,800	73,800	73,800	73,800	73,800	76,500	76,500
Charter Trust Co.	-	-	-	-	-	-	-	6,718	6,718	-	-
Chartwell Investment Partners	-	-	13,930	-	-	-	1,423,870	1,056,300	-	40,000	70,000
Chemical Bank & Trust Co.	30,860	16,160	16,160	16,160	15,960	16,960	16,960	16,960	16,960	11,110	-
Chesapeake Asset Management LLC	10,000	10,000	24,400	10,000	10,000	10,000	23,850	23,850	23,850	101,850	12,000
Chevy Chase Bank FSB	-	-	-	-	-	-	-	-	-	139,454	141,739
Chicago Asset Management Co.	727,300	-	-	-	-	-	-	-	-	-	-
Chicago Equity Partners LLC	-	-	-	-	-	-	-	-	-	514,700	-
Chittenden Trust Co.	48,960	49,557	56,488	66,310	60,702	84,661	94,468	102,388	107,993	121,990	119,468
Choate Investment Advisors LLC	7,000	7,000	7,000	-	-	-	-	-	6,960	-	-
Choice Investment Management LLC	-	-	-	-	-	-	-	-	13,200	13,200	-
Chubb Asset Managers, Inc.	100,000	100,000	50,000	137,600	137,600	137,600	32,600	32,600	32,600	32,600	32,600
Church Capital Management, Inc.	-	-	-	-	-	-	29,990	30,795	54,115	78,200	63,200
CIBC World Markets Corp.	48,433	14,901	13,088	34,824	21,161	30,217	23,963	31,231	51,060	72,747	14,159
Citadel Investment Group LLC	166,800	166,000	6,600	97,800	8,300	28,300	27,466	60,343	66,061	77,173	174,912

SA57

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Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Citigroup Investment Research	7,830,037	9,014,313	11,144,332	12,861,630	12,418,803	10,838,330	12,823,585	13,578,266	13,460,381	12,794,484	7,607,879
Citizens Investment Advisors	108,638	102,875	98,875	73,828	62,628	57,778	62,678	61,878	44,128	37,500	32,878
City National Asset Management	-	-	-	-	11,100	-	-	-	-	-	-
Clariden Leu AG	-	-	-	-	-	-	-	8,500	8,500	8,500	8,500
Cobblestone Capital Advisors LLC	-	-	-	5,347	5,347	5,147	-	-	-	-	-
Colorado Public Employees' Retirement Associatio	882,102	886,902	471,802	462,802	433,000	360,200	368,700	362,500	346,400	346,600	246,800
Columbia Management Advisors, Inc.	3,240,302	3,036,936	2,446,906	2,305,648	2,380,606	2,227,899	2,116,432	1,947,782	1,988,483	2,044,181	1,268,085
Columbia Partners LLC Investment Management	349,280	343,986	-	-	-	-	-	-	-	-	-
Columbus Circle Investors	-	-	-	-	-	-	-	-	470,600	-	-
Comerica Asset Management	217,791	220,460	208,889	210,040	219,228	216,248	208,647	200,720	190,502	183,089	168,487
Commerz Asset Management GmbH	-	-	-	-	-	-	-	-	28,000	28,000	69,200
Commerce Bank, N.A. (KS)	100	100	100	100	100	2,000	8,100	28,458	28,978	27,530	100
Commerce Bank, N.A. (St. Louis, MO)	11,020	4,316	3,816	3,916	253,010	536,176	638,801	649,736	622,366	788,461	81,329
Community Trust & Investment Co.	4,662	-	-	-	4,662	4,662	-	-	-	-	-
Compass Bank	291,305	303,348	377,834	33,730	11,418	11,068	10,073	10,073	10,058	9,283	-
Corning Asset Management Co.	124,792	128,692	128,344	130,744	128,400	94,000	93,381	91,783	82,863	48,363	43,763
Courter Capital Corp.	-	-	-	-	-	-	52,851	52,851	52,851	52,851	52,851
Cowen & Co.	788,211	700,868	628,228	88,198	70,048	89,442	81,781	84,781	42,061	33,853	32,329
Cramer Rosenthal McGlynn LLC	-	-	17,700	16,700	16,800	7,800	-	-	-	-	-
Crawford Investment Counsel, Inc.	-	16,400	14,830	13,400	7,900	7,900	7,913	-	-	-	-
Credit Suisse (Switzerland)	-	-	-	-	-	10,000	10,000	19,988	19,988	21,227	28,806
Credit Suisse (UB)	184,931	147,926	117,671	210,388	286,733	348,140	611,211	356,261	348,997	519,501	524,258
Credit Suisse Asset Management (UK) Ltd.	-	-	-	-	-	-	-	-	40,000	40,000	40,000
Credit Suisse Asset Management, Inc. (NY)	27,900	928,328	923,728	144,600	410,128	836,985	454,758	266,018	269,307	219,020	99,078
Crossinvest SA	-	-	-	-	-	-	-	-	30,000	30,000	10,000
Cutler Investment Counsel LLC	107,200	14,400	-	-	-	-	-	-	-	-	-
D. A. Davidson & Co., Inc.	-	-	-	-	-	-	-	-	-	-	-
D. E. Shaw & Co., Inc.	-	-	-	-	-	-	-	-	80,180	-	-
D. L. Carlson Investment Group, Inc.	88,800	88,700	88,566	87,718	88,018	88,018	52,500	99,400	14,900	273,800	470,900
D.F. Dent & Co., Inc.	4,600	-	-	-	4,400	4,300	-	-	-	-	-
Dana, Fabi, Blanc & Co., Inc.	4,600	-	-	-	4,600	4,600	-	-	-	-	-
Danske Capital Denmark	-	-	-	-	-	-	-	-	-	-	-
Danske Capital Finland Ltd.	-	-	-	-	-	-	-	-	-	-	3,900
Davenport & Co. LLC	441,044	441,121	448,878	449,317	438,636	318,282	3,750	3,750	4,050	4,050	-
David Vaughan Investments, Inc.	81,270	82,170	88,870	88,370	84,070	85,770	324,838	10,877	9,842	9,000	-
Davidson & Garnett, Inc.	103,030	107,256	140,830	143,330	129,484	133,815	89,850	89,185	89,200	88,488	12,350
Davidson Investment Advisors	-	169,210	168,250	191,436	189,325	189,325	140,428	140,950	146,086	150,728	-
Davis Advisors	1,948,700	-	-	-	-	-	189,196	232,321	246,414	257,084	-
Dawson-Herman Capital Management, Inc.	-	-	-	-	618,100	559,800	-	-	86,388	88,528	85,528
Dearden, Maguire, Weaver & Barres, Inc.	4,981	8,128	8,128	-	-	-	124,800	389,600	489,000	-	-
Deere & Co. Pension Fund	48,700	48,700	48,700	48,400	48,400	48,400	-	-	-	-	-
Deka Investment GmbH	-	-	-	-	-	181,000	84,200	84,200	84,200	81,300	81,300
Delaware Investment Advisers	1,174	1,474	28,674	149,200	181,200	637,000	183,678	2,679	2,679	2,679	2,679
Delta LLoyd Asset Management NV	-	-	-	-	-	-	1,647,800	2,232,400	3,066,900	3,278,400	126,700
Denver Investment Advisors LLC	-	-	-	-	-	-	-	-	249,738	100,000	-
DePrince, Race & Zollo, Inc.	-	-	-	-	17,850	49,978	20,150	39,950	39,150	29,750	-
Deutsche Asset Management	533,613	258,198	228,118	560,914	1,326,737	1,880,444	299,400	332,600	-	-	-
Deutsche Asset Management Investment GmbH (I	-	-	-	-	-	-	418,836	388,488	374,942	234,982	188,668
Deutsche Bank Investment Management, Inc.	7,278,163	8,941,173	5,648,803	5,334,208	3,988,024	4,836,998	-	-	-	-	383,180
Deutsche Bank Securities, Inc.	418,367	944,808	588,583	824,712	502,157	458,497	3,018,078	4,412,120	4,139,618	3,888,733	3,188,308
Dexia Asset Management (Belgium) SA	-	-	-	-	4,448	17,877	490,273	1,585,424	-	1,881,800	2,831,010
DG Capital Management, Inc.	-	-	-	-	-	-	17,877	20,062	73,234	100,734	43,134
Dimensional Fund Advisors, Inc.	84,800	103,100	110,700	116,300	118,100	122,900	123,900	123,900	125,000	123,200	200,000
Dodge, Hubard & Peinour, Inc.	22,250	22,250	22,250	22,250	22,250	22,150	21,150	21,150	21,150	21,250	124,900
DUBJ Asset Management Co. Ltd. (Japan)	388,884	560,782	654,917	718,414	-	-	-	-	1,985	2,198	18,950
DUBJ Asset Management Co. Ltd./DIAM Internati	-	-	-	-	37,910	37,738	19,139	3,298	4,416	27,816	17,488
DnB NOR Asset Management	-	-	-	-	-	-	-	-	-	198,905	207,970

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SA58

Exhibit 11

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Dodge & Cox, Inc.	243,484	243,584	236,584	237,384	241,084	258,184	234,584	226,884	226,884	156,000
Doheny Asset Management LLC	10,306	10,306	20,277	22,027	22,027	22,027	24,627	24,927	28,327	23,090
Dremen Value Management LLC	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000
Dreyfus Investment Advisors, Inc.	361,190	291,800	968,800	1,219,300	1,288,477	1,204,788	894,200	1,105,100	1,537,900	1,440,380
Driehaus Capital Management LLC	136,484	-	-	-	-	-	-	-	-	-
DSI International Management, Inc.	48,800	48,800	62,200	62,200	62,200	62,200	62,200	62,200	62,200	62,200
Duff & Phelps Investment Management Co., Inc.	166,258	162,190	161,090	160,068	162,990	77,880	63,180	71,180	71,170	71,230
Dunaker, Streett & Co., Inc.	8,960	8,960	14,060	7,200	8,300	4,700	-	-	-	-
DuPont Capital Management	-	-	-	-	-	-	-	-	-	532,900
E. Ohman J:or Fonder AB	-	-	-	-	-	-	-	-	2,900	2,900
Eagle & Haski Investment Counsel Inc.	27,378	28,380	28,678	31,618	31,680	30,940	30,428	30,180	30,420	30,420
Eastern Investment Advisors	-	-	-	-	-	-	6,880	-	-	-
Eastover Capital Management, Inc.	42,370	48,738	48,978	50,580	52,238	57,756	52,978	57,883	-	107,448
Eaton Vance Management, Inc.	2,119,800	2,120,300	2,720,300	3,114,900	3,140,680	3,202,250	3,336,878	3,198,178	3,600,878	2,423,525
Edge Asset Management, Inc.	281,000	290,600	801,800	801,800	663,000	663,000	788,000	788,000	493,000	-
Edgewood Management LLC	-	-	6,850	7,350	7,850	8,050	-	-	-	-
EDM Gestion SGIIC	-	-	-	-	-	-	-	-	-	408
Effert & Associates, Inc.	10,000	10,000	10,000	9,000	9,000	9,000	-	-	-	-
Emerson Investment Management, Inc.	88,321	89,881	88,540	79,968	81,668	88,868	88,458	93,178	104,478	110,643
Endex Capital Management LLC	-	-	3,800	4,700	4,700	4,700	13,334	13,334	13,334	13,334
Engelstatten Capital Management, Inc.	-	-	31,878	-	-	-	-	-	-	573
Engemann Asset Management	-	-	-	508,000	871,560	871,560	-	-	-	-
Ensemble Capital Management LLC	-	-	-	63,600	40,600	40,600	40,600	40,600	40,600	40,600
EOS Partners LP Equity Strategies	-	-	-	-	-	-	-	-	30,000	100,000
Erste Sparinvest - Kapitalanlagen GmbH	-	-	-	-	21,700	21,700	21,700	21,700	14,600	14,600
Essex Investment Management Co. LLC	269,420	801,220	88,770	424,268	678,628	667,078	32,668	38,948	77,980	17,798
Estabrook Capital Management LLC	8,087	8,082	7,482	9,387	9,387	10,187	8,687	8,634	-	-
Eurizon Capital SA	-	-	-	-	-	-	-	-	154,600	154,600
Evergreen Investment Management Co., Inc.	1,188,782	1,241,728	1,192,783	1,344,414	1,888,888	1,632,772	1,103,628	994,422	926,056	1,288,198
Exis Capital Management, Inc.	-	-	-	-	-	-	-	-	-	555,000
ExxonMobil Corp. Pension Trust	67,368	61,368	85,484	88,184	88,084	79,284	73,884	87,128	88,628	88,281
FAF Advisors	184,896	186,327	1,039,722	1,983,834	1,968,554	1,998,678	1,280,344	1,274,328	387,314	623,814
FBB Capital Partners	-	-	-	-	8,320	8,410	8,208	-	-	-
Federated Investment Management Co.	1,038,400	1,062,000	202,800	288,000	401,800	401,288	381,200	396,800	284,800	-
Feinstein Capital Management	-	-	150,000	-	-	-	-	-	-	-
Fidelity Investments International (UK) Ltd.	2,084,780	1,984,080	1,701,840	1,188,880	1,388,870	882,888	738,100	818,000	1,118,140	2,081,118
Fidelity Investments SA (France)	-	-	-	-	11,800	11,800	11,800	11,800	8,770	8,770
Fidelity Management & Research	53,887,781	52,498,188	53,847,483	48,233,980	52,288,822	50,888,540	40,288,838	41,807,233	41,928,202	49,852,480
Fiduciam Asset Management Ltd. (Ireland)	-	-	-	-	-	-	-	-	-	6,000
Fiduciary Asset Management Co., Inc.	-	98,000	-	-	-	-	-	23,200	71,700	234,000
Fiduciary Financial Services of the Southwest, Inc	80,621	84,291	84,281	84,881	83,251	88,781	84,887	84,947	88,847	88,968
Fiduciary Management Associates LLC	121,800	138,300	148,780	181,900	187,100	178,788	84,738	118,838	148,000	-
Fiduciary Management, Inc.	-	-	-	-	-	-	-	-	-	-
Fiduciary Trust Co.	-	-	-	-	-	-	-	8,282	7,082	14,000
Fiduciary Trust Co. International	2,041,842	2,087,182	2,087,442	2,087,280	2,041,880	2,082,230	2,042,288	2,042,888	209,880	187,318
Fifth Third Asset Management	78,410	84,280	87,727	137,605	131,575	158,788	212,383	238,021	248,302	278,838
Financial Counselors, Inc.	-	-	-	-	-	-	-	68,180	71,380	68,880
First Citizens Capital Management Group	-	-	-	-	-	-	-	-	13,242	13,242
First Community Bank of Bluefield	-	8,480	8,480	8,180	8,780	8,878	-	-	-	-
First Financial Bank NA	24,788	24,740	24,740	24,740	24,740	13,890	10,718	10,640	8,422	-
First Interstate Bank	-	8,580	-	-	-	-	-	-	-	-
First Investors Management Co., Inc.	-	-	188,000	170,000	170,000	-	-	-	-	-
First Manhattan Co.	8,880	-	-	-	-	-	-	-	13,280	8,880
First Midwest Bank Trust Division	30,830	32,480	-	-	-	-	-	-	-	49,780
First National Bank of Chester County	800	850	850	850	850	850	850	775	775	700
First Niagara Investment Advisors, Inc.	23,490	53,700	60,200	68,150	64,250	68,250	43,750	40,480	21,418	-
First Quadrant LP	17,800	17,800	738,600	88,100	14,400	-	18,500	200	200	-

SA59

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Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
First Tennessee Bank	-	-	7,500	7,500	5,312	5,370	-	8,770	-	-	-
First Trust Advisors LP	-	-	793	1,438	2,198	2,327	2,376	5,848	7,131	-	-
FirstMerit Trust	109,161	112,074	100,644	104,151	98,194	92,294	87,863	79,121	63,032	50,446	10,875
Fisher Investments, Inc.	-	-	7,600	-	4,850	-	8,000	-	-	-	-
Flippin, Bruce & Porter, Inc.	38,833	41,032	40,633	38,700	29,900	29,900	-	-	-	-	-
Flood, Gamble Associates, Inc.	-	-	-	-	-	-	-	-	-	-	-
FM Global	-	200,000	226,700	226,700	201,800	201,800	151,800	151,800	-	800	-
Folger Nolan Fleming Douglas, Inc.	18,616	18,616	15,016	18,082	16,082	16,322	16,322	16,182	-	-	-
Folksam Pond AB	-	-	-	-	-	-	-	-	12,182	-	-
Forte Gestela SGIIC	-	-	-	-	-	-	-	-	13,873	13,873	807
Forte Investments Management USA, Inc.	1,637,800	1,897,680	2,020,809	-	-	-	-	-	-	-	2,038
Founders Asset Management, Inc.	67,880	-	-	-	22,000	19,800	-	-	-	-	-
Foxhall Capital Management, Inc.	90,840	88,890	88,140	84,340	717,744	965,270	-	-	-	-	-
Franklin Advisers, Inc.	84,400	22,100	12,701	12,801	60,186	68,480	48,940	42,818	48,818	84,088	89,384
Franklin Mutual Advisers LLC	-	-	-	-	15,001	13,101	388,901	383,301	408,701	442,201	2,501
Franklin Portfolio Associates	-	-	-	-	-	-	-	-	-	-	5,700,800
Franklin Street Advisors, Inc.	283,720	342,870	814,788	847,248	5,800	1,800	-	-	4,700	9,800	841,100
Fred Alger Management, Inc.	1,817,200	8,639,560	7,088,860	11,138,890	427,748	410,688	410,888	118,200	35,048	38,048	35,048
Freeman Associates Investment Management LLC	-	-	-	-	10,890,660	9,241,380	8,868,718	2,800,480	2,770,430	918,480	-
Front Barnett Associates LLC	24,270	-	-	-	-	82,100	-	-	-	28,800	22,000
Front Street Capital, Inc.	-	-	-	-	-	5,870	6,170	7,208	-	-	-
Frost National Bank of San Antonio N.A.	51,874	58,784	52,648	42,489	58,534	78,024	114,270	102,342	132,974	148,824	28,000
Fulton Financial Advisors	-	-	-	7,278	7,978	8,178	40,078	43,788	78,478	72,280	211,919
G. W. Henssler & Associates Ltd.	-	-	-	73,883	84,370	91,088	93,197	104,183	208,882	171,291	84,828
GAM USA, Inc.	-	-	-	-	-	-	-	-	23,224	23,224	12,027
GAMCO Investors	111,000	111,000	112,800	111,000	111,000	111,000	111,000	111,000	111,000	118,000	2,534
Gardner Lewis Asset Management	-	-	-	-	-	-	-	-	-	73,400	2,247,800
Gardner Russo & Gardner	700	700	700	700	700	700	700	14,700	14,700	14,700	-
Gateway Investment Advisers LP	82,700	81,900	80,300	72,923	70,809	78,478	78,468	84,289	78,884	74,913	88,831
GE Asset Management, Inc.	1,888,882	1,854,600	1,860,083	1,188,858	1,478,878	1,498,885	1,817,836	53,777	53,777	18,242	-
Geewax, Terker & Co., Inc.	-	8,000	7,840	7,840	8,240	8,240	8,820	14,270	14,230	348,690	-
General American Investors Co., Inc.	-	-	-	-	-	-	-	-	-	-	1,300,000
General Motors Asset Management	34,100	28,100	88,100	108,700	108,700	69,400	87,000	58,200	58,100	-	-
General Re-New England Asset Management, Inc	11,300	11,300	4,400	4,800	4,800	1,400	1,100	1,100	1,100	1,100	1,100
George Weiss Associates, Inc.	-	-	-	-	-	-	-	-	-	78,800	-
Gesecooperatieve SGIIC	-	-	-	-	-	-	-	-	-	-	478
GIBK Gesellschaft fuer Beratersammlunkation	-	-	-	-	-	-	-	-	8,000	8,000	-
Gibler, Gagnon, Howe & Co. LLC	84,728	84,510	-	-	-	-	-	-	-	-	-
Glenmede Investment Management LP	422,712	441,377	833,180	874,080	878,187	898,332	841,142	428,281	288,661	280,154	128,767
Glens Falls National Bank & Trust Co.	7,300	8,800	12,800	18,400	18,300	18,200	18,200	12,090	18,300	17,180	13,700
Glenview Capital Management LLC	-	-	-	-	-	-	-	-	-	-	800,000
Global Index Advisors, Inc.	-	-	-	-	-	-	-	-	-	18,870	18,870
Global Value Investment Portfolio Management Pt	-	-	-	-	-	-	-	-	-	-	200,000
Gloset, Inc.	1,108,878	308,788	418,482	480,782	428,882	483,832	448,387	-	34,202	-	-
Glynn Capital Management LLC	10,000	10,000	10,000	10,000	10,000	10,000	-	10,000	10,000	10,000	10,000
Gofen & Glossberg, Inc.	8,280	8,280	-	-	2,880	3,080	-	8,480	13,420	12,088	-
Goldman Sachs & Co.	-	-	304,883	341,188	788,888	872,880	834,488	108,818	-	-	47,783
Goldman Sachs Asset Management LP (US)	-	-	302,300	478,200	434,448	484,480	274,080	298,887	308,888	188,833	4,808,400
Goldman Sachs Execution & Clearing LP	-	28,000	-	-	-	-	-	-	-	-	-
Grantham, Mayo, Van Otterloo LLC	-	-	7,800	27,800	28,000	30,000	30,000	43,800	38,000	30,000	87,800
Gravy & Co., Inc.	8,010	8,260	8,880	8,340	8,100	8,800	8,800	8,800	8,800	-	-
Great Lakes Advisers, Inc	283,803	282,253	283,281	272,881	288,811	270,831	288,830	308,143	325,873	381,183	-
Greylin Investment Management, Inc.	-	-	32,278	32,878	32,478	32,278	38,878	38,278	38,300	74,180	217,400
Griffin Asset Management, Inc.	-	-	-	-	-	-	-	8,000	8,000	-	-
Grisanti Brown & Partners LLC	-	-	-	-	-	-	-	-	-	-	40,000
Gruss Asset Management LP	-	-	148,858	148,858	148,858	148,858	148,858	148,858	148,858	148,858	148,858
Guaranty Trust Co. of Missouri	4,008	8,928	10,328	10,828	10,878	11,488	11,488	11,488	13,988	12,488	10,328

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Guardian Investor Services LLC	748,000	758,800	810,300	813,458	813,458	15,000	15,000	15,000	24,948	26,488	26,268
Skyscale Investment Advisors, Inc.	9,180	12,080	8,280	8,280	8,280	8,280	8,280	8,280	8,280	-	-
GW & Wade, Inc.	-	-	-	-	-	-	-	13,020	14,180	14,180	14,180
GW Capital Management LLC	134,380	134,380	104,880	88,240	123,185	124,818	91,070	89,175	83,245	61,348	82,140
H. G. Wellington Capital Management	20,000	29,600	16,700	16,190	40,890	43,380	16,880	16,590	16,080	16,080	10,890
H. M. Payson & Co.	-	-	-	-	4,350	4,350	-	-	-	-	-
Hale & Dorr Capital Management LLC	5,298	5,298	5,298	-	-	-	-	-	-	-	-
Hallmark Capital Management, Inc.	11,743	11,983	11,478	-	-	-	-	-	-	-	-
Hancock Bank of Mississippi (Horizon Advisors)	-	-	3,980	2,600	2,350	2,580	2,400	1,800	1,800	1,800	400
Handelsbanken Fonder AB	-	-	-	-	-	-	-	-	131,970	131,970	3,029
Hansberger Global Investors, Inc.	-	-	-	-	-	-	62,000	91,100	91,100	110,800	138,200
Harbourfy Capital Management Corp.	106,158	108,648	104,398	110,871	110,871	87,156	87,133	50,033	50,483	-	-
Harleysville Group, Inc. Asset Management	348,335	334,848	334,248	333,158	334,078	337,905	334,895	334,898	335,898	336,928	1,640
Harris Investment Management, Inc.	109,008	97,797	94,839	92,238	92,238	87,704	86,804	87,958	88,023	88,773	89,927
Hartford Investment Management Co., Inc.	129,200	132,200	165,437	164,837	164,137	178,037	175,837	175,137	146,337	145,837	154,896
Hartline Investment Corp.	65,499	65,499	65,499	65,499	64,369	35,755	9,178	10,178	10,828	11,128	-
Harvard Management Co., Inc.	179,756	180,084	186,896	190,886	249,898	249,898	183,896	184,896	178,986	178,986	52,289
HBK Investments LP	-	-	-	-	-	-	-	-	21,200	21,200	84,300
Hellman, Jordan Management Co., Inc.	1,064,200	1,368,700	1,648,700	1,398,900	1,404,400	1,709,400	1,888,600	1,237,000	301,900	898,200	-
Hendley & Co., Inc.	27,000	26,900	26,448	24,998	-	-	-	-	-	-	-
Hermes Pensions Management Ltd.	191,871	187,160	171,380	171,380	171,380	178,070	168,748	168,748	168,748	137,703	137,703
Hester Capital Management LLC	-	-	-	-	-	-	-	14,600	20,900	39,000	36,459
HGK Asset Management, Inc.	-	6,700	-	-	-	-	-	-	-	-	-
High Point Bank & Trust Co.	-	-	-	-	-	-	-	-	2,400	2,400	1,600
HighMark Capital Management	-	-	-	824,900	824,900	299,728	299,728	283,438	283,438	256,820	256,820
Holdernese Investments Co.	-	-	-	-	-	-	13,190	13,040	13,240	17,090	13,140
Hotchkis & Wiley Capital Management LLC	-	-	-	-	-	-	-	-	-	-	43,300
Howard Capital Management	98,180	98,180	104,778	-	-	-	-	-	-	-	-
Howard Capital Management, Inc.	-	-	6,750	6,260	6,000	6,000	6,000	6,038	6,000	-	-
HSBC Investments (UK) Ltd.	884,817	701,037	968,279	881,184	840,822	901,930	926,697	1,188,281	861,723	705,984	505,875
HSBC Investments Deutschland GmbH	-	-	-	-	-	-	-	-	4,084	4,084	-
HSBC Investments USA	-	-	-	-	-	-	-	54,000	54,000	54,000	54,000
Huntington Asset Advisors, Inc.	60,384	64,289	70,934	69,220	99,788	60,940	64,148	61,041	60,706	28,661	29,081
HVB Capital Management, Inc.	-	-	-	-	400	-	-	-	-	-	-
I. G. Investment Management Ltd.	23,500	-	-	-	10,000	10,000	-	-	-	-	1,900
Ipersele Gestion SGIIC	-	-	-	-	-	-	-	-	-	-	1,970
IBM Retirement Plan	396,433	392,738	381,484	381,264	353,451	352,144	354,303	372,277	327,048	333,778	334,209
ICC Capital Management, Inc.	87,080	134,480	134,480	136,080	128,120	97,448	112,948	113,348	121,648	153,948	229,875
ICM Asset Management, Inc.	89,200	89,300	88,600	87,700	88,400	53,200	78,480	42,480	41,400	53,400	-
Icon Advisers, Inc.	21,310	23,610	23,900	22,930	-	-	-	-	-	-	-
Independence Investments LLC	-	-	-	-	-	21,896	8,900	12,600	12,200	396,630	4,200
ING Investment Management Co.	1,548,483	1,483,393	934,985	548,530	1,491,395	1,483,618	481,043	529,843	249,983	348,113	103,184
ING Investments LLC	245,800	288,300	99,400	89,700	83,400	78,780	182,710	197,900	333,700	343,890	327,250
Ingalls & Snyder Asset Management	-	9,100	19,000	20,240	22,958	23,055	30,487	30,482	30,887	33,992	118,222	
Insight Investment Management (Global) Ltd.	-	-	-	-	-	-	50,000	211,480	238,480	78,490	78,480	
Integra Bank, N.A.	-	-	-	-	-	-	-	18,400	18,120	19,720	17,748	
Intel Corp. Pension Fund	88,950	88,950	89,750	99,080	98,180	88,480	88,480	114,180	130,650	133,880	131,780	
INTRUST Bank N.A.	-	-	-	-	-	-	11,300	11,300	11,300	11,300	11,300	
Inverness Counsel, Inc.	88,900	88,900	88,900	88,900	88,834	88,834	88,834	88,834	88,834	88,834	94,834	
INVESCO Asset Management Ltd.	-	-	-	-	-	-	25,010	-	13,614	11,880	170,900	
INVESCO Capital Management	21,080	8,780	400	84,840	88,109	84,360	43,140	273,788	847,043	881,818	1,411,438	
Investments Technology, Inc.	-	-	-	-	-	-	-	-	-	1,800	1,800	
Indian Asset Management LLC	-	-	-	-	-	497,199	972,798	948,198	-	-	-	
J. & W. Seligman & Co., Inc.	101,200	101,200	120,800	-	142,400	145,300	-	-	-	-	-	
Jacobs Levy Equity Management, Inc.	-	-	-	222,900	-	-	187,700	178,800	16,900	432,900	426,200	
JAG Advisors	-	-	1,930	-	-	-	-	-	-	-	-	
Janus Capital Management LLC	-	-	-	-	5,155	5,155	-	-	1,207,238	1,991,870	-	

SA61

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Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Jennison Associates LLC	-	-	-	-	72,600	-	14,361,800	22,981,700	23,163,817	22,473,284	9,991,100
JLP Asset Management LLC	-	-	-	-	-	-	-	-	-	-	190,000
JMG Capital Management, Inc	-	-	-	-	-	-	-	-	-	-	32,650
Joel R. Mogy Investment Counsel, Inc.	-	-	-	-	-	-	-	-	-	-	-
John G. Ullman & Associates, Inc.	65,330	64,780	64,288	63,436	59,869	58,388	53,238	5,813	5,835	-	-
John P. O'Brien Investment Management, Inc.	26,428	26,448	26,442	26,476	29,258	29,246	29,257	53,135	52,488	123,038	59,640
Johnson Investment Counsel, Inc.	388,828	396,204	417,104	426,417	469,766	483,289	541,379	25,270	25,262	25,457	25,345
Johnston Lemon Asset Management, Inc.	-	-	9,300	9,360	9,850	-	-	583,878	578,709	578,784	410,678
Johnston, Reid & Mitchell, Inc.	44,690	42,680	48,449	43,563	40,200	40,200	38,300	7,230	7,230	6,730	-
Jones Heward Investment Counsel	-	-	-	110	110	110	610	41,380	41,800	41,760	39,600
JPMorgan Asset Management (UK) Ltd.	63,400	45,100	41,060	3,506	8,106	9,300	8,713	-	-	-	-
JPMorgan Asset Management, Inc. (US)	918	918	918	918	21,800	247,400	1,181,900	17,845	58,480	37,078	21,993
JPMorgan Chase Bank NA	88,901	132,921	217,307	236,826	231,236	270,084	1,756,270	834,000	836,681	756,150	481,800
JPMorgan Investment Advisors, Inc.	1,838,806	1,864,327	3,111,874	3,077,186	3,028,862	2,780,044	1,348,859	1,788,661	1,484,884	1,389,887	963,319
JPMorgan Securities, Inc.	-	-	-	-	-	-	2,278	1,302,872	799,184	740,883	228,446
JPMorgan Trust Bank Ltd.	-	-	-	-	-	-	-	-	117,881	117,881	117,881
Jupiter Asset Management Ltd. (UK)	-	-	-	-	100	2,500	7,300	8,900	3,900	-	-
Jyske Invest Administration A/S	-	-	-	-	-	55,000	55,000	55,000	55,000	55,000	55,000
Kansas Trust Co.	-	-	-	-	-	-	-	-	-	-	2,000
Kanawha Capital Management LLC	7,229	7,930	7,930	7,446	19,833	17,210	17,064	18,784	18,014	48,364	37,527
Karpas Strategies LLC	4,476	-	-	-	-	-	-	-	-	-	-
KBC Asset Management (Belgium)	-	-	-	-	-	-	10,000	10,000	10,000	10,000	-
KCM Investment Advisors	-	-	-	-	23,873	23,873	139,278	139,278	163,937	163,937	150,932
Keating Investment Counselors, Inc.	-	-	-	18,645	-	-	-	-	-	-	-
Kelmoore Investment Co., Inc.	19,080	19,800	11,800	8,800	8,900	8,600	8,900	8,800	8,800	34,100	-
Ken Roberts Investment Management, Inc.	-	-	127,400	141,800	168,000	135,400	248,200	148,400	191,900	265,000	155,400
Kentucky Teachers Retirement System	83,336	84,310	75,920	88,049	-	-	-	-	-	-	-
Kingdon Capital Management LLC	89,400	89,400	116,300	116,300	116,300	116,300	116,300	116,300	116,300	109,900	114,000
Kingwest & Co.	-	-	-	-	300,000	-	-	-	-	-	-
Klingenstein, Fields & Co. LLC	-	-	-	-	-	-	-	-	-	-	-
Kornitzer Capital Management, Inc.	-	20,700	38,980	39,400	39,400	39,400	42,780	73,050	84,018	84,065	1,650
LaSalle National Bank	28,600	20,600	22,000	21,600	20,100	19,800	20,700	19,500	-	-	-
Ledyard National Bank	158,264	143,404	-	-	-	-	-	-	-	-	-
Lee, Danner & Bass, Inc.	-	-	-	-	4,400	3,976	-	-	-	-	-
Legal & General Investment Management Ltd.	23,325	22,825	23,825	24,228	23,525	47,625	30,175	30,178	37,275	36,675	28,529
Legg Mason Canada, Inc.	371,616	186,858	226,606	236,831	288,471	298,639	331,368	388,628	380,886	383,081	353,061
Legg Mason Capital Management, Inc.	-	-	61,400	61,700	38,200	38,200	67,180	68,650	16,300	16,000	2,000
Legg Mason Investment Counsel LLC	2,200	1,100	-	-	-	-	-	-	-	-	6,000
Lehman Brothers, Inc.	-	-	-	-	-	-	200	-	-	-	-
Lehrer Management Co., Inc.	36,200	8,000	8,800	28,221	16,029	114,484	167,033	88,904	64,663	142,102	784,297
Lemanik Asset Management Luxembourg SA	18,500	15,900	17,850	7,850	-	-	-	-	-	-	-
Liberty Ridge Capital, Inc.	-	-	-	-	-	-	-	-	-	-	-
LKB Essen Pensionsstiftung AG	-	32,500	-	-	-	-	52,000	-	-	-	6,000
Lockheed Martin Investment Management Co.	-	-	-	-	-	-	-	-	-	-	-
Loeb Partners Corp.	400,400	388,400	376,000	376,000	276,000	188,000	188,000	98,000	176,000	80,400	80,400
Loews Corp. Investments	16,000	8,000	8,000	8,000	8,000	8,000	7,000	7,000	7,000	126,000	125,000
Logan Capital Management, Inc.	-	-	-	-	-	-	-	-	18,800	-	-
Lombard Odier Darier Hentsch & Cie	-	-	-	-	-	-	-	8,350	-	-	-
Loomis, Sayles & Co. LP	880,742	834,937	865,740	948,340	490,940	481,890	11,000	11,000	10,000	10,000	-
Lord Abbett & Co. LLC	-	-	-	-	-	-	431,980	347,280	284,810	210,000	85,600
Loring, Wolcott & Coolidge Fiduciary Advisors	5,200	4,800	6,800	4,930	4,600	3,033	6,833	37,100	-	-	148,278
Los Angeles Capital Mgmt & Equity Research, Inc	24,800	28,900	28,800	283,046	242,233	28,400	24,800	6,833	6,930	6,800	4,800
Lotsoff Capital Management	-	-	-	-	-	-	58	24,800	24,900	38,700	161,900
Lowe Brockenbrough & Co., Inc.	446,475	443,025	457,825	453,475	274,975	282,080	433,368	58	58	58	58
LSV Asset Management	-	-	-	-	-	-	-	380,295	362,765	363,356	-
Luther King Capital Management Corp.	536,780	885,284	930,764	975,864	828,764	873,064	896,164	694,657	916,437	804,525	1,800
Lutz Investment Advisors SA	-	-	-	-	-	-	-	-	-	28,980	854,969
											28,980

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SA62

App. 168

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
M & I Investment Management Corp.	48,116	44,958	45,600	64,126	63,216	67,984	76,278	76,476	72,418	31,053	72,534
M&T Investment Group	-	28,110	23,988	21,840	31,250	31,749	93,306	97,374	99,884	93,896	93,918
M. A. Greenwood & Associates, Inc.	24,300	24,400	24,400	24,100	24,100	24,100	23,600	23,600	22,200	22,480	-
M.M. Warburg Invest KGaA	-	-	-	-	-	3,200	3,200	3,200	3,200	-	-
MacKay Shields LLC	50,000	-	-	-	-	-	-	-	-	-	-
Mackenzie Financial Corp.	33,400	66,200	67,400	78,400	78,200	75,700	7,600	450	3,900	3,900	-
Mainstream Investment Advisers LLC	-	-	-	28,000	20,000	-	-	-	-	-	-
Mandatum Asset Management Ltd.	-	-	-	-	-	-	-	-	9,623	9,623	9,623
Manning & Napier Advisors, Inc.	-	-	-	-	791,060	369,073	-	-	-	-	-
Marco Investment Management LLC	-	-	-	-	-	-	-	216	216	216	100
Marblehead Capital Management LLC	-	-	-	-	-	-	-	-	-	-	50
Markston International LLC	4,700	-	-	-	-	-	-	-	-	-	41,000
Marque Millennium Capital Management Ltd.	-	-	-	2,600	-	8,700	99,400	100,860	104,370	114,150	113,554
Mersea Capital Management LLC	-	-	-	-	2,286,660	60,874	-	-	-	-	-
Marvin & Palmer Associates, Inc.	-	337,900	-	-	304,700	669,400	-	-	577,000	-	-
Masen Street Advisors LLC	16,400	16,400	16,400	16,400	16,400	16,400	16,400	-	-	-	-
Masters Capital Management LLC	-	-	-	-	-	250,000	-	-	1,098,000	1,100,000	250,000
Maverick Capital Ltd.	-	-	-	-	-	-	-	-	-	-	10,000,000
MB Investment Partners, Inc.	44,380	48,880	40,880	24,421	23,880	23,780	29,250	21,700	20,700	20,700	-
McCullough & Associates LLC	12,500	12,500	10,300	8,300	8,300	-	-	-	-	-	-
McGlinn Capital Management, Inc.	278,200	384,800	278,978	483,782	485,914	443,114	365,033	317,882	334,882	478,414	-
McMorgan & Co. LLC	13,800	12,000	12,000	8,900	8,400	6,000	8,000	3,800	2,700	2,700	2,700
Mellon Capital Management	2,113,819	1,848,447	1,812,888	1,944,241	2,299,284	2,400,511	2,894,684	4,543,353	4,319,083	4,949,643	2,509,816
Mellon Equity Associates LLP	1,800	2,400	29,800	29,400	21,800	-	-	-	2,000	1,900	1,800
Mercantile-Safe Deposit & Trust Co. /Mercantile C	-	-	-	-	79,034	79,034	58,600	58,600	-	-	-
Meridian Investment Advisors	24,188	24,980	23,440	23,280	21,828	21,680	7,250	-	-	-	-
Merrill Lynch, Pierce, Fenner & Smith, Inc.	1,389,880	1,621,206	1,824,381	1,847,913	1,392,513	1,437,226	1,736,926	1,473,666	1,101,971	1,243,912	760,310
Mesirow Asset Management, Inc.	46,830	49,830	73,666	-	-	-	-	-	-	-	-
Metropolitan Life Insurance Co.	287,323	284,032	284,886	279,024	314,086	313,989	314,060	309,888	286,493	309,990	299,886
Metropolitan West Capital Management LLC	-	-	182,552	381,451	536,534	965,613	1,182,882	1,428,916	1,810,886	1,814,318	1,093,800
Metzler Asset Management GmbH	-	-	-	2,000	2,000	2,000	2,000	2,000	2,000	-	-
Meyer Handelman Co.	278,434	278,034	278,034	278,034	278,634	279,634	278,634	278,634	278,234	278,234	283,434
MFC Global Investment Management	218,472	219,709	221,408	220,808	90,585	91,988	56,868	88,804	83,727	92,890	338,945
MFC Global Investment Management (US) LLC	483,423	293,224	-	359,649	196,409	192,352	-	372,085	643,629	223,283	45,925
MFM International	-	-	-	-	-	-	-	427,060	422,080	486,658	289,380
MFS International (UK) Ltd.	-	-	-	-	42,500	42,500	37,880	37,880	3,300	3,300	12,800
MFS Investment Management	2,019,398	2,210,550	4,361,990	8,088,048	9,051,175	9,015,627	2,412,860	2,820,384	6,041,282	3,780,482	113,474
Michigan Department of Treasury	280,889	280,889	280,089	289,089	289,989	286,788	284,059	283,959	259,829	258,829	284,828
Millennium Partners	-	-	-	-	-	-	431,509	103,403	186,048	218,998	1,381,087
Missouri State Employees Retirement System	63,360	66,260	63,790	67,160	59,360	57,760	57,260	55,460	55,460	44,660	38,060
Missouri Valley Partners, Inc.	-	-	-	-	-	-	6,400	-	-	-	-
MIT Investment Management Co.	32,700	29,700	40,500	40,500	40,500	39,350	39,350	39,350	39,350	38,250	-
Mitchell Sinkler & Starr	28,500	28,500	28,500	28,200	28,000	28,000	28,000	28,000	32,108	28,708	19,708
Monarch Capital Management, Inc.	8,100	8,100	12,000	13,600	-	-	-	-	-	-	-
Monetary Management Group, Inc.	-	-	-	-	-	-	-	4,250	2,625	1,875	1,125	1,500
Montag & Caldwell, Inc.	-	19,700	-	-	-	-	-	-	161,600	-	-	-
Moody, Lynn & Co.	-	29,842	6,200	-	11,550	4,170	-	-	-	-	-	-
Moore Capital Management LLC	990,600	1,281,984	109,722	161,722	40,000	-	-	-	-	-	-	-
Morgan Asset Management, Inc.	130,995	132,905	117,426	111,029	117,240	121,618	184,974	348,119	466,303	211,828	33,609
Morgan Dempsey Capital Management LLC	-	-	-	-	-	-	-	17,280	17,280	-	-
Morgan Stanley & Co., Inc.	789,186	640,026	936,963	1,636,072	1,430,488	1,848,272	1,989,740	1,301,186	1,887,327	1,791,484	3,639,968
Morgan Stanley Dean Witter SA	-	-	-	-	-	12,485	12,485	10,882	22,442	22,442	33,755
Morgan Stanley Investment Management (UK)	-	-	-	-	-	-	-	-	258,100	235,100	-
Morgan Stanley Investment Management, Inc.	3,864,338	4,358,209	2,433,139	2,240,228	2,068,699	3,667,284	1,636,691	3,667,648	2,908,227	2,234,860	19,818,696
Morley Fund Management	-	-	-	-	-	-	-	22,700	-	11,300	20,100
Morse Williams & Co., Inc.	26,960	28,260	10,960	-	-	-	-	-	-	-	-
MTB Investment Advisors, Inc.	-	-	-	-	232,590	232,590	234,290	234,290	219,690	219,690	129,690

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SA63

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Munich Capital Management, Inc.	-	-	-	-	-	-	-	-	-	26,000	550,500
Munder Capital Management	-	-	-	-	-	90,800	-	106	106	106	449,716
Murphy Capital Management, Inc.	7,480	7,750	7,750	7,800	7,800	8,000	8,000	7,060	7,160	7,200	7,300
Mutual of America Capital Management Corp.	14,800	19,400	88,682	90,649	71,369	48,718	45,674	44,127	43,344	42,340	43,366
MyBank/First Union Bank & Trust Co.	-	-	-	-	-	14,438	13,985	18,660	17,436	18,488	-
National Bank of Indianapolis Wealth Managemen	-	-	-	-	-	900	700	760	700	728	190
National Independent Trust Co.	-	-	-	-	-	-	-	-	-	-	2,180
National Rural Electric Cooperative Association	1,423,600	1,423,600	1,423,600	1,423,600	1,183,600	913,600	1,138,600	1,113,300	1,143,600	486,600	-
National Westminster Bank Plc	-	-	-	-	-	-	1,000	1,000	1,000	1,000	600
Natixis Private Banking Luxembourg SA	-	-	-	-	-	-	-	-	-	-	13,000
NBT Bank	-	-	-	2,500	2,500	2,500	2,132	2,132	2,132	2,132	2,132
NCM Capital Management Group, Inc.	324,100	320,050	273,775	562,650	108,900	-	-	-	-	-	-
Needham Investment Management LLC	-	-	-	-	-	-	-	-	-	-	202,500
Neuberger Berman LLC	1,909,019	688,609	3,138,324	4,819,866	3,679,866	2,223,787	2,205,284	1,253,747	975,807	811,833	48,444
Neuflize OBC Asset Management	-	-	-	-	-	-	-	-	-	-	78,819
New Jersey Division of Investment	-	-	-	-	-	-	-	-	1,866,900	1,927,600	1,307,900
New Mexico Educational Retirement Board	278,200	86,200	86,200	86,200	86,200	83,700	83,700	86,100	86,100	86,100	82,000
New York Life Investment Management LLC	267,277	648,068	616,663	182,248	160,826	188,848	178,471	173,280	171,362	167,310	164,078
New York State Common Retirement Fund	1,387,700	1,384,800	1,288,700	1,283,200	1,188,200	1,230,000	1,998,300	1,993,800	1,779,030	1,988,130	2,014,408
New York State Teachers Retirement System	1,758,180	1,884,860	1,884,860	1,884,860	1,884,860	1,884,860	1,884,860	1,436,790	1,436,790	1,291,860	1,191,960
Newton Investment Management Ltd.	180,000	107,000	169,900	117,400	318,600	225,790	589,398	18,110	270	270	270
Nicholas Advisors, Inc.	-	-	-	-	-	-	-	89,000	87,100	-	-
Nicholas-Applegate Capital Management	2,266,771	1,011,717	12,283	83	83	83	83	83	-	-	157,700
NIBA Investment Advisers LLC	44,900	44,800	40,900	48,400	57,800	53,900	61,700	68,900	86,600	86,600	30,200
Nissay Asset Management Co.	-	121,234	-	-	244,070	-	-	-	866,700	975,720	-
NLI International, Inc.	-	20,500	34,900	23,300	-	-	-	-	-	-	-
Nomura Asset Management Co., Ltd.	13,200	16,900	19,500	16,860	17,084	51,358	60,360	49,880	179,936	210,536	193,600
Nomura Asset Management U.S.A., Inc.	84,800	138,800	187,900	188,100	183,600	174,000	170,200	183,800	149,200	145,400	-
Nomura Securities Co., Ltd. (Wealth Management	88,828	114,878	120,418	118,213	218,882	251,408	388,405	328,711	390,913	450,863	180,036
Norges Bank Investment Management	-	-	-	-	-	-	24,830	26,288	62,231	62,231	267,560
North American Management Corp.	1,100	1,100	1,100	250	250	250	250	250	250	250	-
Northeast Investment Management, Inc.	2,880	1,800	1,800	700	700	700	700	700	700	-	-
Northern Capital Management LLC	-	-	10,900	17,900	-	-	-	-	-	-	-
Northern Trust Global Advisors, Inc.	58,725	113,388	86,950	89,250	84,641	64,580	60,980	68,810	71,610	106,099	132,099
Northern Trust Investments	3,223,930	3,398,812	2,928,827	2,892,077	3,308,000	3,591,528	3,590,587	3,647,584	3,812,118	3,833,183	1,883,183
Northwestern Investment Management Co., LLC	183,000	161,300	148,300	142,000	140,900	140,100	138,700	137,800	136,200	131,500	131,900
NWD investments	868,282	429,890	818,827	219,656	184,400	88,044	221,233	96,928	187,275	119,718	138,781
NWQ Investment Management Co. LLC	3,870,334	3,307,663	2,899,622	1,832,087	1,980,175	1,864,687	1,889,264	1,851,972	1,812,029	1,641,288	1,887,311
Odin Forvaltning AS	-	-	-	-	-	-	-	-	-	-	17,414
Ohio Public Employees Retirement System	776,500	776,500	701,687	709,917	694,372	748,448	788,221	783,542	783,542	921,016	866,236
OKO Asset Management Ltd.	-	-	-	-	-	-	-	-	540	540	-
Old National Wealth Management	-	-	-	-	-	-	-	-	8,628	-	32,128
Olstein Capital Management LP	-	-	90,000	87,000	-	-	-	-	-	-	-
ON Investment Management, Inc.	-	-	5,000	8,000	8,000	49,000	49,000	60,000	43,000	74,000	-
Onyx Capital Management LLC	-	-	-	-	-	-	-	72,200	39,300	-	-
Oppenheim Pramerica Kapitalanlage GmbH	-	-	-	-	-	-	-	-	2,388	2,388	2,388
Oppenheimer Asset Management	-	-	-	8,718	9,380	8,880	14,080	8,950	8,750	-	-
Oppenheimer Capital	-	8,380	8,380	8,483	8,482	8,380	5,900,238	7,868,221	8,018,928	10,335,111	8,481,678
OppenheimerFunds, Inc.	671,000	721,000	720,000	772,800	832,900	832,900	2,828,700	3,448,320	4,267,910	8,210,170	8,780,630
Optimum Investment Advisors LP	84,168	78,120	81,888	87,715	98,830	87,818	81,918	81,161	82,117	86,316	42,940	
Opus Investment Management, Inc.	-	42,900	38,000	40,200	39,400	38,200	38,200	34,600	27,800	28,800	28,800	
Orleans Capital Management Corp.	79,700	81,200	85,400	84,800	86,800	8,450	-	-	-	-	-	
Osborne Partners Capital Management	20,732	20,832	23,884	23,464	23,884	24,932	28,964	24,164	21,036	18,276	-	
Osterweis Capital Management, Inc.	4,402	4,402	4,402	2,000	2,000	4,402	-	-	-	-	-	
P. J. Schmidt Investment Management, Inc.	16,800	16,800	17,678	18,178	19,078	14,578	6,578	8,375	8,376	-	-	
Pacific Assets Management LLC	-	-	-	-	10,000	-	-	32,000	190,000	-	32,880	
Pacific Capital Wealth Management Services	8,800	8,550	-	-	5,118	8,118	4,880	-	-	-	-	

USCAS 7826

SA64

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Pacific Income Advisers, Inc.	-	-	-	11,158	84,443	68,850	70,435	37,096	8,840	2,778	2,495
PADCO Advisors, Inc. (Rydex Global)	-	-	-	-	-	262,306	263,706	174,911	139,882	190,843	190,137
Paloma Partners Management Co.	-	-	-	-	-	-	-	-	-	-	149,120
Paradigm Asset Management Co. LLC	586,200	611,300	308,100	308,800	318,200	312,900	347,300	302,100	283,700	183,000	-
Paragon Investment Management, Inc.	44,167	44,167	80,767	84,967	84,967	98,197	98,267	38,000	18,800	18,800	-
Parametric Portfolio Associates	73,933	88,371	61,980	73,977	88,153	112,256	99,677	135,186	147,027	107,639	133,370
Park National Bank	7,900	7,200	7,200	7,000	7,950	7,400	12,890	13,880	11,807	11,200	11,300
Parsons Capital Management, Inc.	8,881	7,828	8,718	8,883	8,883	8,168	8,203	8,200	7,353	-	-
Patten & Patten, Inc.	8,400	8,800	8,900	4,850	-	4,729	-	-	7,490	-	-
Peak Investments LLC	106,000	96,000	-	-	-	-	-	-	-	-	-
Pekin Singer Strauss Asset Management	96,110	93,910	93,910	93,910	96,610	79,900	97,900	96,988	90,359	84,329	22,328
PENN Capital Management, Inc.	-	-	6,265	-	-	-	-	-	-	-	-
Pennsylvania Public School Employees Retiremer	-	-	-	-	332,280	311,380	309,380	283,886	828,988	1,248,886	308,788
People's Bank (CT)	-	47,299	80,780	51,480	49,730	49,730	37,884	36,974	37,774	36,474	41,888
Pequot Capital Management, Inc.	-	-	-	-	-	-	71,000	-	-	-	-
Perkins, Wolf, McDonnell & Co.	-	-	321,131	422,011	788,561	787,321	-	-	-	-	-
Petercam Asset Management (Belgium) SA	-	-	-	-	-	-	-	-	-	-	-
Petersen, Flynn & Dinsmore, Inc.	-	-	41,480	41,180	39,780	39,780	31,880	29,380	4,500	4,500	9,600
PGB Trust & Investments	-	-	-	-	-	-	-	12,882	29,940	2,500	2,400
Philadelphia Investment Management Co.	43,618	41,029	38,454	37,784	34,228	30,028	30,198	29,906	12,882	13,082	12,882
Phoenix Investment Counsel, Inc.	843,540	425,130	284,900	277,900	214,400	198,900	208,600	179,100	29,889	-	-
Phoenix/Zweig Advisers LLC	12,700	12,700	12,700	-	-	93,900	18,700	-	1,000	-	-
Pictet Asset Management Ltd.	-	-	-	-	-	-	-	-	-	-	-
Pin Oak Investment Advisers, Inc.	-	-	23,480	22,480	-	-	-	-	1,108	1,108	-
Pinnacle Associates Ltd.	295,790	303,938	358,669	364,418	343,267	360,817	350,817	343,291	10,432	10,432	-
Pioneer Investments	-	-	-	-	308,800	455,600	450,000	480,000	387,392	91,217	40,401
Pioneer Investments Austria	-	-	-	-	-	380	380	880	976,000	973,100	-
Pioneer Investments Kapitalanlagegesellschaft mi	-	-	-	-	-	-	-	-	880	880	880
Pitcairn Financial Group	-	-	27,898	-	4,380	4,448	470	378	6,300	23,301	35,601
PNC Bank NA	522,173	687,884	440,242	425,473	432,808	428,803	441,132	481,972	378	-	-
Prescott Group Capital Management LLC	-	-	-	-	-	-	-	-	564,499	498,888	367,765
Principal Global Investors LLC	238,942	242,688	1,318,810	1,752,314	1,589,695	1,616,922	841,808	829,984	-	-	144,000
Privat Bank Patrimonia SGIIC	-	-	-	-	-	-	-	-	841,900	481,744	218,713
Private Asset Management, Inc.	-	8,050	7,480	8,188	7,800	7,972	8,822	8,722	-	-	34,914
Provident Investment Counsel, Inc.	-	-	-	-	8,100	18,700	18,100	8,700	7,228	83,490	88,010
Prudential Investment Management	967,202	948,742	990,240	958,424	921,236	905,631	911,800	945,708	-	-	-
Putnam Investment Management, Inc.	14,473,480	13,897,901	13,690,986	11,683,420	8,958,840	15,388,637	4,713,210	4,942,898	857,782	1,200,868	1,103,997
Qvest Asset Management Co.	238,989	216,388	211,968	218,968	212,268	203,783	188,942	180,288	1,487,728	234,000	838,800
R. M. Davis, Inc.	-	-	-	-	-	4,200	-	-	180,288	188,970	188,087
Rahler Investment Management, Inc.	336,980	329,890	-	-	-	-	-	-	-	-	-
Ramius Capital Group LLC	-	-	-	-	-	-	-	-	-	-	-
Ramsey Quantitative Systems	-	-	-	-	-	-	24,738	24,228	24,228	23,728	-
RAS Asset Management SGR SpA	-	-	-	-	-	-	18,800	20,000	88,800	73,100	-
Raymond James & Associates	-	-	-	-	-	-	18,000	19,000	13,000	13,000	13,000
RBC Capital Markets (US)	12,578	10,883	14,322	18,874	12,298	12,298	11,188	17,938	19,888	-	-
RCM (UK) Ltd.	-	-	-	-	-	880	18,880	18,230	11,200	11,440	8,448
RCM Capital Management LLC	498,100	477,800	426,100	380,800	401,000	280,198	88,800	67,200	28,000	28,000	-
Reed, Conner & Birdwell LLC	-	-	-	-	-	-	-	-	84,800	174,800	400
Regents of the University of California	8,713,300	8,713,300	8,713,300	8,713,300	8,713,300	8,838,300	1,794,202	-	11,880	8,380	-
Renaissance Technologies Corp.	-	137,800	48,900	438,700	-	-	174,800	831,100	-	-	-
Richards & Tierney, Inc.	-	-	-	-	-	-	-	-	180,700	990,200	842,880
Rigel Capital LLC	-	-	-	-	-	8,800	-	-	-	-	-
Riva y Garcia Gestion SGIIC SA	-	-	-	10,400	8,300	9,300	14,800	13,850	11,700	-	-
RiverSource Investments LLC	8,823,408	8,818,883	8,411,233	14,330,024	18,784,438	18,273,898	17,888,884	18,887,088	18,880,183	14,033,283	2,038
Roanoke Asset Management Corp	-	-	-	-	-	-	23,730	26,870	27,900	28,870	117,004
Robeco Boston Partners Asset Management LLC	-	-	-	14,300	14,300	8,200	8,200	8,900	8,900	-	-
Robeco Weiss, Peck & Greer Investments	782,988	818,431	898,048	867,271	880,438	818,088	884,480	818,101	874,881	879,971	49,821

SA65

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Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Rothschild Investment Management LLC	8,234	-	-	-	-	-	-	-	-	-	-
Rockefeller & Co., Inc.	10,400	10,400	10,400	10,400	10,400	10,400	10,400	800	10,400	10,400	-
RockView Management LLC	19,700	-	29,100	118,100	-	48,000	162,600	34,200	34,200	34,200	37,100
Rodney Square Management Corp.	-	-	-	-	-	-	-	-	10,000	30,000	-
Roger H. Jenewold & Co., Inc.	8,300	8,080	8,350	8,250	8,280	8,547	8,787	8,787	-	-	-
Ropes & Gray LLP	9,290	-	-	11,340	11,340	11,740	8,940	8,940	8,940	-	-
Rothschild Asset Management, Inc. (US)	-	-	-	12,163	12,163	10,800	8,000	9,000	8,700	-	-
Rothschild Investment Corp.	29,600	29,300	59,200	29,700	29,800	28,900	27,800	24,000	24,000	24,800	22,800
Royal London Asset Management Ltd.	85,000	89,000	99,000	84,280	71,008	91,818	58,180	264,850	264,850	264,850	264,850
Rudman Capital Management LLC	-	-	-	-	-	-	-	-	-	-	99,900
Russell Investment Group	39,329	247,357	10,426	74,336	161,272	168,000	58,696	607,346	731,716	671,639	238,011
S.A.C. Capital Advisors	-	-	9,309	22,700	-	-	170,000	-	22,800	77,900	693,700
Safeco Corp. Asset Management	817,800	812,200	812,200	809,700	736,100	707,300	766,700	678,800	488,000	488,000	335,000
Segerman Hill Capital Management LP	-	-	-	-	-	-	-	10,000	-	-	29,900
Selem Capital Management, Inc.	47,900	48,900	48,000	48,650	43,080	43,080	42,650	42,560	41,360	40,750	48,650
Sellard Partners & Pinnacle Trust Co.	100	100	100	100	100	1,220	1,020	920	920	400	700
SAM Groupe Holding AG	-	-	-	-	-	-	-	-	8,700	8,700	4,367
San Francisco Sentry Investment Group	7,600	8,000	8,700	9,100	8,400	8,400	7,900	7,900	7,900	7,900	8,200
Sand Hill Advisors, Inc.	7,080	7,080	7,080	8,680	8,860	8,280	-	-	8,280	-	-
Santander Asset Management SGIIC SA	-	-	-	-	-	-	14,098	14,588	78,258	78,288	-
Saybrook Capital Corp.	-	-	-	-	-	-	-	-	-	-	-
Schafer Cullen Capital Management, Inc.	4,660	-	-	-	-	-	-	-	-	-	8,000
Schneider Capital Management Corp.	-	-	-	-	-	-	-	-	-	-	-
SCM Advisors LLC	2,006,022	2,306,721	2,557,901	3,580,470	3,363,686	2,972,063	2,999,923	2,617,043	2,170,468	2,256,131	300,000
Scottish Investment Trust Plc	-	-	-	-	-	-	190,162	190,162	-	-	-
Seaward Management Corp.	17,060	18,660	18,760	19,160	19,360	19,360	20,343	20,413	21,013	21,018	169,882
SEB Investment Management AB	-	-	-	-	-	8,416	8,416	8,416	8,416	-	16,983
Security Management Co. LLC	459,600	328,200	444,000	219,372	163,265	84,400	2,700	94,200	94,720	94,000	-
Seguros Bilbao Pensos SGIIC	-	-	-	-	-	-	-	-	-	-	7,100
Sena Weller Rohs Williams, Inc.	21,487	22,937	22,060	23,060	27,060	28,410	27,604	25,604	21,804	21,804	1,067
Sentinel Asset Management, Inc.	818,800	821,380	822,360	856,814	743,300	743,300	733,400	682,868	688,868	372,208	22,800
Sentinel Trust Co.	-	29,400	18,800	18,800	18,800	18,800	18,800	18,800	18,800	18,800	2,800
SG Private Banking (Belgium)	-	-	-	-	-	-	-	-	-	-	-
Shaker Investments LLC	-	-	-	-	-	-	-	-	-	-	51,300
Shields & Co.	387,560	387,560	403,060	-	-	-	230,000	288,988	247,400	-	30,000
Shultz, Rose & Co. LLC	48,000	48,000	48,000	48,000	48,000	-	-	-	-	-	-
Simmons First Trust Co.	20,124	20,589	22,589	15,089	-	-	-	-	-	-	-
Sinopia Asset Management SA	-	-	-	-	-	-	-	-	2,428	-	-
SR Investment Associates, Inc.	-	-	346,900	884,000	861,300	801,800	704,300	-	-	43,100	43,100
SLS Capital	-	-	-	-	-	-	-	-	-	-	-
SMH Capital Advisors, Inc.	-	-	-	-	-	-	-	-	-	-	143,088
Smith Breeden Associates, Inc.	-	-	-	-	-	-	63,650	48,700	48,700	43,200	-
SMP Ltd. (Bermuda Capital)	-	-	-	-	3,900	3,900	-	-	-	-	24,000
Sorbe Fund Management LLC	-	-	-	-	-	-	-	-	-	-	20,324
Spectrivest Asset Management A/S	-	-	-	-	-	150,200	296,903	294,603	176,556	122,556	-
Spectrum Advisory Services, Inc.	-	-	-	-	-	-	-	-	-	709	709
SSI Investment Management Inc.	80,720	66,748	38,600	28,600	28,600	28,600	28,600	28,600	11,200	11,200	11,200
St. Johns Investment Management Co.	-	-	66,788	60,065	67,160	41,870	38,600	68,446	32,712	-	-
St. Paul Fire & Marine Insurance Co.	2,156	-	-	224,640	274,640	124,640	-	-	-	-	89,408
Stacey Braun Associates, Inc.	31,200	38,528	18,600	18,600	18,600	18,600	18,400	13,300	13,300	12,600	-
Stafford Capital Management LLC	-	-	18,700	18,700	18,700	18,700	18,750	18,700	-	-	-
Standard Pacific Capital LLC	-	-	-	166,000	-	-	-	-	-	-	-
Starbuck Tisdale & Associates	8,360	8,300	-	-	-	-	-	-	-	-	-
State Bank & Trust, Trust Management Division	-	-	-	-	-	-	-	-	-	-	-
State of Wisconsin Investment Board	1,390,000	1,180,000	660,000	-	-	14,200	28,000	37,300	90,400	90,400	90,400
State Street Global Advisors	10,958,210	11,462,362	12,220,231	12,091,028	10,784,284	10,861,582	12,678,066	12,628,275	74,100	74,100	184,100
State Street Global Advisors (France) SA	-	-	-	-	-	-	-	-	12,742,780	14,226,648	17,332,253
									-	-	69,164

SA66

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Exhibit 11

Quarter Ended	3/31/1999	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
State Street Global Advisors Canada Ltd.	-	-	-	-	-	-	-	-	4,142	4,142	3,943
State Street Global Advisors Ltd. (UK)	-	-	-	-	-	-	-	-	-	-	44,344
State Teachers Retirement System of Ohio	864,748	849,848	937,048	879,348	881,848	883,348	923,348	1,006,673	971,073	1,071,973	858,056
Steelhead Partners LLC	-	-	-	-	-	-	60,000	-	-	-	-
Steinberg Global Asset Management Ltd.	6,690	6,790	7,600	7,900	7,481	6,690	6,450	6,100	-	-	-
Stephens Inc. (AR)	13,250	-	-	-	-	-	-	-	-	-	-
Sterne Agee Asset Management, Inc.	-	-	-	3,605	5,800	5,645	5,870	5,888	-	-	-
Stevenson Capital Management, Inc.	17,800	12,900	28,300	27,600	28,300	28,300	28,300	28,300	23,300	23,300	20,300
Steward Capital Management, Inc.	10,500	10,500	10,500	-	-	-	-	-	-	-	-
Stewart Capital Advisors LLC	378	378	375	375	975	775	2,675	2,675	2,675	2,675	2,675
Stichting Pensioenfonds ABP	-	-	-	-	-	-	-	58,550	84,777	108,006	138,477
Stock Yards Bank & Trust Co.	5,068	-	-	-	-	-	-	-	-	-	-
Storebrand Kapitalforvaltning ASA	-	-	-	-	-	-	-	-	1,097	1,097	-
Sturdivant & Co., Inc.	305,188	188,998	90,470	91,048	86,100	84,900	84,990	84,650	34,650	31,750	43,968
Sumitomo Life Insurance Co. (Investment Manage	1,400	1,400	1,400	1,400	1,400	-	-	-	-	-	-
Summit Capital Management LLC	-	-	-	28,300	-	-	-	-	-	-	-
Summit Investment Partners, Inc.	10,000	10,800	10,800	11,100	10,906	10,903	10,778	10,898	10,813	10,407	10,407
SunAmerica Asset Management Corp.	148,580	210,198	230,345	1,887,408	1,473,338	1,940,207	81,080	8,480	8,480	10,880	4,428
Susquehanna Trust & Investment Co.	-	-	-	-	-	-	-	-	11,760	-	-
Swedbank Robur Fonder AB	-	-	-	-	-	-	-	-	962,200	1,249,999	7,100
Swiss Re Asset Management (Americas), Inc.	-	60,000	-	-	8,000	-	-	-	-	-	-
Swisscanto Asset Management AG	-	-	-	-	-	-	-	-	44,500	165,000	165,000
Synchrony Asset Management SA	-	-	-	-	-	14,800	14,900	44,500	1,000	2,800	2,800
Synovus Investment Advisors, Inc.	49,202	9,327	10,382	6,882	6,778	13,111	6,778	1,000	6,778	-	16,278
Systematic Financial Management LP	161,474	187,598	106,626	89,677	94,036	83,248	89,940	89,149	88,329	87,388	-
T. Leavell & Associates, Inc.	21,660	21,400	21,700	17,900	28,700	17,700	12,100	11,900	11,900	12,200	10,300
T. Rowe Price Associates, Inc.	3,827,883	4,336,483	2,677,883	866,408	893,208	891,800	878,455	899,098	887,108	887,948	784,798
TCW Asset Management Co.	829,938	828,883	1,148,725	1,828,868	1,727,881	907,948	-	-	-	-	-
TD Asset Management, Inc.	-	-	131,487	130,870	137,998	139,813	218,640	174,287	40,068	42,388	147,588
TD Banknorth Wealth Management Group	25,783	48,818	52,823	82,128	86,893	80,278	34,083	30,138	38,735	39,632	20,687
Teacher Retirement System of Texas	1,481,300	1,880,000	1,840,000	1,128,000	1,455,000	1,283,000	1,048,000	1,128,000	1,218,000	1,328,000	1,248,000
Telesis Management LLC	-	100,000	-	-	-	-	-	-	-	-	-
Terre Haute First National Bank	6,830	6,830	6,830	6,830	7,530	6,830	6,030	10,830	13,188	18,008	14,080
Terry McDaniel & Co.	4,844	4,844	-	-	-	-	-	-	-	-	-
Thales Fund Management LLC	-	-	33,800	89,800	103,700	84,400	274,800	136,100	136,100	136,100	274,500
The Adams Express Co.	150,000	150,000	150,000	150,000	150,000	150,000	150,000	150,000	-	-	-
The Baupost Group LLC	-	-	-	-	-	-	-	-	-	-	899,800
The Boston Company Asset Management LLC	300,000	300,000	300,000	788,650	1,882,063	1,882,803	2,341,353	1,977,838	1,927,930	995,299	23,800
The Bryn Mawr Trust Co.	22,084	17,884	17,884	17,884	17,317	16,984	18,734	18,234	11,734	9,334	-
The Burney Co.	6,424	6,424	6,424	6,424	6,910	6,910	6,660	6,560	6,661	-	-
The California Public Employees Retirement Syste	1,960,830	2,037,930	1,964,824	2,026,068	1,896,848	1,928,848	1,823,849	1,828,849	1,748,449	1,788,348	1,787,848
The Edgar Lomax Co., Inc.	-	-	-	-	-	-	-	-	-	-	5,109,800
The First National Bank of Omaha (FNB Fund Adv	849,263	826,304	499,229	381,738	384,088	293,228	281,728	218,278	140,648	58,247	1,240
The Florida State Board of Administration	840,888	803,063	813,863	807,963	807,963	799,813	797,913	827,413	827,413	828,113	1,017,813
The Keller Group Investment Management, Inc.	146,828	178,889	251,818	274,109	299,191	328,960	326,286	370,643	390,804	321,248	-
The Mechanics Bank Asset Management	7,830	8,180	5,180	4,788	4,788	4,788	4,788	4,788	4,788	4,830	4,089
The Mitchell Group, Inc.	108,800	107,900	10,400	10,400	10,400	79,400	73,400	200	-	-	113,800
The Pennsylvania Trust Co.	133,020	128,418	80,935	80,938	84,870	84,870	17,070	12,710	12,860	11,160	-
The Philadelphia Trust Co.	-	-	3,200	-	28,950	28,550	40,900	58,550	-	-	28,000
The Portola Group, Inc.	808,898	689,888	883,189	774,309	838,284	884,988	880,332	496,387	518,812	383,237	385,703
The Swarthmore Group, Inc.	238,690	182,800	180,800	118,900	88,750	98,450	228,430	189,880	189,880	-	-
The Trust Co. of Oklahoma	7,000	7,143	7,900	8,900	8,000	10,000	10,000	11,200	11,200	11,400	-
The Trust Co. of Toledo	30,800	34,100	34,100	34,000	23,000	23,000	23,700	20,900	20,900	23,400	-
The Washington Trust Co.	-	-	-	-	4,418	4,898	-	-	-	-	1,900
Thrivent Investment Management, Inc.	43,700	48,100	103,700	88,200	42,200	42,000	42,000	-	-	-	-
TIAA-CREF Asset Management LLC	2,811,198	2,807,492	2,775,492	3,057,883	3,253,274	2,954,174	3,298,980	3,381,727	3,429,840	3,818,808	3,414,788
TimesSquare Capital Management LLC	208,192	208,982	202,482	203,082	201,282	208,182	198,282	192,982	188,182	182,962	183,062

SAG7

ISCAS 7029

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Treinvest KAGmbH	-	-	-	-	-	-	-	-	-	5,000	7,000
Tirathwell & Looney, Inc.	318,334	316,568	331,458	312,968	306,688	304,689	308,068	308,128	306,388	329,374	368,938
TNB Financial Services, Inc.	-	-	21,400	22,400	-	-	-	-	-	-	-
Tobias Bros., Inc.	50,000	150,000	50,000	50,000	-	-	-	-	-	-	-
Tocqueville Asset Management LP	164,500	160,700	64,100	-	-	-	-	-	-	-	-
Todd Investment Advisors, Inc.	-	6,600	6,800	6,800	7,300	7,300	7,300	7,100	7,100	-	-
Tompkins County Trust Co.	8,233	11,533	18,133	19,533	10,483	4,580	3,360	900	700	700	100
Tower Asset Management LLC	39,128	43,378	48,618	-	-	-	-	-	300	-	-
Tower Bank & Trust Co.	-	-	-	-	-	-	-	-	-	-	-
Tradition Capital Management LLC	-	-	-	-	-	-	100	-	-	-	-
Trainer Wortham & Co., Inc.	12,096	11,432	11,432	12,632	12,232	11,532	11,532	11,992	11,532	10,332	-
Transamerica Investment Management LLC	-	-	-	13,423	13,877	14,557	13,457	13,457	13,457	13,457	18,222
Treco Investment Counsel LLC	-	-	-	20,400	20,400	20,400	20,400	19,068	19,068	19,068	12,068
Trellus Management Co. LLC	-	-	-	-	-	-	-	-	-	60,000	-
Tributary Capital Management LLC	-	-	-	-	-	2,700	2,700	2,500	2,500	1,650	1,650
Trusco Capital Management, Inc.	1,807,972	1,818,229	1,296,615	1,942,413	2,209,075	2,514,068	2,434,799	2,804,018	2,900,788	3,199,101	1,287,617
Trust Co. of Connecticut	-	6,360	6,360	6,390	6,100	6,400	-	5,450	-	-	-
Trust Company of Vermont	-	-	-	-	-	-	-	-	-	-	4,255
Trustmark Investment Advisors	10,760	10,760	10,760	10,700	10,700	10,700	10,184	9,829	9,829	11,380	13,800
Turner Investment Partners, Inc.	-	-	-	-	650	-	-	-	-	-	-
Twin Capital Management, Inc.	-	-	-	-	25,600	-	-	-	-	61,100	-
U. S. Global Investors, Inc.	9,000	10,000	9,000	9,500	10,000	8,000	10,000	10,000	3,000	-	-
UBS Global Asset Management	610,813	648,600	724,200	1,381,700	1,348,600	1,470,700	2,041,600	2,148,100	2,447,800	2,718,000	19,900
UBS Global Asset Management (UK) Ltd.	-	-	47,104	41,804	48,204	48,204	48,104	48,484	66,664	61,780	78,199
UBS O'Connor LLC	-	-	-	-	-	-	50,700	78,800	15,300	-	-
UBS Private Banking (US)	-	-	-	-	-	-	-	-	-	16,885	-
UBS Securities LLC	-	-	-	272,349	312,748	311,132	184,889	661,648	534,931	856,813	1,316,689
UMB Bank	586,469	573,144	699,813	663,158	664,729	660,629	679,809	305,646	322,634	338,335	161,469
Union Bank of California N.A.	1,114,608	1,088,447	1,054,667	948,062	928,760	960,060	782,418	742,378	782,644	717,386	686,661
Union Investment Privatfonds GmbH	-	-	-	-	-	-	-	-	-	141,900	141,900
United Bank & Trust (Michigan)	-	-	27,010	26,145	26,405	26,376	32,300	32,480	36,060	36,060	39,140
United States Trust Co. of New York	674,387	678,042	714,206	685,638	604,252	662,690	618,418	618,683	611,459	603,433	384,158
Universal-Investment-GmbH	-	-	-	-	-	-	-	-	8,060	8,060	22,666
Urquijo Gestion SGIIC	-	-	-	-	-	-	-	-	-	-	9,877
USAA Investment Management Corp.	278,654	237,800	238,000	348,752	641,800	617,900	380,637	256,231	106,732	97,641	46,678
Veeve Lane Asset Management	100,000	100,000	100,000	100,000	100,000	100,000	100,000	112,000	100,000	100,000	100,000
Van Eck Global	40,000	60,000	-	-	-	-	2,900	2,900	2,900	-	-
Van Kampen Asset Management	714,883	1,321,078	748,766	1,647,768	1,478,171	2,082,248	3,230,961	6,082,014	6,897,628	14,941,806	182,514
Vanguard Group, Inc.	6,900,630	6,091,273	6,129,678	6,169,448	6,217,656	6,298,117	6,344,737	6,480,388	6,661,806	6,768,585	6,813,820
Vaughan Nelson Investment Management LP	-	-	-	-	-	-	-	-	34,900	-	-
Veritas SG Investment Trust GmbH	-	-	-	-	-	-	8,000	8,000	8,000	8,000	9,000
Verizon Pension Fund	33,460	30,526	67,810	71,999	68,618	60,797	66,160	238,624	238,624	333,124	234,748
Victory Capital Management, Inc.	484,803	930,861	1,127,763	903,580	563,386	536,932	661,691	980,843	978,460	1,071,286	270,478
Virginia Retirement Systems	190,252	177,852	196,352	161,252	123,852	124,152	132,152	153,552	132,552	162,752	226,552
Volksbanken Invest KAG	-	-	-	-	-	-	-	-	-	-	17,400
W. H. Reaves & Co., Inc.	-	114,400	318,100	482,150	603,220	683,170	40,920	38,048	12,320	17,520	-
Wedbush & Reed Investment Management Co.	203,200	626,200	221,400	21,660	18,418	260,188	10,188	-	-	264,268	-
Wagner Investment Management, Inc.	-	-	300	300	300	300	300	300	300	-	-
Wall Street Associates (US)	-	6,000	-	-	10,000	10,000	-	-	-	-	-
Walnut Asset Management LLC	-	-	-	-	-	-	-	-	-	-	-
Washington Capital Management, Inc.	-	-	44,725	-	-	-	-	60,920	60,360	-	-
Washington Trust Bank	-	-	-	6,445	6,765	7,400	6,770	9,286	15,348	15,316	17,076
Waters Parkerson & Co., Inc.	-	-	-	-	-	-	103,756	106,080	109,020	139,668	103,700
WB Capital Management, Inc.	41,363	31,678	53,353	83,415	258,403	258,403	118	-	-	-	-
WCM Investment Management	-	-	-	-	-	-	-	300	-	-	-
Webster Financial Advisors	-	-	8,600	8,900	8,900	8,900	8,900	8,900	8,900	16,379	16,121
Wedgewood Investors, Inc.	-	-	-	-	-	8,200	-	-	-	-	-

App. 174

Exhibit 11

Quarter Ended	6/30/1999	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Weintraub Capital Management LLC	-	-	-	-	70,000	-	-	-	-	-	-
Weisberg & Fields, Inc.	21,400	21,400	21,190	19,180	18,850	18,660	18,650	18,750	17,950	17,950	15,000
Welch & Forbes LLC	14,750	21,220	17,663	17,220	18,220	21,328	18,888	19,188	19,188	19,693	19,083
Wellington Management Co. LLP	3,881,900	3,751,300	4,799,200	4,947,900	4,893,500	3,500,300	3,371,900	3,437,000	3,302,300	34,600	19,877,390
Wells Capital Management, Inc.	-	62,606	66,236	171,536	82,360	181,476	68,700	266,306	340,975	330,207	107,847
Wells Fargo Bank N.A.	145,535	182,076	184,974	337,302	693,109	828,639	477,173	676,160	686,433	403,465	365,111
Wells Fargo Investments LLC	-	-	11,966	10,768	-	-	-	-	17,017	24,311	56,489
WesBanco Bank Wheeling	18,446	20,390	20,390	20,390	20,245	20,346	20,300	22,824	22,824	22,474	20,540
Westfield Capital Management Co. LLC	30,099	30,099	139,999	436,199	418,848	418,799	8,600	5,600	3,600	-	1,200
Westpeak Global Advisors LP	17,600	18,600	30,600	39,600	24,900	19,600	20,000	20,600	-	210,180	181,700
William Blair Capital Management LLC	28,062	39,706	30,482	9,607	8,607	8,107	8,472	9,757	11,867	10,652	-
Williams, Jones & Associates, Inc.	-	6,300	6,300	6,300	6,392	6,400	-	-	-	-	27,400
Wilmington Trust FSB	19,478	17,478	21,607	23,103	27,248	27,611	30,256	32,727	32,132	44,160	12,273
Wilmington Trust Investment Management LLC	1,247,607	1,167,130	1,097,063	1,077,767	1,070,167	1,063,730	1,059,882	1,094,727	1,061,393	1,076,801	287,941
Wilmington Trust of Pennsylvania	30,064	32,964	35,074	31,689	34,310	34,810	38,708	39,708	41,328	47,380	50,328
Wilson/Bennett Capital Management, Inc.	783	783	783	813	813	813	813	813	813	279	279
Winslow Capital Management, Inc.	-	-	-	200,000	96,280	95,480	-	-	-	-	-
WIP Asset Management Oy	-	-	-	-	-	-	-	-	-	2,000	2,000
Wisconsin Capital Management LLC	-	-	-	44,900	72,250	90,250	153,050	158,150	153,750	235,401	-
Woodley Farra Manion Portfolio Management, Inc	-	-	-	-	-	-	-	-	-	-	190
Woodmont Investment Counsel LLC	-	-	-	-	-	-	59,565	59,191	56,991	56,991	70,015
Woodstock Corp.	4,800	4,800	4,800	4,800	4,800	6,800	2,000	2,675	2,000	-	-
Wright Investors Service, Inc.	142,105	169,065	160,605	40,455	22,705	18,660	-	-	-	-	-
Wyper Capital Management	-	-	-	-	-	-	-	240,000	-	-	-
Zions First National Bank	-	-	-	11,825	-	-	-	-	6,140	-	-
Zuercher Kantonalbank /Invt Mgmt/	-	-	-	-	-	29,000	29,000	79,000	78,000	78,000	78,000

SA69

Exhibit 12

Exhibit 12

Halliburton Co. (HAL)

Institutional Increases in Reported Holdings

Source: FactSet Research Systems, Halliburton's SEC Filings

Quarter Ended	3/31/1999	6/31/1999	9/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Total Increases From Prior Quarter	20,486,710	30,884,295	41,972,638	39,857,504	31,053,540	65,621,168	54,080,288	28,141,161	40,088,126	73,328,942
(Amounts Shown as Increases Only)										
Count of Institutions with Increases	183	224	220	201	217	227	215	242	212	206
1st Source Corp. Investment Advisors, Inc.	500	-	-	-	200	-	-	-	-	79,600
3 Banken-Generali Investment GmbH	-	-	-	-	-	-	-	-	600	-
A.G. Edwards & Sons, Inc.	148	1,350	648	-	2,377	838	1,548	1,051	1,209	4,609
Aberdeen Asset Managers Ltd.	-	-	-	-	-	-	8,000	-	-	-
ABN AMRO Asset Management (Amsterdam)	-	-	-	-	-	6,931	-	2,069	-	10,700
ABN AMRO Bank NV (Belgium)	-	-	-	-	-	-	-	1,200	-	-
Acadia Trust, N.A.	315	12,149	-	-	-	-	-	-	-	-
Adage Capital Advisors LLC	-	-	-	-	-	-	-	-	-	223,986
Advanced Investment Partners LLC	-	-	-	-	-	-	-	-	262,500	-
Adventus Capital Management, Inc.	100	-	-	78,436	50,865	-	-	-	944	998
Affinity Wealth Management, Inc.	-	-	-	-	-	-	-	-	-	-
AG Asset Management LLC	402,750	-	65,528	-	7,175	-	-	-	-	-
AGF Funds, Inc.	-	-	-	-	-	-	-	32,900	-	-
AGF International Advisors Co. Ltd.	-	-	-	-	-	-	-	12,436	-	382
AIB Investment Managers Ltd.	2,382	62,036	46,650	10,569	9,225	17,970	-	-	-	-
AIG Global Investment Group	-	-	-	-	-	-	-	-	-	235,783
AIG Private Bank Ltd.	-	-	-	4,000	-	-	-	-	-	-
Alarus Financial, N.A.	-	-	19,966	4,788	1,821	-	2,835	-	-	23,650
Aletti Gestielle SGR SpA	-	-	-	-	-	100,856	-	-	-	-
Alex Brown Investment Management LLC	-	-	-	-	-	-	-	-	400,000	-
Allegiant Asset Management Co.	-	-	234,236	66,712	-	-	-	-	-	-
AllianceBernstein LP	-	-	1,335,554	-	-	-	-	-	-	119,298
Allianz Global Investors Kapitalanlagegesellschaft	-	269,000	-	-	51,660	-	-	-	40,692	-
Allianz of America, Inc.	-	-	-	746,860	-	-	-	-	-	-
Allied Asset Advisors, Inc.	-	-	-	-	-	1,800	-	-	-	-
Allstate Investment Management Co.	-	-	10,800	33,000	-	-	7,300	-	-	-
Alte Leipziger Trust Investment GmbH	-	-	-	-	-	-	-	-	-	1,000
American Century Investment Management, Inc.	372,300	-	1,257,000	400	-	-	95	-	-	308,280
AmeriCap Advisors LLC	-	-	66,000	1,000	9,000	-	66,200	-	265,800	-
AMF Pensionsforsakring AB	-	-	-	-	-	-	-	260,000	-	-
Amica Mutual Insurance Co., Inc.	-	-	-	-	-	-	-	17,728	11,360	-
Analytic Investors, Inc.	-	-	-	-	-	-	-	-	148,021	5,934
Aon Advisors, Inc.	-	-	-	-	-	3,800	-	-	-	-
Appleton Partners, Inc.	-	25,350	13,900	-	1,073	900	3,200	-	-	79,813
AR Asset Management, Inc.	-	-	12,200	-	100	-	-	-	-	-
Archie Grey Allen, Jr.	-	800	-	-	-	-	-	-	-	-
Ardsley Partners	-	-	-	-	-	-	-	-	-	750,000
Ark Asset Management Co., Inc.	-	12,800	888,800	-	-	664,700	-	-	6,300	-
Armstrong Shaw Associates, Inc.	-	37,500	887,820	210,660	-	39,900	-	-	-	-
Aronson & Johnson & Ortiz LP	-	-	-	-	-	-	-	-	114,500	100,100
Artisan Partners LP	-	-	-	-	-	-	-	-	-	53,200
Ashburton (Jersey) Ltd.	-	-	-	-	-	-	-	32,600	-	-
Ashfield Capital Partners LLC	8,831	9,676	10,034	27,263	12,060	-	32,731	695	-	-
Atlantic Investment Management, Inc.	-	-	-	-	-	-	-	-	-	440,000
Atlantic Trust Stein Roe	-	-	1,100	-	-	-	140,015	-	-	-

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SA71

Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Atwood & Palmer, Inc.	-	-	-	-	-	-	-	-	-	-
Avive Gestion d'Actifs SA	-	-	-	-	-	-	-	60,000	-	-
Avive Vida y Pensiones SA de Seguros y Reseg	-	-	-	-	-	-	-	-	60,000	-
AXA Framlington Investment Management Ltd.	-	-	-	-	-	-	-	7,000	1	-
AXA Investment Managers Paris SA	2,600	-	4,660	-	1,200	-	-	-	13,207	10,250
AXA Rosenberg Investment Management LLC	3,800	-	-	-	-	-	100	-	-	700
Ayco Asset Management	6,327	23,322	11,635	43,291	48,800	67,760	34,117	74,488	58,636	-
Azzad Asset Management, Inc.	-	-	-	-	-	300	-	-	-	-
Babson Capital Management LLC	950	-	-	-	-	-	21,318	-	2,985	-
Bainco International Investors LLC	-	-	-	-	-	-	-	-	-	-
Baird Investment Management	948	1,391	18,998	-	-	3,158	-	-	-	38,718
Baker Boyer National Bank Asset Management	100	-	-	21,626	4,126	-	-	-	-	-
Baldwin Brothers, Inc.	9,638	3,200	-	-	-	-	-	-	-	-
Banca del Gottardo (Switzerland)	-	-	-	-	18,000	-	-	-	60,000	-
Banca Finnat Euramerica SpA (Asset Manageme	-	-	-	-	-	-	-	-	-	600
BancorpSouth, Inc. Asset Management	-	-	-	-	-	-	600	-	-	-
Bank Julius Baer & Co. AG	-	-	-	-	-	-	-	-	-	30,000
Bank Morgan Stanley AG	-	12,250	-	5,910	28,380	32,473	-	7,168	17,692	-
Bank of Hawaii Asset Management Group	4,234	-	-	-	-	-	-	-	-	-
Bank of New York Co. NA (MA)	-	-	600	-	-	300	-	-	900	-
Bank of New York Trust Co. N.A.	1,176	3,333	-	3,580	350	-	-	-	-	-
Bank of the West Investment & Trust Department	-	-	-	-	4,150	-	-	-	-	-
Bankhaus Carl Spaengler & Co (Asset Managem	-	-	-	-	-	-	2,800	-	8,300	-
Banque Degroof SA	-	-	-	-	-	6,000	-	800	-	-
Barclays Fonsos SA SGIIC	-	-	-	-	-	-	-	-	-	12,159
Barclays Global Investors NA (CA)	-	-	1,429,770	-	132,626	372,877	-	-	66,037	1,488,460
Baring Asset Management, Inc.	-	-	-	15,200	600	-	-	-	-	-
Barrett Associates, Inc	10,600	26,900	46,770	23,650	7,100	-	-	7,750	-	-
Barrow, Hanley, Mewhinney & Strauss, Inc.	-	-	-	-	-	2,683,200	-	369,800	-	-
Bartlett & Co., Inc.	-	16,199	-	-	-	-	-	-	-	-
Batterymarch Financial Management, Inc.	-	-	-	-	-	-	-	-	-	-
BB&T Asset Management LLC	-	-	7,140	200	-	11,538	1,343	7,032	-	1,230
BBVA Gestion SGIIC SA	-	-	-	-	48,179	-	84,869	-	-	-
BBVA Patrimonios	-	-	-	-	-	-	-	-	-	38,883
Beacon Trust Co.	-	-	127,249	13,200	1,918	21,518	-	34,048	-	-
Bear Stearns Asset Management, Inc.	-	-	309,000	86,200	67,300	186,700	60,000	-	-	-
Bear, Stearns & Co., Inc.	-	11,662	343,181	44,857	-	-	-	-	300	74,622
Bearbull Asset Management Ltd.	-	-	-	-	-	20,000	-	-	-	-
Beaty, Haynes & Patterson, Inc.	-	-	25,980	-	450	-	-	-	-	-
Becker Capital Management, Inc.	-	-	6,998	-	-	-	-	5,400	14,101	121,777
Bel Air Investment Advisors LLC	-	-	-	378,400	11,680	-	-	-	-	-
Berkeley Capital Management LLC	-	-	-	-	-	85	-	-	-	-
Bessemer Investment Management LLC	-	-	304	300	1,470	7,940	-	2,111	33,638	-
Beutel Goodman Investment Counsel	-	-	6,366	-	-	-	-	-	-	-
Biplemme Gestioni SGR SpA	-	-	-	-	-	236,002	-	-	-	-
Birinyi Associates, Inc.	-	-	125	-	-	7,000	-	-	-	-
Bishop Street Capital Management, Inc.	-	24,350	-	-	-	-	-	-	-	-
Bjurman, Barry & Associates	138,660	-	2,675	-	-	800	800	20	6,300	8,955
BlackRock Advisors, Inc.	-	-	-	-	-	-	-	307,900	116,300	-
Blackrock Investment Management (UK) Ltd.	-	597,327	346,085	674,867	880,367	492,621	-	72,373	-	-
BlackRock Japan Co. Ltd.	-	583,660	26,390	-	-	106,750	-	27,390	-	-
BMO Capital Markets (CA)	-	600	66,616	-	6,211	-	6,238	1,278	600	-
BNP Paribas Arbitrage SNC	-	-	-	-	-	-	-	-	-	16,407

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SA72

Exhibit 12

Quarter Ended	9/30/1998	12/31/1998	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
BNP Paribas Asset Management (France)	-	-	-	488,618	158,720	31,510	27,560	-	28,440	-
BNY Investment Advisors	1,164	-	-	-	4,772	18,906	-	-	-	-
Bonness Enterprises, Inc.	-	32,500	-	-	-	-	-	-	-	-
Boone County National Bank	-	3,078	-	-	-	-	-	-	-	-
Boston Advisors, Inc.	-	-	-	-	-	-	-	-	-	-
Boston Private Value Investors, Inc.	-	-	-	-	-	-	269,985	11,850	-	-
Boston Trust & Investment Management, Inc.	-	-	-	-	-	254	-	-	-	-
Bowman Financial Management	-	-	600	-	-	-	10	290	3,900	-
Boys, Arnold & Co., Inc.	-	-	-	-	5,800	82	-	-	-	-
BP Investment Management Ltd.	35,000	23,000	-	-	-	-	-	-	-	-
Brandywine Global Investment Management LLC	-	-	-	-	-	-	-	-	-	80
Bremer Investment Advisory Services	5,850	-	-	-	-	-	-	-	-	-
Bridges Investment Counsel, Inc.	-	-	200	-	-	-	-	-	-	-
Bridgeway Capital Management, Inc.	-	-	-	-	-	-	-	-	-	328,000
Brown Brothers Harriman & Co.	-	-	-	-	-	38,275	-	-	-	-
Brown Investment Advisory, Inc.	-	117,478	24,070	-	28,650	-	-	26,263	-	-
BSI Service Holding SA	-	-	-	-	-	-	3,000	-	-	-
BTR Capital Management, Inc.	-	-	-	-	-	-	-	17,060	18,000	-
Burke, Lawton, Brewer & Burke Investment Mana	-	-	-	8,850	1,290	50	-	-	-	13,666
Burroughs Hutchinson, Inc.	-	-	-	-	-	-	-	-	600	-
C. S. McKee LP	-	-	-	-	-	-	-	-	-	-
CAAM SGR SpA	-	-	-	-	-	18,000	-	-	-	42,000
Cadence Capital Management LLC	-	-	-	-	-	-	295,700	339,233	-	-
California State Teachers Retirement System	-	176,566	-	-	-	63,747	31,100	-	107,389	-
Cambier Investors, Inc.	-	-	-	132,000	-	-	-	-	-	-
Cambridge Investments Ltd.	-	-	-	316,100	-	-	-	-	-	-
Canadaigua National Bank & Trust Co.	-	1,500	-	-	-	-	6,400	2,100	-	-
Centabria Fondos	-	-	-	-	-	-	-	-	-	1,155
Cape Ann Savings Bank	-	-	-	-	-	-	-	600	-	-
Capital Advisors, Inc. (OK)	-	-	-	-	-	-	-	-	-	-
Capital City Trust Co.	-	5,850	-	-	828	-	-	-	200	-
Capital Growth Management LP	2,944,000	-	-	4,676,000	-	-	-	-	-	-
Capital Guardian Trust Co.	-	-	8,200	-	-	-	-	-	-	-
Capital Management Associates, Inc. (FL)	-	-	-	1,420	-	-	-	1,526	-	-
Capital One Asset Management LLC	12,205	-	-	-	-	500	875	955	16	4,460
Capital Research & Management Co.	-	-	-	-	-	4,000,000	390,000	160,000	4,000,000	-
Capitalia Asset Management SGR SpA	-	-	-	-	-	-	-	-	-	4,800
Capstone Asset Management Co., Inc.	940	386	1,980	-	788	2,930	460	-	-	920
Carlson Capital LP	-	-	206,600	-	-	-	-	-	-	-
Carret Asset Management LLC	63,700	34,607	-	1,850	4,360	118,057	-	3,500	7,231	-
CastleArk Management LLC/CI Asset Managems	-	-	-	215,000	-	-	-	-	-	-
Catawba Capital Management, Inc.	-	2,900	350	-	-	50	-	1,400	2,900	-
Caxton Associates LLC	407,200	-	178,900	-	-	-	-	-	-	2,566,600
CCM Partners LP	-	5,048	448	-	-	-	-	-	-	-
CedarPoint Capital Management, Inc.	-	-	-	-	105,000	-	-	-	-	-
Central Trust Bank (MO)	-	-	2,608	-	-	-	-	200	100	-
Charles Schwab Investment Management, Inc.	30,600	10,100	-	11,614	9,695	10,100	1,700	3,120	-	4,900
Charles Stewart Mott Foundation	-	75,000	-	-	-	-	-	-	8,000	-
Charter Trust Co.	-	-	-	-	-	-	8,718	1,000	-	-
Chartwell Investment Partners	-	13,930	-	-	-	1,423,670	-	-	40,000	30,000
Chemical Bank & Trust Co.	-	-	-	-	1,000	-	-	-	-	-
Chesapeake Asset Management LLC	-	14,400	-	-	-	13,850	-	-	78,000	-
Chevy Chase Bank FSB	-	-	-	-	-	-	-	-	139,454	2,285

Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Chicago Asset Management Co.	-	-	-	-	-	-	-	-	-	-
Chicago Equity Partners LLC	-	-	-	-	-	-	-	-	814,700	-
Chittenden Trust Co.	697	5,611	6,642	12,382	3,879	9,664	7,690	5,638	13,697	-
Choate Investment Advisors LLC	-	-	-	-	-	-	-	8,980	-	-
Cholse Investment Management LLC	-	-	-	-	-	-	-	13,200	-	-
Chubb Asset Managers, Inc.	-	-	97,900	-	-	-	-	-	-	-
Church Capital Management, Inc.	-	-	-	-	-	29,990	775	23,350	24,089	5,000
CIBC World Markets Corp.	-	-	21,736	-	9,066	-	7,268	19,849	21,667	-
Citadel Investment Group LLC	-	-	61,000	-	20,000	-	52,845	-	9,122	97,739
Citigroup Investment Research	94,178	3,130,119	1,437,298	-	-	1,987,233	782,703	-	-	-
Citizens Investment Advisors	-	-	-	-	-	-	-	-	-	-
City National Asset Management	-	-	-	11,100	-	-	-	-	-	-
Clariden Leu AG	-	-	-	-	-	-	-	-	-	-
Cobblestone Capital Advisors LLC	-	-	5,347	-	-	-	6,900	-	-	-
Colorado Public Employees' Retirement Assocati	-	-	-	-	-	-	-	-	-	-
Columbia Management Advisors, Inc.	-	411,066	-	75,061	-	-	-	-	-	-
Columbia Partners LLC Investment Management	-	-	-	-	-	-	-	16,711	77,666	-
Columbus Circle Investors	-	-	-	-	-	-	-	-	-	-
Comerica Asset Management	2,729	-	3,171	5,169	20	-	-	470,800	-	-
Cominvest Asset Management GmbH	-	-	-	-	-	-	-	-	-	-
Commerce Bank, N.A. (KS)	-	-	-	-	1,900	7,100	16,385	26,000	-	60,200
Commerce Bank, N.A. (St. Louis, MO)	-	-	100	249,094	282,166	103,625	9,835	3,520	-	-
Community Trust & Investment Co.	-	-	-	4,962	-	-	-	173,660	-	-
Compass Bank	11,041	78,188	-	-	-	-	-	-	-	-
Conning Asset Management Co.	800	752	4,400	-	-	1,381	-	1,100	-	-
Couner Capital Corp.	-	-	-	-	-	82,881	-	-	-	-
Cowen & Co.	-	-	-	5,850	-	-	3,000	-	-	-
Cramer Rosenthal McGlynn LLC	-	17,700	-	-	-	-	-	-	-	-
Crawford Investment Counsel, Inc.	16,400	-	-	-	-	13	-	-	-	-
Credit Suisse (Switzerland)	-	-	-	-	10,000	-	9,988	-	1,559	4,881
Credit Suisse (US)	-	-	92,664	78,378	60,407	282,071	-	-	170,604	4,788
Credit Suisse Asset Management (UK) Ltd.	-	-	-	-	-	-	-	40,000	-	-
Credit Suisse Asset Management, Inc. (NY)	697,428	-	-	266,926	426,640	-	-	3,289	-	-
Crossinvest SA	-	-	-	-	-	-	-	30,000	-	-
Cutler Investment Counsel LLC	-	-	-	-	-	-	-	-	-	-
D. A. Davidson & Co., Inc.	-	-	-	-	-	-	-	-	60,160	-
D. E. Shaw & Co., Inc.	-	-	-	-	-	82,500	16,900	-	256,900	199,700
D. L. Carlson Investment Group, Inc.	100	1,666	-	300	-	-	-	-	-	-
D.F. Dent & Co., Inc.	-	-	-	4,450	-	-	-	-	-	-
Dane, Felt, Stone & Co., Inc.	-	-	-	4,600	-	-	-	-	-	-
Danske Capital Denmark	-	-	-	-	-	-	-	-	-	-
Danske Capital Finland Ltd.	-	-	-	-	-	-	-	-	-	3,900
Davenport & Co. LLC	77	7,666	536	-	-	3,750	-	300	-	-
Davis Vaughan Investments, Inc.	900	3,600	-	-	1,700	6,253	-	-	-	-
Davidson & Bernard, Inc.	4,228	33,278	2,600	-	4,060	3,060	333	16	-	-
Davidson Investment Advisors	189,210	40	2,166	-	-	6,910	525	5,116	4,659	-
Davis Advisers	-	-	-	-	-	-	63,168	14,093	10,650	-
Dawson-Herman Capital Management, Inc.	-	-	-	-	-	-	-	68,388	-	-
Dearden, Maguire, Weaver & Barrett, Inc.	154	3,000	-	518,100	41,600	-	244,600	89,400	-	-
Deere & Co. Pension Fund	-	-	-	-	-	-	-	-	-	-
Deka Investment GmbH	-	-	-	-	-	14,800	-	-	-	-
Delaware Investment Advisers	300	25,200	122,526	32,000	161,000	2,579	-	-	-	-
Delta Lloyd Asset Management NV	-	-	-	-	455,600	1,310,900	264,600	834,800	211,600	-
			-		-	-	-	249,736	-	-

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SA74

Exhibit 12

Quarter Ended	6/30/[illegible]	12/31/[illegible]	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Denver Investment Advisors LLC	-	-	-	17,580	82,328	-	18,800	200	-	-
DePrince, Race & Zollo, Inc.	-	-	-	-	-	289,400	93,200	-	-	-
Deutsche Asset Management	-	-	324,798	776,823	253,707	-	-	8,457	-	-
Deutsche Asset Management Investment GmbH (	-	-	-	-	-	-	-	-	-	383,190
Deutsche Bank Investment Management, Inc.	-	-	-	-	871,874	-	496,044	-	-	-
Deutsche Bank Securities, Inc.	329,241	-	224,849	-	154,340	33,778	1,089,181	-	1,891,500	549,810
Dexia Asset Management (Belgium) SA	-	-	-	4,448	13,229	-	2,405	53,152	27,500	-
DG Capital Management, Inc.	-	-	-	-	-	-	-	-	-	200,000
Dimensional Fund Advisors, Inc.	6,500	7,900	5,600	2,600	2,900	1,000	-	1,100	-	1,700
Dixon, Hubbard & Feinour, Inc.	-	-	-	-	-	-	-	-	100	-
DLJBJ Asset Management Co. Ltd. (Japan)	175,088	304,158	-	-	-	-	-	1,958	241	-
DLJBJ Asset Management Co. Ltd./DIAM Internat	-	-	-	37,910	-	-	-	1,120	23,100	-
DnB NOR Asset Management	-	-	-	-	-	-	-	-	186,605	11,369
Dodge & Cox, Inc.	-	-	-	3,100	-	-	-	-	-	-
Doherty Asset Management LLC	-	9,971	1,760	-	-	-	2,930	400	-	383,388
Dreman Value Management LLC	-	-	-	-	-	-	-	400	-	-
Dreyfus Investment Advisors, Inc.	-	818,600	281,300	66,177	-	-	-	-	-	-
Driehaus Capital Management LLC	-	-	-	-	-	-	410,900	432,800	-	-
DSI International Management, Inc.	-	15,400	-	-	-	-	-	-	-	-
Duff & Phelps Investment Management Co., Inc.	-	-	-	-	-	-	-	-	-	-
Duncker, Streett & Co., Inc.	-	8,960	-	-	-	-	8,600	10	60	-
DuPont Capital Management	-	-	-	-	-	-	-	-	-	-
E. Ohman J:or Fonster AB	-	-	-	-	-	-	-	-	-	-
Eads & Heald Investment Counsel, Inc.	-	3,285	2,240	-	-	-	-	2,900	-	532,900
Eastern Investment Advisors	-	-	-	-	-	-	-	250	-	-
Eastover Capital Management, Inc.	4,388	-	4,678	1,688	9,520	8,850	-	-	-	-
Eaton Vance Management, Inc.	500	800,000	384,000	28,330	81,800	-	4,988	-	107,449	-
Edge Asset Management, Inc.	8,850	511,000	-	-	-	133,325	-	404,700	-	-
Edgewood Management LLC	-	8,850	500	300	400	132,000	-	-	-	-
EDM Gestion SGIIC	-	-	-	-	-	-	-	-	-	-
Elliott & Associates, Inc.	-	-	-	-	-	-	-	-	-	-
Emerson Investment Management, Inc.	-	-	-	-	-	-	-	-	-	408
Endex Capital Management LLC	4,200	9,019	8,428	4,730	7,190	-	-	-	-	-
Engebretson Capital Management, Inc.	-	3,600	1,100	-	-	8,634	6,720	11,300	8,188	-
Engemann Asset Management	-	31,878	-	-	-	-	-	-	-	-
Ensemble Capital Management LLC	-	-	508,000	183,560	-	-	-	-	-	878
EQ8 Partners LP Equity Strategies	-	-	63,800	-	-	-	-	-	-	-
Erste Sparinvest - Kapitalanlagen GmbH	-	-	-	-	-	-	-	-	-	-
Essex Investment Management Co. LLC	-	-	-	21,700	-	-	-	-	30,000	70,000
Estabrook Capital Management LLC	231,800	-	834,818	285,340	-	-	-	-	-	28,600
Eurizon Capital SA	28	1,400	1,675	-	840	-	2,780	42,335	-	-
Evergreen Investment Management Co., Inc.	-	-	-	-	-	-	-	-	-	-
Exis Capital Management, Inc.	57,943	-	161,631	212,444	78,914	-	-	154,900	-	-
ExxonMobil Corp. Pension Trust	-	-	-	-	-	-	-	-	447,111	-
FAF Advisors	-	24,129	-	-	-	-	-	-	-	585,000
FBB Capital Partners	-	884,395	944,212	-	431,022	-	8,232	-	488	1,578
Federated Investment Management Co.	18,600	-	-	8,320	90	-	-	-	436,800	-
Feirstein Capital Management	-	190,000	88,400	142,900	-	-	4,300	-	-	-
Fidelity Investments International (UK) Ltd.	-	-	-	-	-	-	-	-	-	-
Fidelity Investments SA (France)	-	-	-	207,320	-	78,402	75,900	300,140	988,975	-
Fidelity Management & Research	-	1,152,297	-	11,900	-	-	-	-	-	-
Fideuram Asset Management Ltd. (Ireland)	-	-	-	7,092,982	8,701,936	-	1,547,879	117,889	7,927,288	-
Fiduciary Asset Management Co., Inc.	69,000	-	-	-	-	-	-	-	-	8,000
							23,200	48,600	162,300	-

Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Fiduciary Financial Services of the Southwest, Inc	3,660	-	270	-	3,600	-	-	900	110	-
Fiduciary Management Associates LLC	16,500	11,460	2,160	38,200	-	-	60,800	33,466	-	-
Fiduciary Management, Inc.	-	-	-	-	-	-	-	-	-	14,000
Fiduciary Trust Co.	-	-	-	-	-	-	8,292	-	-	-
Fiduciary Trust Co. International	-	30,280	-	-	10,280	-	400	-	-	-
Fifth Third Asset Management	7,990	3,467	49,878	-	27,190	83,818	28,638	8,281	29,534	10,954
Financial Counselors, Inc.	-	-	-	-	-	-	69,130	2,230	-	-
First Citizens Capital Management Group	-	-	-	-	-	-	-	13,242	-	66,972
First Community Bank of Bluefield	6,480	-	-	-	-	-	-	-	-	-
First Financial Bank NA	-	-	-	-	-	-	-	-	-	-
First Interstate Bank	8,880	-	-	-	-	-	-	-	-	-
First Investors Management Co., Inc.	-	169,000	1,000	-	-	-	-	-	-	-
First Manhattan Co.	-	-	-	-	-	-	-	13,260	-	-
First Midwest Bank Trust Division	1,640	-	-	-	-	-	-	-	49,780	22,780
First National Bank of Chester County	80	-	-	-	-	-	228	-	-	-
First Niagara Investment Advisors, Inc.	29,280	7,600	4,660	1,100	3,000	-	-	-	-	-
First Quadrant LP	-	719,000	-	-	-	16,800	-	-	-	-
First Tennessee Bank	-	7,200	-	-	-	-	8,770	-	-	-
First Trust Advisors LP	-	763	686	769	129	1,048	2,273	1,482	-	-
FirstMerit Trust	2,618	-	3,177	-	-	-	-	-	-	-
Fisher Investments, Inc.	-	7,900	-	4,600	-	8,000	-	-	-	-
Flippin, Bruce & Porter, Inc.	4,200	-	-	-	-	-	-	-	-	-
Flood, Gamble Associates, Inc.	-	-	-	-	-	-	-	-	-	-
FM Global	330,000	28,700	-	-	-	-	-	800	-	-
Folger Nolan Fleming Douglas, Inc.	-	-	1,068	-	240	-	-	-	-	-
Folksam Fond AB	-	-	-	-	-	-	-	-	-	-
Fortis Gesbeta SGIIC	-	-	-	-	-	-	-	13,873	-	-
Fortis Investments Management USA, Inc.	269,780	123,189	-	22,000	-	-	-	-	-	2,038
Founders Asset Management, Inc.	-	-	-	717,744	277,828	-	-	-	-	-
Foxhall Capital Management, Inc.	-	1,450	-	-	-	-	-	-	-	-
Franklin Advisers, Inc.	-	-	-	400	100	378,800	-	3,300	8,263	4,328
Franklin Mutual Advisers LLC	-	-	-	-	-	-	-	42,400	36,500	-
Franklin Portfolio Associates	-	-	-	8,800	-	-	-	-	-	8,700,600
Franklin Street Advisors, Inc.	88,660	172,228	32,460	-	-	-	-	4,700	8,100	831,300
Fred Alger Management, Inc.	4,022,360	1,480,000	4,064,440	-	-	-	-	-	-	-
Freeman Associates Investment Management LLC	-	-	-	-	-	-	-	-	-	-
Front Barnett Associates LLC	-	-	-	-	62,100	-	-	-	25,600	-
Front Street Capital, Inc.	-	-	-	-	8,870	300	1,038	-	-	-
Frost National Bank of San Antonio N.A.	7,610	-	-	-	-	-	-	-	-	28,000
Fulton Financial Advisors	-	-	-	18,848	17,690	38,248	-	20,832	25,860	83,068
G. W. Henssler & Associates Ltd.	-	-	7,275	700	200	31,600	8,713	32,887	-	-
GAM USA, Inc.	-	-	73,993	10,477	9,886	2,111	10,898	101,389	-	-
GAMCO Investors	-	-	-	-	-	-	-	23,224	-	-
Gardner Lewis Asset Management	-	1,800	-	-	-	-	-	-	4,000	2,132,800
Gardner Russo & Gardner	-	-	-	-	-	-	-	-	73,400	-
Gateway Investment Advisers LP	-	-	-	-	-	-	14,000	-	-	-
GE Asset Management, Inc.	9,200	-	-	-	7,669	-	7,771	-	-	-
Geewax, Terker & Co., Inc.	-	-	-	282,022	19,988	119,173	-	-	-	-
General American Investors Co., Inc.	8,000	1,840	-	400	-	280	5,750	-	334,480	-
General Motors Asset Management	-	-	-	-	-	-	-	-	-	1,300,000
General Re-New England Asset Management, Inc	-	87,000	23,600	-	-	-	-	-	-	-
George Weiss Associates, Inc.	-	-	600	-	-	-	-	-	-	-
Geoscooperativo SGIIC	-	-	-	-	-	-	-	-	79,600	-
	-	-	-	-	-	-	-	-	-	475

USCA5 7038

SA76

Exhibit 12

Quarter Ended	6/30/1998	12/31/1998	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
GfBK Gesellschaft fuer Boersenkommunikation	-	-	-	-	-	-	-	6,000	-	-
Gilder, Gagnon, Howe & Co. LLC	-	-	-	-	-	-	-	-	-	-
Glenmede Investment Management LP	18,988	91,803	40,910	5,067	18,175	-	-	-	-	-
Glens Falls National Bank & Trust Co.	1,500	4,600	2,600	-	-	-	-	-	-	-
Glenview Capital Management LLC	-	-	-	-	-	-	-	4,250	880	-
Global Index Advisors, Inc.	-	-	-	-	-	-	-	-	-	500,000
Global Value Investment Portfolio Management P	-	-	-	-	-	-	-	-	18,570	-
Globalt, Inc.	-	107,897	74,330	-	35,240	-	-	-	-	200,000
Glynn Capital Management LLC	-	-	-	-	-	-	-	34,202	-	-
Gofen & Glosberg, Inc.	-	-	-	2,850	200	-	8,450	7,970	-	-
Goldman Sachs & Co.	-	304,883	38,278	415,396	118,128	-	-	-	-	47,783
Goldman Sachs Asset Management LP (US)	-	302,300	178,900	-	50,038	-	22,887	9,861	-	4,418,767
Goldman Sachs Execution & Clearing LP	29,000	-	-	-	-	-	-	-	-	-
Grantham, Mayo, Van Otterloo LLC	-	7,600	20,000	-	-	10,000	12,500	-	-	57,500
Gratry & Co., Inc.	250	-	-	-	-	-	-	-	-	-
Great Lakes Advisors, Inc.	-	1,034	19,590	-	1,620	-	39,493	20,730	58,250	-
Greylin Investment Management, Inc.	-	32,275	700	-	-	3,600	2,450	1,028	34,850	143,250
Griffin Asset Management, Inc.	-	-	-	-	-	-	6,000	-	-	-
Grisanti Brown & Partners LLC	-	-	-	-	-	-	-	-	-	-
Gruss Asset Management LP	-	148,856	-	-	-	-	-	-	-	40,000
Guaranty Trust Co. of Missouri	4,917	1,400	300	350	510	-	-	2,900	-	-
Guardian Investor Services LLC	7,900	-	3,208	-	-	-	-	8,938	1,523	-
Guysauta Investment Advisors, Inc.	2,900	-	-	-	-	-	-	-	-	-
GW & Wade, Inc.	-	-	-	-	-	13,020	1,140	-	-	-
GW Capital Management LLC	-	-	-	24,925	1,350	-	-	-	-	765
H. G. Wellington Capital Management	5,500	-	-	24,600	2,400	-	-	-	-	-
H. M. Payson & Co.	-	-	-	4,350	-	-	-	-	-	-
Hale & Dorr Capital Management LLC	-	-	-	-	-	-	-	-	-	-
Hallmark Capital Management, Inc.	-	-	-	-	-	-	-	-	-	-
Hancock Bank of Mississippi (Horizon Advisers)	-	3,990	-	-	-	-	-	-	-	-
Handelsbanken Fonder AB	-	-	-	-	-	360	-	-	-	-
Hansberger Global Investors, Inc.	-	-	-	-	-	-	-	131,970	-	-
Hardesty Capital Management Corp.	488	-	8,478	-	-	92,000	89,100	-	18,400	27,700
Harleysville Group, Inc. Asset Management	-	-	-	1,920	3,830	28	-	480	-	-
Harris Investment Management, Inc.	-	-	-	-	-	-	-	800	1,230	-
Hartford Investment Management Co., Inc.	3,000	33,237	-	-	-	-	1,454	68	-	-
Hartline Investment Corp.	-	-	-	-	18,900	-	-	-	-	9,128
Harvard Management Co., Inc.	-	-	-	-	-	-	1,000	480	500	-
HBK Investments LP	-	5,900	38,000	66,000	-	-	1,300	-	-	-
Heitman, Jordan Management Co., Inc.	301,600	160,000	-	10,800	289,500	198,400	-	21,200	-	73,300
Hendley & Co., Inc.	-	-	-	-	-	-	-	-	598,400	-
Hermes Pensions Management Ltd	-	14,205	-	-	3,710	-	-	-	-	-
Hester Capital Management LLC	-	-	-	-	-	-	-	-	-	-
HGK Asset Management, Inc.	9,200	-	-	-	-	-	14,500	8,000	18,500	485
High Point Bank & Trust Co.	-	-	-	-	-	-	-	-	-	-
HighMark Capital Management	-	-	-	-	-	-	-	2,400	-	-
Holdernass Investments Co.	-	-	524,900	-	-	-	-	-	-	-
Hotchkis & Wiley Capital Management LLC	-	-	-	-	-	12,190	850	200	3,850	-
Howard Capital Management	-	9,629	-	-	-	-	-	-	-	43,300
Howland Capital Management, Inc.	-	6,750	-	-	-	-	-	-	-	-
HSBC Investments (UK) Ltd.	-	-	166,975	-	61,408	26,697	35	-	-	-
HSBC Investments Deutschland GmbH	-	-	-	-	-	-	229,884	-	-	-
HSBC Investments USA	-	-	-	-	-	-	-	4,084	-	-
							84,000	-	-	-

USCA5 7809

SA77

Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Huntington Asset Advisors, Inc.	3,875	6,975	-	-	-	-	-	-	-	-
HVB Capital Management, Inc.	-	-	-	400	-	-	-	-	-	-
I. G. Investment Management Ltd.	-	-	-	10,000	-	-	-	-	-	1,900
Iberoasia Gestion SGIIC	-	-	-	-	-	-	-	-	-	1,970
IBM Retirement Plan	-	-	-	-	-	2,089	16,074	-	6,732	430
ICC Capital Management, Inc.	37,400	-	1,620	-	-	18,500	400	8,600	32,100	75,730
ICM Asset Management, Inc.	300	-	-	-	-	29,280	-	-	12,000	-
Icon Advisers, Inc.	2,800	-	-	-	-	-	-	-	-	-
Independence Investments LLC	-	-	-	-	21,695	-	3,700	-	384,400	-
ING Investment Management Co.	-	-	-	1,143,083	3,228	-	48,600	-	98,220	-
ING Investments LLC	40,700	-	-	13,700	-	106,960	-	188,800	10,180	-
Ingalls & Snyder Asset Management	9,100	8,900	2,240	2,718	100	7,402	28	109	3,405	84,230
Insight Investment Management (Global) Ltd.	-	-	-	-	-	50,000	181,480	28,000	-	-
Integra Bank, N.A.	-	-	-	-	-	-	18,400	720	800	-
Intel Corp. Pension Fund	-	12,900	-	-	-	-	18,700	16,500	3,000	-
INTRUST Bank N.A.	-	-	-	-	-	11,300	-	-	-	-
Invemess Counsel, Inc.	-	-	-	2,234	-	-	-	-	-	6,800
INVESCO Asset Management Ltd.	-	-	-	-	-	25,010	-	13,614	-	158,920
INVESCO Capital Management	-	-	84,240	1,469	8,141	-	231,826	273,278	14,772	849,923
Investments Technology, Inc.	-	-	-	-	-	-	-	-	1,500	-
Iridian Asset Management LLC	-	-	-	-	497,196	178,500	275,400	-	-	-
J. & W. Seligman & Co., Inc.	-	19,800	-	142,400	2,900	-	-	-	-	-
Jacobs Levy Equity Management, Inc.	-	-	222,900	-	-	197,700	-	-	416,000	-
JAG Advisors	-	1,500	-	-	-	-	-	-	-	-
Janus Capital Management LLC	-	-	-	8,188	-	-	-	1,207,238	784,638	-
Jennison Associates LLC	-	-	-	72,600	-	14,361,500	8,810,200	301,917	-	-
JLF Asset Management LLC	-	-	-	-	-	-	-	-	-	190,000
JMG Capital Management, Inc.	-	-	-	-	-	-	-	-	-	32,660
Joel R. Mogy Investment Counsel, Inc.	-	-	-	-	-	-	6,613	22	-	-
John G. Ullman & Associates, Inc.	-	-	-	-	-	-	-	-	70,560	-
John P. O'Shea Investment Management, Inc.	14	-	34	-	10	12	13	12	178	-
Johnson Investment Counsel, Inc.	-	20,900	9,313	29,369	27,483	66,110	22,997	12,733	3,045	-
Johnston Lemon Asset Management, Inc.	-	9,500	50	600	-	-	7,230	-	-	-
Johnston, Reid & Mitchell, Inc.	-	3,799	-	-	-	-	2,060	880	-	-
Jones Heward Investment Counsel	-	-	110	-	-	400	-	-	-	-
JPMorgan Asset Management (UK) Ltd.	-	-	-	1,600	188	3,413	9,132	80,848	-	-
JPMorgan Asset Management, Inc. (US)	-	-	-	20,662	228,800	934,500	-	-	117,299	-
JPMorgan Chase Bank NA	48,220	84,466	19,618	-	38,830	1,466,202	10,411	-	-	-
JPMorgan Investment Advisors, Inc.	218,422	1,288,247	-	-	751,362	-	-	-	-	-
JPMorgan Securities, Inc.	-	-	-	-	-	3,278	-	117,881	-	-
JPMorgan Trust Bank Ltd.	-	-	-	100	2,400	4,800	-	-	-	-
Jupiter Asset Management Ltd. (UK)	-	-	-	-	68,000	-	-	-	-	-
Jyske Invest Administration A/S	-	-	-	-	-	-	-	-	-	2,000
Kanaly Trust Co.	701	-	-	18,348	-	-	-	280	33,370	-
Kanawha Capital Management LLC	-	-	-	-	-	-	-	-	-	-
Karpas Strategies LLC	-	-	-	-	-	10,000	-	-	-	-
KBC Asset Management (Belgium)	-	-	-	23,873	-	113,405	-	44,858	-	-
KCM Investment Advisors	-	-	18,848	-	-	-	-	-	-	-
Keating Investment Counselors, Inc.	-	-	-	-	-	-	-	-	29,300	-
Kelmoore Investment Co., Inc.	-	127,400	14,100	43,800	-	113,800	-	45,500	93,100	-
Ken Roberts Investment Management, Inc.	10,976	-	14,128	-	-	-	-	-	-	-
Kentucky Teachers Retirement System	-	28,800	-	-	-	-	-	-	-	4,100
Kingdon Capital Management LLC	-	-	-	800,000	-	-	-	-	-	-

SA78

LSCAS 7940

Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Kingswell & Co.	-	-	-	-	-	-	-	-	-	-
Klingenstein, Fields & Co. LLC	20,700	18,280	480	-	-	9,380	30,900	11,665	-	1,850
Komitzer Capital Management, Inc.	-	1,400	-	-	-	900	-	-	-	-
LaSalle National Bank	8,140	-	-	-	-	-	-	-	-	-
Ladyard National Bank	-	-	-	4,400	-	-	-	-	-	-
Lee, Danner & Bass, Inc.	-	1,000	400	-	24,000	-	-	7,100	-	-
Legal & General Investment Management Ltd.	-	32,751	8,932	16,840	40,188	38,789	27,430	1,730	-	-
Legg Mason Canada, Inc.	-	81,400	300	-	-	28,950	-	-	-	-
Legg Mason Capital Management, Inc.	-	-	-	-	-	-	-	-	-	8,000
Legg Mason Investment Counsel LLC	-	-	-	-	-	200	-	-	-	-
Lehman Brothers, Inc.	-	900	16,321	-	96,456	72,648	-	-	73,036	582,195
Lehrer Management Co., Inc.	-	1,760	-	-	-	-	-	-	-	-
Lemanik Asset Management Luxembourg SA	-	-	-	-	-	-	-	-	-	6,000
Liberty Ridge Capital, Inc.	32,600	-	-	-	-	53,000	-	-	-	-
LKB Expert Fondsleitung AG	-	-	-	-	-	-	-	-	50,486	-
Lockheed Martin Investment Management Co.	-	-	-	-	-	-	-	80,000	-	-
Loeb Partners Corp.	-	-	-	-	-	-	-	-	-	-
Loews Corp. Investments	-	-	-	-	-	-	-	19,300	-	-
Logan Capital Management, Inc.	-	-	-	-	-	-	8,350	-	-	-
Lombard Odier Darier Hentsch & Cie.	-	-	-	-	-	11,000	-	-	-	-
Loomis, Sayles & Co. LP	-	-	-	-	-	-	-	-	-	-
Lord Abbett & Co. LLC	-	-	-	-	-	-	37,100	-	-	149,278
Loring, Wolcott & Coolidge Fiduciary Advisors	-	1,000	-	-	233	1,800	-	-	-	-
Los Angeles Capital Mgmt & Equity Research, Inc	4,400	-	284,248	-	-	1,100	-	-	14,200	113,200
Lotsoff Capital Management	-	-	-	-	-	55	-	-	-	-
Lowe Brockenbrough & Co., Inc.	-	14,800	-	-	7,075	141,318	-	2,460	30,801	-
LSV Asset Management	-	-	-	-	-	-	-	-	1,100	400
Luther King Capital Management Corp.	356,484	35,800	45,200	-	-	23,100	-	23,760	-	-
Lux Investment Advisors SA	-	-	-	-	-	-	-	-	28,950	-
M & I Investment Management Corp.	-	-	40,926	-	4,488	-	2,192	-	-	-
M&T Investment Group	28,110	-	-	9,510	498	61,862	4,088	-	-	-
M. A. Greenwood & Associates, Inc.	100	-	-	-	-	-	-	-	280	-
M.M. Warburg Invest KGaA	-	-	-	-	3,200	-	-	-	-	-
MacKay Shields LLC	-	-	-	-	-	-	-	-	-	-
Mackenzie Financial Corp.	21,800	12,200	8,000	-	800	-	-	3,480	-	-
Mainstream Investment Advisers LLC	-	-	35,000	-	-	-	-	-	-	-
Mandatum Asset Management Ltd.	-	-	-	-	-	-	-	6,623	-	-
Manning & Napier Advisors, Inc.	-	-	-	791,350	-	-	-	-	-	-
Marco Investment Management LLC	-	-	-	-	-	-	218	-	-	-
Markeboresy Capital Management LLC	-	-	-	-	-	-	-	-	-	80
Markston International LLC	-	-	-	-	-	-	-	-	-	41,000
Marque Millennium Capital Management Ltd.	-	-	2,600	-	6,700	92,700	1,480	3,510	9,780	-
Marsico Capital Management LLC	-	-	-	2,386,660	-	-	-	-	-	-
Marvin & Palmer Associates, Inc.	537,900	-	-	504,700	363,700	-	-	877,000	-	-
Mason Street Advisors LLC	-	-	-	-	-	-	-	-	-	-
Masters Capital Management LLC	-	-	-	-	230,000	-	-	1,088,000	66,000	-
Maverick Capital Ltd.	-	-	-	-	-	-	-	-	-	10,000,000
MB Investment Partners, Inc.	1,500	-	-	-	-	8,500	-	-	-	-
McCullough & Associates LLC	-	-	-	-	-	-	-	-	-	-
McGlinn Capital Management, Inc.	78,800	-	207,807	2,132	-	-	-	16,800	141,732	-
McMorgan & Co. LLC	-	-	-	-	-	-	-	-	-	-
Mellon Capital Management	-	184,442	131,382	364,023	102,247	284,173	1,848,689	-	830,480	-
Mellon Equity Associates LLP	800	24,100	1,900	-	-	-	-	2,000	-	-

Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Mercantile-Safe Deposit & Trust Co. /Mercantile C	-	-	-	79,034	-	-	-	-	-	-
Meridian Investment Advisors	775	-	-	-	-	-	-	-	-	-
Merrill Lynch, Pierce, Fenner & Smith, Inc.	281,388	309,186	-	-	44,723	299,690	-	-	141,841	-
Mesirow Asset Management, Inc.	-	29,788	-	-	-	-	-	-	-	-
Metropolitan Life Insurance Co.	-	658	11,436	38,041	-	81	-	-	45,497	-
Metropolitan West Capital Management LLC	-	182,862	178,869	177,083	128,979	497,389	283,734	183,939	203,763	-
Metzler Asset Management GmbH	-	-	2,000	-	-	-	-	-	-	-
Meyer Handelman Co.	-	-	-	-	-	-	-	-	1,000	7,200
MFC Global Investment Management	1,237	1,700	-	-	1,393	-	1,818	4,823	29,163	246,768
MFC Global Investment Management (US) LLC	-	-	316,669	-	-	-	372,095	271,534	-	-
MFM International	-	-	-	-	-	-	427,060	-	74,798	-
MFS International (UK) Ltd.	-	-	-	42,800	-	-	-	-	-	9,600
MFS Investment Management	191,155	2,151,400	3,726,065	663,130	-	-	407,724	3,220,898	-	-
Michigan Department of Treasury	-	-	6,000	600	-	7,300	-	-	-	9,000
Millennium Partners	-	-	-	-	-	431,809	-	62,645	32,650	1,142,168
Missouri State Employees Retirement System	2,900	-	-	1,200	-	-	-	-	-	-
Missouri Valley Partners, Inc.	-	-	-	-	-	8,400	-	-	-	-
MIT Investment Management Co.	-	15,600	-	-	-	-	-	-	-	-
Mitchell Binaker & Starr	-	1,000	1,700	-	-	-	-	4,106	-	-
Monarch Capital Management, Inc.	4,000	2,900	1,600	-	-	-	-	-	-	-
Monetary Management Group, Inc.	-	-	-	-	-	4,250	-	-	-	378
Montag & Caldwell, Inc.	19,700	-	-	-	-	-	181,600	-	-	-
Moody, Lynn & Co.	29,882	-	-	11,650	-	-	-	-	-	-
Moore Capital Management LLC	271,364	-	82,000	-	-	-	-	-	-	-
Morgan Asset Management, Inc.	1,910	-	-	6,211	4,378	73,388	181,148	119,184	-	-
Morgan Dempsey Capital Management LLC	-	-	-	-	-	-	17,290	-	-	-
Morgan Stanley & Co., Inc.	-	298,987	697,089	-	118,774	410,468	-	858,171	-	1,848,364
Morgan Stanley Gestion SGIIC SA	-	-	-	-	12,485	-	-	11,880	-	11,313
Morgan Stanley Investment Management (UK)	-	-	-	-	-	-	-	238,100	-	-
Morgan Stanley Investment Management, Inc.	373,971	-	-	-	1,770,868	-	2,029,284	-	-	17,260,578
Morley Fund Management	-	-	-	-	-	-	22,700	-	11,300	9,800
Morse Williams & Co., Inc.	-	-	-	-	-	-	-	-	-	-
MTB Investment Advisors, Inc.	-	-	-	232,880	-	1,700	-	-	-	-
Mulvihill Capital Management, Inc.	-	-	-	-	-	-	-	-	26,000	304,500
Munder Capital Management	-	-	-	-	60,800	-	106	-	-	449,810
Murphy Capital Management, Inc.	300	-	50	-	200	-	-	100	50	100
Mutual of America Capital Management Corp.	4,500	70,282	887	-	-	-	-	-	-	1,025
MyBank/First United Bank & Trust Co.	-	-	-	-	14,435	-	1,878	1,778	1,050	-
National Bank of Indianapolis Wealth Manageme	-	-	-	-	800	-	60	-	28	-
National Independent Trust Co.	-	-	-	-	-	-	-	-	-	-
National Rural Electric Cooperative Association	-	-	-	-	-	225,000	-	50,300	-	2,160
National Westminster Bank Plc	-	-	-	-	-	1,000	-	-	-	-
Natixis Private Banking Luxembourg SA	-	-	-	-	-	-	-	-	-	13,000
NBT Bank	-	-	2,600	-	-	-	-	-	-	-
NCM Capital Management Group, Inc.	-	-	288,978	-	-	-	-	-	-	-
Needham Investment Management LLC	-	-	-	-	-	-	-	-	-	202,600
Neuberger Berman LLC	-	2,466,515	1,661,941	-	-	-	-	-	-	-
Neuflize OBC Asset Management	-	-	-	-	-	-	-	-	-	75,615
New Jersey Division of Investment	-	-	-	-	-	-	-	1,585,690	-	-
New Mexico Educational Retirement Board	-	-	-	-	-	-	4,400	-	-	3,900
New York Life Investment Management LLC	976,789	-	-	-	-	15,928	-	-	-	-
New York State Common Retirement Fund	-	-	-	-	53,600	496,300	297,300	-	180,100	48,278
New York State Teachers Retirement System	-	-	-	-	-	-	-	-	-	-

USCA5 7942

SA80

Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Newton Investment Management Ltd.	-	62,500	-	186,200	-	575,808	-	-	-	-
Nicholas Advisers, Inc.	-	-	-	-	-	-	69,000	-	-	-
Nicholas-Applegate Capital Management	-	-	-	-	-	-	-	-	-	137,700
NIBA Investment Advisors LLC	-	-	7,900	9,200	-	7,600	8,200	-	-	-
Nissay Asset Management Co	121,234	-	-	244,070	-	-	-	886,700	119,020	-
NLI International, Inc.	20,800	14,400	-	-	-	-	-	-	-	-
Nomura Asset Management Co., Ltd.	3,200	3,000	-	88	34,300	-	-	128,988	31,800	-
Nomura Asset Management U.S.A., Inc.	84,300	19,030	-	9,400	10,500	-	-	-	-	-
Nomura Securities Co., Ltd. (Wealth Management	24,748	5,840	-	101,889	61,624	88,099	-	65,202	59,840	-
Norges Bank Investment Management	-	-	-	-	-	24,930	1,328	28,973	-	209,329
North American Management Corp.	-	-	-	-	-	-	-	-	-	-
Northeast Investment Management, Inc.	-	-	-	-	-	-	-	-	-	-
Northern Capital Management LLC	-	10,900	7,000	-	-	-	-	-	-	-
Northern Trust Global Advisors, Inc.	84,844	-	-	28,391	-	-	8,030	5,600	33,585	27,000
Northern Trust Investments	178,282	-	-	422,923	286,528	-	98,697	184,534	21,065	-
Northwestern Investment Management Co. LLC	-	-	-	-	-	-	-	700	-	400
NWD Investments	-	89,837	-	-	-	128,189	-	90,768	-	17,043
NWQ Investment Management Co. LLC	-	-	-	-	-	34,887	-	-	129,289	225,923
Odin Forvaltning AB	-	-	-	-	-	-	-	-	-	17,414
Ohio Public Employees Retirement System	-	-	8,220	-	84,078	41,073	4,021	-	127,474	-
OKO Asset Management Ltd.	-	-	-	-	-	-	-	540	-	-
Old National Wealth Management	-	-	-	-	-	-	-	5,625	-	32,128
Olstein Capital Management LP	-	80,000	37,000	-	-	-	-	-	-	-
ON Investment Management, Inc.	-	8,000	-	-	44,000	-	11,000	-	31,000	-
Onyx Capital Management LLC	-	-	-	-	-	-	72,200	-	-	-
Oppenheim Pramerica Kapitalanlage GmbH	-	-	-	-	-	-	-	2,359	-	-
Oppenheimer Asset Management	-	-	9,716	-	-	8,200	-	-	-	-
Oppenheimer Capital	5,550	-	155	-	-	3,894,886	1,988,983	1,127,705	1,318,185	-
OppenheimerFunds, Inc.	80,000	-	82,600	60,100	-	1,980,900	625,620	816,580	942,260	540,660
Optimum Investment Advisors LP	21,665	5,878	-	1,116	-	-	-	10,978	3,201	-
Opus Investment Management, Inc.	42,900	-	2,200	-	-	-	-	-	-	-
Orleans Capital Management Corp.	1,600	-	3,160	500	-	-	-	-	-	-
Osborne Partners Capital Management	-	3,032	-	200	1,266	2,032	-	-	-	-
Osterweis Capital Management, Inc.	-	-	-	-	2,402	-	-	-	-	-
P. J. Schmidt Investment Management, Inc.	-	1,878	-	-	-	-	-	-	-	-
Pacific Assets Management LLC	-	-	-	10,000	-	-	32,000	188,000	-	32,880
Pacific Capital Wealth Management Services	1,080	-	-	8,113	-	-	-	-	-	-
Pacific Income Advisers, Inc.	-	-	11,138	73,310	-	770	-	-	-	-
PADCO Advisors, Inc. (Rydex Global)	-	-	-	-	262,106	21,387	-	-	-	49,594
Palomar Partners Management Co.	-	-	-	-	-	-	-	-	-	149,120
Paradigm Asset Management Co. LLC	-	-	-	11,400	-	34,400	-	-	-	-
Paragon Investment Management, Inc.	-	38,600	4,200	-	300	3,100	-	-	-	-
Parametric Portfolio Associates	10,438	-	11,627	14,678	24,103	-	45,808	11,842	-	29,731
Part National Bank	-	-	-	550	80	8,280	1,000	-	-	100
Parsons Capital Management, Inc.	1,337	787	-	-	-	38	-	-	-	-
Patten & Patten, Inc.	-	-	-	-	4,729	-	-	7,460	-	-
Peak Investments LLC	-	-	-	-	-	-	-	-	-	-
Pekin Singer Strauss Asset Management	-	-	-	4,700	-	-	-	-	-	-
PENN Capital Management, Inc.	-	8,265	-	-	-	-	-	-	-	-
Pennsylvania Public School Employees Retireme	-	-	-	322,280	-	-	-	235,105	720,600	-
People's Bank (CT)	47,268	3,496	700	-	-	-	-	800	1,700	2,224
Pequot Capital Management, Inc.	-	-	-	-	-	71,000	-	-	-	-
Perkins, Wolf, McDonnell & Co.	-	331,131	60,880	564,870	740	-	-	-	-	-

USCA5 7043

SA81

Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Petercam Asset Management (Belgium) SA	-	-	-	-	-	-	-	4,900	-	6,000
Petersen, Flynn & Dinamore, Inc.	-	41,480	-	-	-	-	-	-	-	-
PGB Trust & Investments	-	-	-	-	-	-	12,582	-	500	-
Philadelphia Investment Management Co.	-	-	-	-	-	170	-	-	-	-
Phoenix Investment Counsel, Inc.	-	-	23,900	-	-	7,700	-	-	-	-
Phoenix/Zweig Advisers LLC	-	-	-	-	93,900	-	-	-	-	-
Pictet Asset Management Ltd.	-	-	-	-	-	-	-	1,108	-	-
Pin Oak Investment Advisors, Inc.	-	23,450	-	-	-	-	-	10,432	-	-
Pinnacle Associates Ltd.	8,178	62,720	7,760	-	8,350	-	12,774	4,101	-	-
Pioneer Investments	-	-	-	305,600	180,000	-	-	828,000	-	-
Pioneer Investments Austria	-	-	-	-	360	-	500	-	-	-
Pioneer Investments Kapitalanlagegesellschaft mbH	-	-	-	-	-	-	-	8,300	18,001	12,900
Pitcairn Financial Group	-	27,896	-	4,350	98	-	-	-	-	-
PNC Bank NA	68,891	-	-	-	2,797	16,828	20,840	42,837	-	-
Prescott Group Capital Management LLC	-	-	-	-	-	-	-	-	-	144,000
Principal Global Investors LLC	6,713	1,073,158	436,804	-	26,827	-	-	11,948	-	-
Privat Bank Patrimonio SGIIC	-	-	-	-	-	-	-	-	-	34,914
Private Asset Management, Inc.	8,080	1,400	708	-	122	-	-	903	46,238	38,550
Provident Investment Counsel, Inc.	-	-	-	8,100	9,800	-	-	-	-	-
Prudential Investment Management	-	40,468	-	-	-	6,269	33,909	12,083	243,083	-
Putnam Investment Management, Inc.	-	-	-	-	8,429,097	-	228,388	-	-	401,800
Qwest Asset Management Co.	-	-	4,100	-	-	-	-	-	-	-
R. M. Davis, Inc.	-	-	-	-	4,200	-	-	-	-	-
Rainier Investment Management, Inc.	-	-	-	-	-	-	-	-	-	-
Ramius Capital Group LLC	-	-	-	-	-	24,735	-	-	-	-
Ramsey Quantitative Systems	-	-	-	-	-	15,500	4,500	75,900	-	-
RAS Asset Management SGR SpA	-	-	-	-	-	19,000	-	-	-	-
Raymond James & Associates	-	-	-	-	-	-	17,936	1,920	-	-
RBC Capital Markets (US)	-	3,729	1,982	-	-	-	3,075	-	240	-
RCM (UK) Ltd.	-	-	-	-	590	16,000	-	10,000	-	-
RCM Capital Management LLC	-	-	-	80,200	-	-	-	17,300	80,400	-
Reed, Conner & Birdwell LLC	-	-	-	-	-	-	-	11,550	-	-
Regents of the University of California	-	-	-	-	-	-	-	-	-	-
Renaissance Technologies Corp.	137,600	-	389,100	-	-	174,600	348,600	-	829,500	-
Richards & Tierney, Inc.	-	-	-	-	8,500	-	-	-	-	-
Rigel Capital LLC	-	-	10,400	-	3,000	6,200	-	-	-	-
Riva y Garcia Gestion SGIIC SA	-	-	-	-	-	-	-	-	-	2,038
RiverSource Investments LLC	985,475	1,882,360	6,918,751	2,464,412	1,479,169	-	1,017,231	-	-	-
Roanoke Asset Management Corp.	-	-	-	-	-	23,730	2,940	1,230	-	-
Robeco Boston Partners Asset Management LLC	-	-	14,500	-	-	-	-	-	-	-
Robeco Weiss, Peck & Greer Investments	-	39,928	11,228	-	38,680	48,382	-	-	8,420	-
Rochdale Investment Management LLC	-	-	-	-	-	-	-	-	-	-
Rockefeller & Co., Inc.	-	-	-	-	-	-	-	9,800	-	-
RockView Management LLC	-	26,100	89,000	-	48,000	104,900	-	-	-	2,900
Rodney Square Management Corp.	-	-	-	-	-	-	-	10,000	20,000	-
Roger H. Jarsvold & Co., Inc.	-	300	-	-	1,297	-	-	-	-	-
Ropes & Gray LLP	-	-	11,340	-	400	-	-	-	-	-
Rothschild Asset Management, Inc. (US)	-	-	12,183	-	-	-	-	-	-	-
Rothschild Investment Corp.	-	29,900	-	-	-	1,300	-	-	500	-
Royal London Asset Management Ltd.	-	-	-	-	20,910	-	208,470	-	-	-
Rudman Capital Management LLC	-	-	-	-	-	-	-	-	-	98,900
Russell Investment Group	208,031	-	83,900	88,948	3,728	-	581,780	124,369	-	-
S.A.C. Capital Advisors	-	8,909	13,381	-	-	170,000	-	22,500	95,400	615,800

SA82

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Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/29/2001	9/30/2001	12/31/2001
Sahco Corp. Asset Management	-	-	-	-	-	76,400	-	-	-	-
Sagemore Hill Capital Management LP	-	-	-	-	-	-	19,000	-	-	28,900
Salem Capital Management, Inc.	-	1,100	-	-	-	-	-	-	-	5,100
Salient Partners & Pinnacle Trust Co.	-	-	-	-	1,120	-	-	-	-	300
SAM Groupe Holding AG	-	-	-	-	-	-	-	6,700	-	-
San Francisco Sentry Investment Group	800	700	450	-	-	-	-	-	-	-
Sand Hill Advisors, Inc.	-	-	-	-	-	-	-	9,690	-	-
Santander Asset Management SGIIC SA	-	-	-	-	-	14,668	-	60,993	-	-
Saybrook Capital Corp.	-	-	-	-	-	-	-	-	-	8,000
Schafer Cullen Capital Management, Inc.	-	-	-	-	-	-	-	-	-	-
Schneider Capital Management Corp.	-	-	-	-	-	-	-	-	-	300,000
SCM Advisors LLC	303,699	249,480	992,289	-	-	423,840	-	-	67,668	-
Scottish Investment Trust Plc	-	-	-	-	-	160,162	-	-	-	189,862
Seaward Management Corp.	1,800	100	400	200	-	1,023	30	600	5	-
SEB Investment Management AB	-	-	-	-	5,415	-	-	-	-	-
Security Management Co. LLC	-	118,600	-	-	-	-	91,500	920	-	-
Seguros Bilbao Fondos SGIIC	-	-	-	-	-	-	-	-	-	1,087
Sens Weller Rohs Williams, Inc.	1,450	-	1,000	4,000	-	1,184	-	-	-	1,068
Sentinel Asset Management, Inc.	2,880	1,000	54,464	-	-	-	-	3,030	-	-
Sentinel Trust Co.	29,400	-	-	-	-	-	-	-	-	-
SG Private Banking (Belgium)	-	-	-	-	-	-	-	-	-	51,300
Shaker Investments LLC	-	-	-	-	-	230,000	69,900	-	-	30,000
Shields & Co.	-	108,900	-	-	-	-	-	-	-	-
Shufro, Rose & Co. LLC	-	-	-	-	-	-	-	-	-	-
Simmons First Trust Co.	485	2,000	-	-	-	-	-	2,429	-	-
Sinopia Asset Management SA	-	-	-	-	-	-	-	-	43,100	-
SR Investment Associates, Inc.	-	345,800	318,350	-	140,200	-	-	-	-	-
SLS Capital	-	-	-	-	-	-	-	-	-	143,089
SMH Capital Advisors, Inc.	-	-	-	-	-	83,950	-	-	-	-
Smith Breeden Associates, Inc.	-	-	-	3,900	-	-	-	-	-	24,000
SMP Ltd. (Scotia Capital)	-	-	-	-	-	-	-	-	-	20,324
Sorce Fund Management LLC	-	-	-	-	180,200	148,793	-	-	-	-
Sparinvest Asset Management A/S	-	-	-	-	-	-	-	-	709	-
Spectrum Advisory Services, Inc.	-	28,600	-	-	-	-	-	-	-	-
SSI Investment Management, Inc.	8,026	10,020	-	7,178	-	-	28,845	-	-	-
St. Johns Investment Management Co.	-	-	-	-	-	-	-	-	-	59,469
St. Paul Fire & Marine Insurance Co.	-	-	224,540	80,000	-	-	-	-	-	-
Stacey Braun Associates, Inc.	7,328	-	1,000	-	-	-	-	-	-	-
Stafford Capital Management LLC	-	15,700	-	-	-	-	-	-	-	-
Standard Pacific Capital LLC	-	-	158,000	-	-	-	-	-	-	-
Starbuck Tiedale & Associates	-	-	-	-	-	-	-	-	-	-
State Bank & Trust, Trust Management Division	-	-	-	-	-	-	-	90,400	-	-
State of Wisconsin Investment Board	-	-	-	-	14,200	11,800	11,300	36,600	-	80,000
State Street Global Advisors	527,182	737,858	-	-	187,298	1,715,503	183,180	-	1,484,098	3,105,405
State Street Global Advisors (France) SA	-	-	-	-	-	-	-	-	-	68,164
State Street Global Advisors Canada Ltd.	-	-	-	-	-	-	-	4,142	-	-
State Street Global Advisors Ltd. (UK)	-	-	-	-	-	-	-	-	-	44,344
State Teachers Retirement System of Ohio	-	287,200	-	2,500	-	70,000	83,325	-	100,900	-
Steelhead Partners LLC	-	-	-	-	-	60,000	-	-	-	-
Steinberg Global Asset Management Ltd.	-	1,750	-	-	-	-	-	-	-	-
Stephens Inc. (AR)	-	-	-	-	-	-	-	-	-	-
Sterne Agee Asset Management, Inc.	-	-	3,605	4,985	845	-	-	-	-	-
Stevenson Capital Management, Inc.	-	16,500	-	-	-	-	3,000	-	-	7,000

USCA5 7045

SA83

Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Steward Capital Management, Inc.	-	-	-	-	-	-	-	-	-	-
Stewart Capital Advisors LLC	-	-	-	600	-	1,800	-	-	-	-
Stichting Pensioenfonds ABP	-	-	-	-	-	-	58,550	-	53,228	28,472
Stock Yards Bank & Trust Co.	-	-	-	-	-	-	-	-	-	-
Storebrand Kapitalforvaltning ASA	-	-	-	-	-	-	-	1,097	-	-
Sturdivant & Co., Inc.	-	-	575	-	-	150	-	-	-	12,218
Sumitomo Life Insurance Co. (Investment Manage	-	-	-	-	-	-	-	-	-	-
Summit Capital Management LLC	-	-	28,300	-	-	-	-	-	-	-
Summit Investment Partners, Inc.	600	-	600	-	-	-	178	-	-	-
SunAmerica Asset Management Corp.	61,648	10,150	1,367,060	-	466,666	-	-	2,070	-	-
Susquehanna Trust & Investment Co.	-	-	-	-	-	-	-	11,780	-	-
Swedbank Robur Fonder AB	-	-	-	-	-	-	-	662,200	687,769	-
Swiss Re Asset Management (Americas), Inc.	60,000	-	-	8,000	-	-	-	-	-	-
Swisscanto Asset Management AG	-	-	-	-	14,500	-	20,000	-	120,500	-
Synothony Asset Management SA	-	-	-	-	-	1,000	-	1,800	-	-
Synovus Investment Advisors, Inc.	-	1,025	-	-	6,338	-	-	-	-	16,278
Systematic Financial Management LP	-	-	-	-	-	-	-	-	-	-
T. Leavell & Associates, Inc.	-	300	-	7,800	-	-	-	-	300	-
T. Rowe Price Associates, Inc.	810,600	-	-	7,900	-	-	-	-	841	-
TCW Asset Management Co.	69,946	516,842	660,140	-	-	-	-	-	-	-
TD Asset Management, Inc.	-	131,497	-	7,098	-	43,627	-	-	2,300	108,197
TD Banknorth Wealth Management Group	21,068	9,108	-	4,770	3,386	-	-	6,800	2,887	-
Teacher Retirement System of Texas	108,700	-	-	310,000	-	-	60,000	90,000	110,000	-
Teleos Management LLC	100,000	-	-	-	-	-	-	-	-	-
Terre Haute First National Bank	-	1,000	-	900	-	1,200	2,600	2,525	1,650	-
Terry McDaniel & Co.	-	-	-	-	-	-	-	-	-	-
Thales Fund Management LLC	-	33,600	56,500	15,900	-	210,100	-	-	-	136,400
The Adams Express Co.	-	-	-	-	-	-	-	-	-	-
The Beupost Group LLC	-	-	-	-	-	-	-	-	-	969,600
The Boston Company Asset Management LLC	-	-	488,680	1,105,413	60,440	388,650	-	-	-	-
The Bryn Mawr Trust Co.	-	200	-	-	-	1,750	-	-	-	-
The Burney Co.	-	-	-	-	-	-	-	81	-	-
The California Public Employees Retirement Syst	79,790	-	61,566	-	29,600	-	2,000	-	13,600	6,800
The Edgar Lomax Co., Inc.	-	-	-	-	-	-	-	-	-	3,108,800
The First National Bank of Omaha (FNB Fund Ad	-	-	-	-	-	-	-	-	-	-
The Florida State Board of Administration	-	10,600	-	-	-	-	29,600	-	-	191,700
The Keller Group Investment Management, Inc.	33,034	73,280	22,290	25,072	27,779	-	44,388	19,691	-	-
The Mechanics Bank Asset Management	650	-	-	-	-	-	-	-	-	-
The Mitchell Group, Inc.	1,300	-	-	-	99,000	-	-	-	-	113,600
The Pennsylvania Trust Co.	-	-	-	-	-	-	-	-	-	-
The Philadelphia Trust Co.	-	3,200	-	28,950	1,600	12,380	17,650	-	-	28,000
The Portola Group, Inc.	83,600	23,500	191,150	84,958	15,401	25,967	-	29,428	-	-
The Swarthmore Group, Inc.	-	-	-	-	8,900	107,760	-	-	-	-
The Trust Co. of Oklahoma	143	457	-	1,200	2,000	-	1,200	-	200	-
The Trust Co. of Toledo	3,500	-	-	-	-	700	-	-	2,600	-
The Washington Trust Co.	-	-	-	4,418	240	-	-	-	-	1,500
Thrivent Investment Management, Inc.	2,400	87,600	-	-	-	-	-	-	-	-
TIAA-CREF Asset Management LLC	-	-	282,191	185,581	-	302,586	94,867	87,913	87,168	-
TimeSquare Capital Management LLC	-	-	-	-	3,900	-	-	-	-	100
TirolInvest KAGmbH	-	-	-	-	-	-	-	-	5,000	2,000
Tirschwell & Loewy, Inc.	-	14,900	-	-	-	400	3,040	-	22,988	39,565
TNB Financial Services, Inc.	-	31,400	1,000	-	-	-	-	-	-	-
Tobias Bros., Inc.	100,000	-	-	-	-	-	-	-	-	-

USCA5 7946

SA84

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Exhibit 12

Quarter Ended	6/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Tocqueville Asset Management LP	-	-	-	-	-	-	-	-	-	-
Todd Investment Advisors, Inc.	8,900	-	-	900	-	-	-	-	-	-
Tompkins County Trust Co.	6,300	6,600	1,200	-	-	-	-	-	-	-
Tower Asset Management LLC	4,260	3,443	-	-	-	-	-	300	-	-
Tower Bank & Trust Co.	-	-	-	-	-	100	-	-	-	-
Tradition Capital Management LLC	-	-	-	-	-	-	-	-	100	-
Trainer Wortham & Co., Inc.	-	-	1,200	-	-	-	60	-	-	-
Transamerica Investment Management LLC	-	-	13,423	154	980	-	-	-	-	1,765
Treco Investment Counsel LLC	-	-	20,400	-	-	-	-	-	-	-
Trellus Management Co. LLC	-	-	-	-	-	-	-	-	50,000	-
Tributary Capital Management LLC	-	-	-	-	2,700	-	-	-	-	-
Trusco Capital Management, Inc.	-	-	648,498	288,662	705,013	-	389,217	-	666,343	-
Trust Co. of Connecticut	5,350	-	-	780	-	-	8,480	-	-	-
Trust Company of Vermont	-	-	-	-	-	-	-	-	-	4,255
Trustmark Investment Advisors	-	-	-	-	-	-	-	-	2,524	2,150
Turner Investment Partners, Inc.	-	-	-	680	-	-	-	-	-	-
Twin Capital Management, Inc.	-	-	-	28,800	-	-	-	-	51,100	-
U. S. Global Investors, Inc.	1,000	-	-	1,000	-	2,000	-	-	-	-
UBS Global Asset Management	-	78,400	637,500	-	121,600	570,900	109,800	299,400	266,800	-
UBS Global Asset Management (UK) Ltd.	-	47,104	-	3,700	-	966	2,380	37,100	-	-
UBS O'Connor LLC	-	-	-	-	-	30,700	46,100	-	-	-
UBS Private Banking (US)	-	-	-	-	-	-	-	-	19,895	-
UBS Securities LLC	-	-	272,349	40,399	-	-	476,965	-	121,662	880,089
UMB Bank	-	-	-	1,641	-	19,030	-	19,789	18,701	-
Union Bank of California N.A.	-	-	-	-	135,190	-	-	10,471	-	-
Union Investment Privatfonds GmbH	-	-	-	-	-	-	-	-	141,900	-
United Bank & Trust (Michigan)	-	27,010	-	280	-	5,925	180	3,610	900	2,150
United States Trust Co. of New York	3,888	36,161	-	-	-	23,716	2,468	-	-	-
Universal-Investment-GmbH	-	-	-	-	-	-	-	8,050	-	14,638
Uraplus Gestion SGIIC	-	-	-	-	-	-	-	-	-	9,577
USAA Investment Management Corp.	-	-	114,752	192,148	-	-	-	-	-	-
Value Line Asset Management	-	-	-	-	-	-	-	12,000	-	-
Van Eck Global	10,000	-	-	-	-	2,900	-	-	-	-
Van Kampen Asset Management	606,462	-	885,898	-	566,077	1,166,713	2,831,058	2,835,511	6,043,953	-
Vanguard Group, Inc.	190,383	36,605	39,870	82,206	60,461	46,520	115,619	401,452	-	48,955
Vaughan Nelson Investment Management LP	-	-	-	-	-	-	-	34,900	-	-
Veritas SG Investment Trust GmbH	-	-	-	-	-	5,000	-	-	-	-
Verizon Pension Fund	-	36,985	3,769	-	14,981	5,383	152,654	-	86,500	-
Victory Capital Management, Inc.	179,188	497,102	-	-	-	522,759	98,152	18,617	92,826	-
Virginia Retirement Systems	-	18,400	-	-	500	8,000	31,400	-	30,200	63,600
Volksbanken Invest KAG	-	-	-	-	-	-	-	-	-	17,400
W. H. Reaves & Co., Inc.	114,400	201,700	188,060	121,070	79,880	-	-	-	8,200	-
Waddell & Reed Investment Management Co.	328,000	-	-	-	244,740	-	-	-	254,255	-
Wagner Investment Management, Inc.	-	300	-	-	-	-	-	-	-	-
Wall Street Associates (US)	6,000	-	-	10,000	-	-	-	-	-	-
Walnut Asset Management LLC	-	-	-	-	-	-	60,920	-	-	-
Washington Capital Management, Inc.	-	44,725	-	-	-	-	-	-	-	-
Washington Trust Bank	-	-	6,448	320	635	1,370	818	6,080	2,970	-
Waters Parkerson & Co., Inc.	-	-	-	-	-	103,788	4,329	940	27,635	-
WB Capital Management, Inc.	-	21,475	82	204,988	-	-	-	-	-	-
WCM Investment Management	-	-	-	-	-	-	300	-	-	-
Webster Financial Advisors	-	5,900	-	-	-	-	-	-	10,479	-
Wedgewood Investors, Inc.	-	-	-	-	5,200	-	-	-	-	-

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SA85

Exhibit 12

Quarter Ended	9/30/1999	12/31/1999	3/31/2000	6/30/2000	9/30/2000	12/31/2000	3/31/2001	6/30/2001	9/30/2001	12/31/2001
Weintraub Capital Management LLC	-	-	-	70,000	-	-	-	-	-	-
Weisberg & Fields, Inc.	-	-	-	-	-	-	100	-	-	-
Welch & Forbes LLC	8,640	-	-	1,000	3,108	-	280	-	525	-
Wellington Management Co. LLP	-	1,047,900	48,700	-	-	-	66,100	-	-	19,842,790
Wells Capital Management, Inc.	52,905	15,630	103,300	-	99,115	-	197,606	74,670	-	-
Wells Fargo Bank N.A.	36,541	-	172,328	358,637	133,730	-	96,007	11,253	-	-
Wells Fargo Investments LLC	-	11,988	-	-	-	-	-	17,017	7,294	32,175
WesBanco Bank Wheeling	945	-	-	-	100	-	2,524	-	-	-
Westfield Capital Management Co. LLC	-	109,470	298,830	-	280	-	-	-	-	1,200
Westpeak Global Advisors LP	1,000	11,900	9,000	-	-	200	900	-	210,160	-
William Blair Capital Management LLC	11,525	-	-	-	-	365	1,285	2,240	-	-
Williams, Jones & Associates, Inc.	5,300	-	-	92	8	-	-	-	-	37,400
Wilmington Trust FSB	1,000	4,132	1,498	4,145	363	2,847	2,469	-	12,028	-
Wilmington Trust Investment Management LLC	-	-	-	-	-	-	38,045	-	17,408	-
Wilmington Trust of Pennsylvania	2,900	2,110	-	2,611	550	3,995	1,000	1,820	8,065	2,845
Wilson/Bennett Capital Management, Inc.	-	-	-	-	-	-	-	-	-	-
Winslow Capital Management, Inc.	-	-	200,000	-	-	-	-	-	-	-
WP Asset Management Oy	-	-	-	-	-	-	-	-	2,000	-
Wisconsin Capital Management LLC	-	-	44,900	27,350	19,000	62,800	5,100	-	81,661	-
Woodley Farra Manion Portfolio Management, Inc	-	-	-	-	-	-	-	-	-	195
Woodmont Investment Counsel LLC	-	-	-	-	-	89,665	-	-	-	-
Woodstock Corp.	-	-	-	-	2,000	-	875	-	-	-
Wright Investors Service, Inc.	26,950	-	-	-	-	-	-	-	-	-
Wyser Capital Management	-	-	-	-	-	-	240,000	-	-	-
Zions First National Bank	-	-	11,625	-	-	-	-	8,140	-	-
Zuercher Kantonalbank /Invt Mgmt	-	-	-	-	29,000	-	49,000	-	-	-

USCA5 7048

SA86

Exhibit 13

Exhibit 13 **Halliburton's Stock Price and a Summary of the Events Related to the Disclosures**
Not split-adjusted. 6/3/1999-12/7/2001

Source: FactSet Research Systems, Inc.
Returns listed in this Exhibit for days of partial disclosures are the company-specific returns.

Exhibit 14

Exhibit 14

Market and Industry indices are indexed to the price of HAL on December 10, 2001 ($14.00)
Source: FactSet Research Systems, Inc.; CRSP

USCA5 7052

Exhibit 15

Exhibit 15

Halliburton (HAL)

Regression Model Output

Summary Output

Regression Statistics	
Multiple R-Square	0.76925
Standard Error	0.01725
Observations	252
Durbin-Watson Statistic	2.18

ANOVA

	df	SS	MS	FStat	Significance F
Regression	2	0.24696	0.12348	415.052	5.13392E-80
Residual	249	0.07408	0.00030		
Total	251	0.32103			

Equation

	Coefficient	Standard Error	tStat	P-Value	Lower 95%	Upper 95%
Regression	0.00115	0.00109	1.05096	0.29430	-0.00100	0.00329
NAN	0.90049	0.09526	9.45264	2.55969E-18	0.71287	1.08812
Industry Index Residual	1.03256	0.03794	27.21875	1.41114E-78	0.95784	1.10728

Regression Period: 10/1/1996 - 9/30/1999
Industry Composition: Market Cap Weighted Index Comprised Of Statistically Significant Companies In Oilfield Services Industry
*Prediction Equation – Halliburton Predicted Return = 0.00115 + (0.90049 * NAN Return) + (1.03256 * Industry Index Residual Return)*

SA92

Exhibit 16

Exhibit 16

Halliburton (HAL)

Companies Considered for Industry Index

Ticker/ID	Company	Pricing in Class and Control Period	T-Stat	Statistically Significant	Party to Securities Class Action Lawsuit in Class or Control Period	Included in Industry Index
SLB	Schlumberger	Yes	22.680	Yes	No	Yes
NE	Noble Corp	Yes	18.979	Yes	No	Yes
DO	Diamond Offshore Drilling Inc	Yes	18.758	Yes	No	Yes
RDC	Rowan Companies	Yes	18.545	Yes	No	Yes
BJS	BJ Services Co	Yes	18.489	Yes	No	Yes
BHI	Baker Hughes Inc	Yes	18.267	Yes	No. Lawsuit was dismissed.	Yes
TDW	Tidewater Inc	Yes	17.880	Yes	No	Yes
RIG	Transocean Inc	Yes	17.871	Yes	No	Yes
CAM	Cameron International Corp	Yes	17.537	Yes	No	Yes
ESV	ENSCO International Inc	Yes	17.410	Yes	No	Yes
WFT	Weatherford International	Yes	17.379	Yes	No	Yes
SII	Smith International	Yes	16.956	Yes	No	Yes
HP	Helmerich & Payne Inc	Yes	16.101	Yes	No	Yes
NBR	Nabors Industries Ltd	Yes	15.727	Yes	No. Lawsuit concerning wholly-owned subsidiary was prior to class and control period.	Yes
PDE	Pride International Inc	Yes	13.958	Yes	No	Yes
GSF	GlobalSantaFe Corp	Yes	13.815	Yes	No	Yes
PKD	Parker Drilling Company	Yes	13.281	Yes	No	Yes
ATW	Atwood Oceanics	Yes	12.705	Yes	No	Yes
GLBL	Global Industries Ltd	Yes	12.303	Yes	No	Yes
NOV	National Oilwell Varco Inc	Yes	11.517	Yes	No	Yes
MDR	McDermott International Inc	Yes	11.271	Yes	No. Lawsuit was dismissed.	Yes
PTEN	Patterson-UTI Energy Inc	Yes	10.826	Yes	No	Yes
PDS	Precision Drilling Corp.	Yes	9.844	Yes	No	Yes
GW	Grey Wolf	Yes	9.650	Yes	No	Yes
VTS	Veritas DGC	Yes	9.595	Yes	No	Yes
FGH/LQ	Friede Goldman Halter Inc.	Yes	9.541	Yes	No	Yes
DRQ	Drill-Quip Inc	Yes	9.439	Yes	No	Yes
PGOGY	Petroleum Geo Services ASA	Yes	9.040	Yes	No	Yes
VRC	Varco International	Yes	8.683	Yes	No	Yes
IO	Input/Output Inc	Yes	8.579	Yes	No	Yes
CKH	SEACOR Holdings Inc	Yes	8.579	Yes	No	Yes
SPN	Superior Energy Services	Yes	8.314	Yes	No	Yes
MVK	Maverick Tube Corp	Yes	7.541	Yes	No	Yes
ESI	Ensign Resource Services Group	Yes	7.333	Yes	No	Yes
OII	Oceaneering International Inc	Yes	7.317	Yes	No	Yes
BWG	Bouygues Offshore S.A.	Yes	7.276	Yes	No	Yes
NR	Newpark Resources	Yes	7.072	Yes	No	Yes
19238410	Coflexip Stena Offshore ADR	Yes	7.001	Yes	No	Yes
CRR	Carbo Ceramics Inc.	Yes	6.868	Yes	No	Yes
UNT	Unit Corp	Yes	6.123	Yes	No	Yes
TCSMQ	TransCoastal Marine Services	Yes	6.067	Yes	No	Yes
BRS	Bristow Group Inc	Yes	5.927	Yes	No	Yes
KEGS	Key Energy Services Inc	Yes	5.694	Yes	No	Yes

Exhibit 16

Halliburton (HAL)

Companies Considered for Industry Index

Ticker/ID	Company	Pricing in Class and Control Period	T-Stat	Statistically Significant	Party to Securities Class Action Lawsuit in Class or Control Period	Included in Industry Index
MIND	Mitcham Industries	Yes	4.778	Yes	No. Lawsuit was prior to class and control period.	Yes
HLX	Helix Energy Solutions Group Inc	Yes	4.439	Yes	No	Yes
GMRK	GulfMark Offshore Inc	Yes	4.158	Yes	No	Yes
CLB	Core Laboratories	Yes	3.918	Yes	No. Lawsuit was dismissed.	Yes
LSS	Lone Star Technologies Inc	Yes	3.809	Yes	No	Yes
TESO	Tesco Corp.	Yes	3.581	Yes	No	Yes
CGV	CGG Veritas ADR	Yes	2.363	Yes	No	Yes
DWSN	Dawson Geophysical Co	Yes	2.232	Yes	No	Yes
SNSAY	Stolt Comex Seaway	Yes	2.121	Yes	No	Yes
SELA	Seitel	Yes	6.081	Yes	Yes. Lawsuit is pending decision with a class period ranging from 7/13/00 - 4/1/02.	No
EFX	Enerflex Systems	Yes	1.400	No	No	No
837754	Northgate	Yes	0.869	No	No	No
RES	RPC Inc	Yes	0.518	No	No	No
89900J10	Paradigm Geophysical	Yes	0.362	No	No	No
TTI	Tetra Technologies Inc	Yes	0.127	No	No	No
COO	Chiles Offshore Inc.	No				No
EGEOQ	Eagle Geophysical	No				No
GLM	Global Marine Inc.	No				No
HC	Hanover Compressor Co	No				No
HMAR	Hvide Marine	No				No
MRL	Marine Drilling Companies	No				No
PLA	Plains Energy Services	No				No
FLC	R&B Falcon Corp.	No				No
TBI	Tuboscope Inc.	No				No
UTI	UTI Energy	No				No
FTI	FMC Technologies	No				No
GRP	Grant Prideco	No				No
HLX	Heller Marine	No				No
TMAR	Trico Marine Services	No				No

Exhibit 17

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Exhibit 17

Halliburton (HAL)

Actual v. Predicted Returns

*Prediction Equation – HAL = 0.00115 + (0.90049 * NAN) + (1.03256 * Industry Index Residual)*

Residual Return = (1 + Actual Return) / (1 + Predicted Return) - 1

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
8/3/1999	3.313%	0.142%	1.863%	2.166%	1.123%	0.0172	0.665	
8/4/1999	0.292%	2.006%	-1.138%	0.748%	-0.451%	0.0172	-0.264	
8/7/1999	3.343%	0.714%	1.724%	2.538%	0.785%	0.0172	0.467	
8/8/1999	-2.250%	-1.192%	-0.835%	-1.821%	-0.437%	0.0172	-0.249	
8/9/1999	0.144%	0.166%	-0.343%	-0.090%	0.234%	0.0172	0.135	
8/10/1999	0.862%	-1.167%	1.718%	0.837%	0.025%	0.0172	0.014	
8/11/1999	4.986%	-0.768%	3.159%	2.685%	2.240%	0.0172	1.334	
8/14/1999	0.271%	-0.458%	0.259%	-0.031%	0.302%	0.0172	0.175	
8/15/1999	3.789%	0.529%	2.495%	3.167%	0.603%	0.0172	0.361	
8/16/1999	-4.694%	2.229%	-4.918%	-2.958%	-1.790%	0.0172	-1.007	
8/17/1999	4.241%	0.734%	1.835%	2.671%	1.529%	0.0172	0.910	
8/18/1999	-3.975%	0.234%	0.079%	0.407%	-4.065%	0.0172	-2.366	****
8/21/1999	-4.496%	0.629%	-4.036%	-3.487%	-1.048%	0.0172	-0.585	
8/22/1999	-3.994%	-0.895%	-2.160%	-2.922%	-1.105%	0.0172	-0.622	
8/23/1999	0.297%	-0.127%	1.048%	1.082%	-0.777%	0.0172	-0.455	
8/24/1999	-2.519%	-1.269%	-2.172%	-3.271%	0.778%	0.0172	0.436	
8/25/1999	-1.824%	-0.044%	-0.395%	-0.332%	-1.496%	0.0172	-0.865	
8/28/1999	3.096%	1.236%	-1.108%	0.084%	3.010%	0.0172	1.746	
8/29/1999	4.204%	1.475%	1.931%	3.437%	0.742%	0.0172	0.445	
8/30/1999	4.323%	1.595%	2.914%	4.560%	-0.227%	0.0172	-0.138	
7/1/1999	-3.315%	0.558%	-3.184%	-2.570%	-0.682%	0.0172	-0.374	
7/2/1999	1.714%	0.742%	0.625%	1.428%	0.282%	0.0172	0.166	
7/6/1999	1.685%	-0.064%	1.062%	1.154%	0.525%	0.0172	0.308	
7/7/1999	-2.486%	0.237%	-2.440%	-2.191%	-0.302%	0.0172	-0.171	
7/8/1999	3.541%	0.035%	3.377%	3.633%	-0.089%	0.0172	-0.053	
7/9/1999	0.547%	0.553%	0.604%	1.237%	-0.681%	0.0172	-0.400	
7/12/1999	2.857%	-0.214%	2.118%	2.109%	0.733%	0.0172	0.434	
7/13/1999	-1.587%	-0.373%	-0.298%	-0.530%	-1.063%	0.0172	-0.613	
7/14/1999	1.478%	0.461%	-0.221%	0.301%	1.174%	0.0172	0.683	
7/15/1999	0.795%	0.842%	-0.423%	0.436%	0.357%	0.0172	0.208	
7/16/1999	-2.234%	0.493%	-1.359%	-0.844%	-1.402%	0.0172	-0.806	
7/19/1999	-1.613%	-0.786%	-0.356%	-0.961%	-0.658%	0.0172	-0.378	
7/20/1999	-5.328%	-2.167%	-2.034%	-3.937%	-1.448%	0.0172	-0.807	
7/21/1999	3.752%	0.279%	1.242%	1.648%	2.069%	0.0172	1.219	
7/22/1999	-2.086%	-1.289%	0.062%	-0.981%	-1.116%	0.0172	-0.641	
7/23/1999	0.142%	-0.299%	1.267%	1.154%	-1.001%	0.0172	-0.587	
7/26/1999	-1.702%	-0.985%	-0.796%	-1.594%	-0.109%	0.0172	-0.062	
7/27/1999	0.577%	1.125%	-1.619%	-0.543%	1.127%	0.0172	0.650	
7/28/1999	4.304%	0.162%	1.797%	2.116%	2.142%	0.0172	1.268	
7/29/1999	2.338%	-1.702%	2.962%	1.841%	0.687%	0.0172	0.405	
7/30/1999	-0.806%	-0.677%	1.162%	0.705%	-1.501%	0.0172	-0.876	
8/2/1999	-0.813%	-0.246%	-1.803%	-1.968%	1.178%	0.0172	0.670	
8/3/1999	2.322%	-0.752%	0.869%	0.335%	1.981%	0.0172	1.152	
8/4/1999	2.003%	-1.413%	3.520%	2.477%	-0.463%	0.0172	-0.275	
8/5/1999	5.759%	0.622%	3.109%	3.886%	1.803%	0.0172	1.086	
8/6/1999	-2.351%	-0.973%	0.382%	-0.367%	-1.991%	0.0172	-1.150	
8/9/1999	4.309%	-0.391%	6.516%	6.491%	-2.048%	0.0172	-1.265	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
8/10/1999	-2.309%	-1.133%	0.379%	-0.515%	-1.803%	0.0172	-1.040	
8/11/1999	-0.498%	1.511%	-0.402%	1.151%	-1.629%	0.0172	-0.955	
8/12/1999	-1.750%	-0.111%	-0.527%	-0.529%	-1.227%	0.0172	-0.708	
8/13/1999	-2.417%	2.188%	-3.056%	-1.071%	-1.361%	0.0172	-0.781	
8/16/1999	-0.652%	0.266%	-1.639%	-1.338%	0.695%	0.0172	0.398	
8/17/1999	2.362%	0.971%	2.259%	3.322%	-0.929%	0.0172	-0.556	
8/18/1999	-2.436%	-0.720%	-1.258%	-1.832%	-0.615%	0.0172	-0.350	
8/19/1999	1.708%	-0.746%	2.268%	1.785%	-0.075%	0.0172	-0.044	
8/20/1999	-0.775%	0.885%	-0.477%	0.419%	-1.189%	0.0172	-0.692	
8/23/1999	0.000%	1.744%	-0.108%	1.576%	-1.552%	0.0172	-0.914	
8/24/1999	-3.125%	0.186%	-1.796%	-1.572%	-1.577%	0.0172	-0.900	
8/25/1999	-3.226%	1.199%	-5.166%	-4.140%	0.954%	0.0172	0.530	
8/26/1999	0.417%	-1.140%	0.619%	-0.272%	0.691%	0.0172	0.400	
8/27/1999	0.553%	-0.954%	0.676%	-0.048%	0.600%	0.0172	0.348	
8/30/1999	-1.788%	-1.734%	0.107%	-1.337%	-0.457%	0.0172	-0.262	
8/31/1999	4.062%	-0.135%	3.000%	3.091%	0.942%	0.0172	0.563	
9/1/1999	-0.943%	0.764%	-1.535%	-0.783%	-0.162%	0.0172	-0.093	
9/2/1999	-1.361%	-0.832%	-1.248%	-1.924%	0.574%	0.0172	0.327	
9/3/1999	1.517%	2.814%	-1.412%	1.191%	0.322%	0.0172	0.189	
9/7/1999	5.027%	-0.317%	4.303%	4.272%	0.724%	0.0172	0.438	
9/8/1999	-0.906%	-0.517%	-0.453%	-0.819%	-0.087%	0.0172	-0.050	
9/9/1999	8.005%	0.321%	4.518%	5.069%	0.891%	0.0172	0.543	
9/10/1999	1.355%	0.451%	-0.561%	-0.058%	1.414%	0.0172	0.819	
9/13/1999	-2.187%	-0.807%	-0.310%	-0.751%	-1.447%	0.0172	-0.832	
9/14/1999	-2.484%	-0.511%	-3.615%	-4.079%	1.662%	0.0172	0.924	
9/15/1999	-3.439%	-1.234%	-0.184%	-1.166%	-2.300%	0.0172	-1.318	
9/16/1999	0.396%	-0.184%	0.591%	0.558%	-0.162%	0.0172	-0.094	
9/17/1999	-0.131%	1.209%	-0.448%	0.741%	-0.866%	0.0172	-0.506	
9/20/1999	-5.263%	0.014%	-3.639%	-3.630%	-1.695%	0.0172	-0.947	
9/21/1999	-5.556%	-1.886%	-1.884%	-3.529%	-2.101%	0.0172	-1.175	
9/22/1999	0.588%	0.285%	-1.489%	-1.166%	1.775%	0.0172	1.017	
9/23/1999	-1.462%	-2.280%	1.023%	-0.882%	-0.585%	0.0172	-0.338	
9/24/1999	-3.412%	-0.185%	-1.636%	-1.741%	-1.701%	0.0172	-0.969	
9/27/1999	1.843%	0.432%	0.158%	0.687%	1.169%	0.0172	0.682	
9/28/1999	-5.732%	-0.217%	-4.123%	-4.338%	-1.457%	0.0172	-0.808	
9/29/1999	4.320%	-0.761%	4.388%	3.958%	0.348%	0.0172	0.210	
9/30/1999	0.613%	0.926%	-0.485%	0.447%	0.165%	0.0172	0.096	
10/1/1999	1.982%	-0.147%	0.632%	0.634%	1.339%	0.0173	0.780	
10/4/1999	-4.933%	1.662%	-3.730%	-2.241%	-2.753%	0.0174	-1.547	
10/5/1999	-13.208%	-0.080%	-4.517%	-4.622%	-9.002%	0.0174	-4.943	****
10/6/1999	2.717%	1.806%	-1.317%	0.383%	2.325%	0.0174	1.344	
10/7/1999	-4.233%	-0.463%	-2.185%	-2.537%	-1.740%	0.0173	-0.980	
10/8/1999	0.552%	1.095%	-3.487%	-2.499%	3.130%	0.0174	1.758	
10/11/1999	8.044%	0.229%	6.558%	7.092%	0.979%	0.0175	0.600	
10/12/1999	1.382%	-1.680%	0.770%	-0.603%	1.997%	0.0174	1.143	
10/13/1999	1.022%	-1.996%	2.517%	0.917%	0.105%	0.0174	0.061	
10/14/1999	-0.843%	-0.015%	-2.194%	-2.164%	1.350%	0.0173	0.783	
10/15/1999	-5.782%	-2.591%	-0.066%	-2.286%	-3.578%	0.0175	-2.001	****
10/18/1999	-2.166%	0.098%	-2.179%	-2.047%	-0.121%	0.0173	-0.069	
10/19/1999	1.661%	0.765%	1.891%	2.756%	-1.066%	0.0173	-0.633	
10/20/1999	3.811%	1.846%	0.261%	2.046%	1.730%	0.0174	1.017	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
10/21/1999	4.198%	-0.145%	1.398%	1.427%	2.730%	0.0173	1.601	
10/22/1999	3.691%	1.320%	2.236%	3.612%	0.076%	0.0173	0.046	
10/25/1999	0.971%	-0.410%	-0.819%	-1.099%	2.093%	0.0173	1.197	
10/26/1999	-1.763%	-0.817%	-1.249%	-1.911%	0.151%	0.0173	0.086	
10/27/1999	-3.426%	0.897%	-0.794%	0.103%	-3.525%	0.0173	-2.039	****
10/28/1999	0.169%	3.292%	-4.744%	-1.819%	2.025%	0.0176	1.127	
10/29/1999	1.686%	1.747%	0.520%	2.224%	-0.526%	0.0174	-0.310	
11/1/1999	2.819%	-0.346%	2.050%	1.920%	0.882%	0.0173	0.520	
11/2/1999	-4.032%	-0.298%	-2.828%	-3.073%	-0.990%	0.0173	-0.554	
11/3/1999	0.000%	0.700%	-0.318%	0.417%	-0.416%	0.0173	-0.241	
11/4/1999	-1.176%	0.664%	-1.743%	-1.088%	-0.090%	0.0173	-0.051	
11/5/1999	-3.231%	0.783%	-4.729%	-4.063%	0.867%	0.0174	0.478	
11/8/1999	6.151%	0.597%	4.371%	5.166%	0.937%	0.0174	0.567	
11/9/1999	4.305%	-0.754%	4.846%	4.439%	-0.129%	0.0174	-0.077	
11/10/1999	1.270%	0.538%	1.547%	2.196%	-0.906%	0.0173	-0.535	
11/11/1999	-2.508%	0.376%	-3.126%	-2.777%	0.277%	0.0173	0.155	
11/12/1999	7.235%	1.102%	2.999%	4.203%	2.909%	0.0173	1.748	
11/15/1999	3.148%	0.039%	3.352%	3.612%	-0.447%	0.0173	-0.267	
11/16/1999	-1.017%	1.832%	-0.602%	1.143%	-2.137%	0.0174	-1.245	
11/17/1999	3.671%	-0.804%	4.776%	4.502%	-0.795%	0.0174	-0.478	
11/18/1999	-2.975%	1.127%	-3.878%	-2.875%	-0.103%	0.0174	-0.058	
11/19/1999	-1.752%	-0.084%	-0.429%	-0.403%	-1.354%	0.0173	-0.780	
11/22/1999	-1.783%	0.023%	-1.231%	-1.135%	-0.656%	0.0173	-0.375	
11/23/1999	-0.906%	-1.263%	-2.816%	-3.930%	3.146%	0.0174	1.741	
11/24/1999	0.305%	0.879%	-0.070%	0.833%	-0.524%	0.0173	-0.305	
11/26/1999	-2.435%	0.240%	-1.465%	-1.182%	-1.268%	0.0173	-0.725	
11/29/1999	-3.588%	-0.584%	-3.052%	-3.563%	-0.027%	0.0173	-0.015	
11/30/1999	0.162%	-1.236%	0.834%	-0.137%	0.299%	0.0173	0.173	
12/1/1999	6.472%	0.495%	4.629%	5.340%	1.075%	0.0174	0.652	
12/2/1999	-3.951%	1.147%	-2.539%	-1.474%	-2.514%	0.0173	-1.429	
12/3/1999	-2.690%	1.592%	-4.153%	-2.740%	0.052%	0.0174	0.029	
12/6/1999	-3.577%	-0.397%	-2.542%	-2.867%	-0.731%	0.0173	-0.410	
12/7/1999	-4.047%	-0.403%	-2.397%	-2.723%	-1.361%	0.0173	-0.765	
12/8/1999	4.042%	-0.064%	3.581%	3.754%	0.278%	0.0173	0.166	
12/9/1999	-2.365%	0.317%	-4.208%	-3.945%	1.645%	0.0174	0.911	
12/10/1999	-3.287%	0.514%	-3.616%	-3.157%	-0.135%	0.0173	-0.075	
12/13/1999	-1.073%	0.071%	-1.827%	-1.708%	0.646%	0.0173	0.367	
12/14/1999	1.447%	-1.291%	3.010%	2.060%	-0.601%	0.0174	-0.353	
12/15/1999	6.061%	0.548%	4.144%	4.886%	1.120%	0.0174	0.676	
12/16/1999	-0.168%	0.597%	0.191%	0.849%	-1.009%	0.0173	-0.569	
12/17/1999	-1.010%	0.316%	-1.783%	-1.442%	0.438%	0.0173	0.250	
12/20/1999	-2.721%	-0.037%	-1.167%	-1.124%	-1.615%	0.0173	-0.924	
12/21/1999	4.021%	1.441%	0.739%	2.175%	1.807%	0.0173	1.065	
12/22/1999	3.025%	0.341%	1.389%	1.835%	1.168%	0.0173	0.688	
12/23/1999	2.610%	1.306%	3.083%	4.474%	-1.784%	0.0174	-1.074	
12/27/1999	0.477%	-0.180%	0.735%	0.711%	-0.233%	0.0173	-0.136	
12/28/1999	0.949%	0.225%	0.375%	0.705%	0.242%	0.0173	0.141	
12/29/1999	0.940%	0.662%	1.764%	2.532%	-1.553%	0.0173	-0.920	
12/30/1999	-3.727%	0.095%	-3.421%	-3.332%	-0.408%	0.0173	-0.228	
12/31/1999	3.871%	0.542%	4.998%	5.763%	-1.789%	0.0174	-1.068	
1/3/2000	-4.814%	-0.683%	-3.511%	-4.126%	-0.717%	0.0173	-0.396	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
1/4/2000	0.489%	-3.991%	1.186%	-2.255%	2.807%	0.0177	1.548	
1/5/2000	-4.383%	-0.070%	-0.145%	-0.098%	-4.289%	0.0173	-2.479	****
1/6/2000	4.075%	-0.689%	5.944%	5.632%	-1.475%	0.0174	-0.893	
1/7/2000	6.199%	3.194%	1.058%	4.083%	2.033%	0.0175	1.207	
1/10/2000	-3.994%	1.757%	-1.788%	-0.149%	-3.851%	0.0174	-2.214	****
1/11/2000	3.680%	-1.863%	3.390%	2.117%	1.531%	0.0174	0.896	
1/12/2000	-6.790%	-0.865%	-2.714%	-3.287%	-3.622%	0.0173	-2.022	****
1/13/2000	1.325%	1.586%	1.887%	3.491%	-2.093%	0.0174	-1.248	
1/14/2000	0.817%	1.150%	0.450%	1.615%	-0.785%	0.0173	-0.461	
1/18/2000	8.104%	-0.220%	6.505%	6.633%	1.379%	0.0175	0.842	
1/19/2000	1.199%	0.467%	-0.588%	-0.072%	1.272%	0.0173	0.735	
1/20/2000	-3.259%	-0.340%	-1.976%	-2.232%	-1.051%	0.0173	-0.594	
1/21/2000	3.828%	0.256%	2.544%	2.972%	0.832%	0.0173	0.495	
1/24/2000	-5.900%	-2.541%	-1.467%	-3.688%	-2.297%	0.0175	-1.266	
1/25/2000	0.313%	0.504%	-0.600%	-0.051%	0.365%	0.0173	0.211	
1/26/2000	-3.281%	-0.409%	-1.407%	-1.707%	-1.602%	0.0173	-0.910	
1/27/2000	-3.069%	-0.407%	-2.691%	-3.030%	-0.041%	0.0173	-0.023	
1/28/2000	-4.500%	-2.773%	-0.352%	-2.746%	-1.803%	0.0175	-1.002	
1/31/2000	0.873%	1.491%	0.575%	2.050%	-1.154%	0.0173	-0.679	
2/1/2000	0.692%	1.291%	2.479%	3.837%	-3.029%	0.0173	-1.813	
2/2/2000	2.062%	0.183%	-0.997%	-0.749%	2.833%	0.0173	1.626	
2/3/2000	0.673%	1.490%	-1.504%	-0.097%	0.771%	0.0173	0.444	
2/4/2000	-1.505%	-0.026%	-1.888%	-1.858%	0.360%	0.0173	0.204	
2/7/2000	1.528%	0.359%	1.620%	2.111%	-0.571%	0.0173	-0.337	
2/8/2000	-1.338%	1.242%	-3.451%	-2.330%	1.016%	0.0174	0.571	
2/9/2000	-3.729%	-1.783%	-2.307%	-3.873%	0.150%	0.0174	0.083	
2/10/2000	-0.178%	0.583%	4.373%	5.155%	-5.070%	0.0174	-3.070	****
2/11/2000	-3.351%	-1.707%	1.205%	-0.178%	-3.179%	0.0174	-1.826	
2/14/2000	4.927%	0.247%	3.412%	3.861%	1.027%	0.0173	0.615	
2/15/2000	7.130%	0.710%	4.486%	5.386%	1.655%	0.0174	1.004	
2/16/2000	1.623%	-0.549%	1.047%	0.701%	0.916%	0.0173	0.533	
2/17/2000	-1.597%	0.475%	-0.666%	-0.145%	-1.455%	0.0173	-0.840	
2/18/2000	-4.708%	-2.639%	-0.288%	-2.558%	-2.208%	0.0175	-1.230	
2/22/2000	-3.237%	0.126%	-2.053%	-1.892%	-1.370%	0.0173	-0.777	
2/23/2000	-3.345%	1.249%	-1.945%	-0.769%	-2.596%	0.0173	-1.486	
2/24/2000	3.279%	0.029%	3.820%	4.085%	-0.775%	0.0173	-0.485	
2/25/2000	-4.938%	-0.994%	-0.576%	-1.375%	-3.613%	0.0173	-2.058	****
2/28/2000	3.898%	0.764%	2.086%	2.957%	0.912%	0.0173	0.543	
2/29/2000	9.286%	1.965%	4.284%	6.307%	2.802%	0.0174	1.707	
3/1/2000	7.201%	1.394%	5.091%	6.626%	0.539%	0.0174	0.330	
3/2/2000	3.053%	-0.067%	4.049%	4.235%	-1.134%	0.0174	-0.681	
3/3/2000	-3.111%	2.289%	-4.193%	-2.154%	-0.979%	0.0175	-0.548	
3/6/2000	0.917%	-0.728%	1.943%	1.466%	-0.541%	0.0173	-0.317	
3/7/2000	7.879%	-2.147%	7.337%	5.757%	2.008%	0.0176	1.203	
3/8/2000	-10.393%	0.692%	-7.766%	-7.281%	-3.357%	0.0175	-1.774	
3/9/2000	0.827%	2.440%	-1.976%	0.271%	0.355%	0.0174	0.204	
3/10/2000	-1.402%	-0.395%	0.750%	0.534%	-1.926%	0.0173	-1.120	
3/13/2000	-1.738%	-1.447%	1.252%	0.104%	-1.839%	0.0174	-1.061	
3/14/2000	-1.125%	-2.275%	0.547%	-1.369%	0.247%	0.0174	0.140	
3/15/2000	-1.463%	0.836%	-3.933%	-3.194%	1.787%	0.0174	0.997	
3/16/2000	3.980%	4.215%	1.832%	5.802%	-1.741%	0.0177	-1.038	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
3/17/2000	-2.540%	0.839%	-2.580%	-1.974%	-0.577%	0.0173	-0.327	
3/20/2000	-5.700%	-1.655%	-2.626%	-4.087%	-1.682%	0.0174	-0.927	
3/21/2000	3.627%	1.944%	1.730%	3.652%	-0.024%	0.0174	-0.014	
3/22/2000	3.167%	1.322%	4.652%	6.109%	-2.773%	0.0174	-1.590	
3/23/2000	-2.100%	1.494%	-1.142%	0.281%	-2.375%	0.0173	-1.373	
3/24/2000	2.970%	0.126%	1.709%	1.992%	0.959%	0.0173	0.565	
3/27/2000	-2.244%	-0.359%	0.538%	0.347%	-2.582%	0.0173	-1.498	
3/28/2000	-1.148%	-1.304%	-1.311%	-2.413%	1.297%	0.0173	0.730	
3/29/2000	6.799%	-0.957%	6.316%	5.775%	0.989%	0.0175	0.586	
3/30/2000	0.776%	-1.714%	-0.244%	-1.681%	2.499%	0.0174	1.415	
3/31/2000	1.387%	1.201%	-0.393%	0.790%	0.592%	0.0173	0.344	
4/3/2000	3.343%	-1.626%	4.457%	3.253%	0.088%	0.0174	0.052	
4/4/2000	-5.882%	-1.193%	-3.742%	-4.824%	-1.112%	0.0174	-0.609	
4/5/2000	-5.000%	0.051%	-4.821%	-4.818%	-0.192%	0.0174	-0.105	
4/6/2000	3.125%	1.501%	0.303%	1.779%	1.322%	0.0173	0.776	
4/7/2000	1.118%	1.434%	-1.401%	-0.041%	1.158%	0.0173	0.667	
4/10/2000	-3.312%	-1.908%	-4.379%	-6.123%	2.994%	0.0175	1.609	
4/11/2000	4.894%	-0.985%	5.355%	4.757%	0.131%	0.0174	0.079	
4/12/2000	1.555%	-2.898%	3.918%	1.550%	0.005%	0.0176	0.003	
4/13/2000	-3.675%	-1.758%	-2.209%	-3.750%	0.077%	0.0174	0.043	
4/14/2000	-1.113%	-6.617%	2.488%	-3.275%	2.235%	0.0185	1.171	
4/17/2000	-1.125%	2.913%	-5.182%	-2.613%	1.528%	0.0176	0.845	
4/18/2000	8.455%	3.838%	3.355%	7.035%	1.327%	0.0177	0.803	
4/19/2000	-0.600%	-0.789%	0.125%	-0.467%	-0.134%	0.0173	-0.077	
4/20/2000	1.961%	0.119%	1.473%	1.743%	0.214%	0.0173	0.126	
4/24/2000	-1.479%	-0.969%	0.798%	0.068%	-1.544%	0.0173	-0.892	
4/25/2000	0.300%	3.745%	-3.719%	-0.353%	0.656%	0.0177	0.369	
4/26/2000	4.491%	-1.182%	2.695%	1.834%	2.610%	0.0174	1.531	
4/27/2000	4.298%	0.782%	2.085%	2.971%	1.289%	0.0173	0.766	
4/28/2000	-2.885%	0.119%	-0.554%	-0.350%	-2.543%	0.0173	-1.466	
5/1/2000	0.141%	1.427%	-1.005%	0.362%	-0.219%	0.0173	-0.127	
5/2/2000	7.062%	-2.010%	4.819%	3.280%	3.662%	0.0175	2.162	****
5/3/2000	-4.486%	-2.050%	-1.863%	-3.655%	-0.862%	0.0174	-0.477	
5/4/2000	3.867%	0.027%	2.520%	2.741%	1.096%	0.0173	0.651	
5/5/2000	-0.288%	1.494%	0.830%	2.110%	-2.327%	0.0173	-1.371	
5/8/2000	3.200%	-0.957%	1.115%	0.404%	2.785%	0.0173	1.615	
5/9/2000	1.183%	-1.155%	1.886%	1.001%	0.180%	0.0173	0.083	
5/10/2000	0.511%	-2.639%	0.373%	-1.877%	2.433%	0.0175	1.366	
5/11/2000	2.414%	2.073%	0.821%	2.623%	-0.203%	0.0174	-0.120	
5/12/2000	-0.574%	0.805%	0.958%	1.828%	-2.359%	0.0173	-1.389	
5/15/2000	2.948%	2.122%	1.323%	3.392%	-0.429%	0.0174	-0.255	
5/16/2000	-0.121%	1.305%	-2.800%	-1.602%	1.505%	0.0174	0.853	
5/17/2000	-0.971%	-1.330%	2.850%	1.860%	-2.779%	0.0174	-1.630	
5/18/2000	-2.698%	-1.057%	-2.684%	-3.608%	0.946%	0.0173	0.526	
5/19/2000	2.519%	-2.360%	0.668%	-1.321%	3.891%	0.0174	2.201	****
5/22/2000	-6.880%	-0.687%	-4.501%	-5.152%	-1.822%	0.0174	-0.994	
5/23/2000	2.902%	-2.321%	4.241%	2.404%	0.487%	0.0175	0.285	
5/24/2000	-0.513%	1.561%	-2.585%	-1.158%	0.653%	0.0174	0.372	
5/25/2000	-0.387%	-1.257%	0.389%	-0.616%	0.231%	0.0173	0.132	
5/26/2000	-2.975%	-0.146%	-1.947%	-2.028%	-0.967%	0.0173	-0.548	
5/30/2000	4.867%	3.782%	-2.396%	1.046%	3.583%	0.0177	2.050	****

Exhibit 17.

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
5/31/2000	3.954%	-0.207%	4.716%	4.797%	-0.805%	0.0174	-0.485	
6/1/2000	-0.368%	2.483%	-3.141%	-0.892%	0.529%	0.0175	0.300	
6/2/2000	-4.926%	2.887%	-7.876%	-5.418%	0.520%	0.0177	0.277	
6/5/2000	-5.570%	-0.340%	-3.023%	-3.313%	-2.334%	0.0173	-1.303	
6/6/2000	6.447%	-0.834%	4.904%	4.427%	1.934%	0.0174	1.160	
6/7/2000	-2.062%	1.168%	-0.644%	0.502%	-2.551%	0.0173	-1.481	
6/8/2000	-1.842%	-0.572%	2.095%	1.762%	-3.542%	0.0173	-2.082	****
6/9/2000	-2.011%	0.067%	-1.879%	-1.764%	-0.251%	0.0173	-0.142	
6/12/2000	5.748%	-1.143%	4.596%	3.831%	1.844%	0.0174	1.100	
6/13/2000	0.259%	1.462%	-0.287%	1.135%	-0.866%	0.0173	-0.505	
6/14/2000	-1.548%	-0.134%	-0.186%	-0.208%	-1.343%	0.0173	-0.775	
6/15/2000	-2.490%	0.510%	-1.502%	-0.977%	-1.528%	0.0173	-0.875	
6/16/2000	5.242%	-0.708%	3.861%	3.464%	1.719%	0.0174	1.024	
6/19/2000	-1.916%	1.653%	-3.337%	-1.843%	-0.074%	0.0174	-0.042	
6/20/2000	-0.651%	-0.232%	-0.719%	-0.837%	0.188%	0.0173	0.108	
6/21/2000	4.325%	0.359%	4.051%	4.621%	-0.283%	0.0174	-0.170	
6/22/2000	-4.397%	-1.838%	-1.100%	-2.674%	-1.770%	0.0174	-0.991	
6/23/2000	0.000%	-0.960%	0.540%	-0.193%	0.193%	0.0173	0.111	
6/26/2000	-1.051%	0.924%	-2.059%	-1.179%	0.130%	0.0173	0.074	
6/27/2000	1.328%	-0.536%	1.040%	0.706%	0.618%	0.0173	0.360	
6/28/2000	-3.145%	0.779%	-3.022%	-2.304%	-0.861%	0.0173	-0.486	
6/29/2000	4.871%	-0.638%	2.168%	1.777%	3.041%	0.0173	1.787	
6/30/2000	-2.581%	0.704%	-0.158%	0.585%	-3.147%	0.0173	-1.831	
7/3/2000	-0.530%	0.948%	-0.719%	0.226%	-0.754%	0.0173	-0.437	
7/5/2000	-5.060%	-1.589%	-4.644%	-6.112%	1.120%	0.0174	0.603	
7/6/2000	-0.281%	0.935%	0.388%	1.357%	-1.618%	0.0173	-0.947	
7/7/2000	-1.688%	1.480%	-1.817%	-0.429%	-1.264%	0.0173	-0.726	
7/10/2000	-3.863%	-0.126%	-1.946%	-2.008%	-1.893%	0.0173	-1.072	
7/11/2000	11.310%	0.151%	7.581%	8.078%	2.990%	0.0175	1.844	
7/12/2000	-1.738%	1.345%	-1.991%	-0.730%	-1.015%	0.0173	-0.581	
7/13/2000	-1.361%	0.552%	-0.720%	-0.132%	-1.230%	0.0173	-0.710	
7/14/2000	-1.103%	0.995%	0.074%	1.087%	-2.167%	0.0173	-1.266	
7/17/2000	-4.324%	0.122%	-3.019%	-2.892%	-1.474%	0.0173	-0.826	
7/18/2000	4.865%	-1.301%	4.594%	3.687%	0.943%	0.0174	0.561	
7/19/2000	0.139%	-1.146%	0.572%	-0.327%	0.468%	0.0173	0.269	
7/20/2000	0.417%	1.374%	-1.539%	-0.238%	0.656%	0.0173	0.378	
7/21/2000	-8.371%	-1.316%	-1.968%	-3.103%	-3.373%	0.0174	-1.884	
7/24/2000	-1.331%	-1.431%	-3.026%	-4.298%	3.100%	0.0174	1.707	
7/25/2000	1.349%	0.607%	-2.177%	-1.587%	2.983%	0.0173	1.696	
7/26/2000	3.107%	-1.253%	2.870%	1.951%	1.134%	0.0174	0.686	
7/27/2000	4.161%	-0.900%	3.803%	3.231%	0.901%	0.0174	0.535	
7/28/2000	0.139%	-2.345%	2.128%	0.200%	-0.062%	0.0175	-0.036	
7/31/2000	1.513%	1.071%	-1.058%	-0.013%	1.527%	0.0173	0.882	
8/1/2000	1.491%	0.153%	2.310%	2.637%	-1.117%	0.0173	-0.683	
8/2/2000	1.602%	0.029%	2.066%	2.273%	-0.656%	0.0173	-0.388	
8/3/2000	-0.920%	1.130%	-2.695%	-1.651%	0.743%	0.0173	0.421	
8/4/2000	2.387%	0.903%	1.427%	2.401%	-0.014%	0.0173	-0.008	
8/7/2000	0.907%	1.167%	-0.303%	0.852%	0.054%	0.0173	0.031	
8/8/2000	2.311%	0.164%	0.894%	1.186%	1.112%	0.0173	0.651	
8/9/2000	5.646%	-0.518%	3.442%	3.202%	2.369%	0.0173	1.410	
8/10/2000	-0.950%	-1.010%	-0.346%	-1.152%	0.205%	0.0173	0.117	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
8/11/2000	-2.158%	0.872%	-1.547%	-0.697%	-1.471%	0.0173	-0.844	
8/14/2000	2.451%	1.253%	2.580%	3.907%	-1.401%	0.0173	-0.839	
8/15/2000	-1.565%	-0.442%	-0.330%	-0.624%	-0.937%	0.0173	-0.538	
8/16/2000	4.982%	-0.166%	3.424%	3.501%	1.431%	0.0173	0.855	
8/17/2000	-0.483%	1.148%	0.075%	1.225%	-1.668%	0.0173	-0.975	
8/18/2000	-1.977%	-0.252%	-1.184%	-1.335%	-0.651%	0.0173	-0.371	
8/21/2000	1.423%	0.392%	-0.645%	-0.198%	1.625%	0.0173	0.938	
8/22/2000	-1.637%	0.029%	0.204%	0.351%	-1.982%	0.0173	-1.151	
8/23/2000	2.497%	0.559%	2.190%	2.880%	-0.372%	0.0173	-0.221	
8/24/2000	-1.392%	0.347%	-1.842%	-1.475%	0.084%	0.0173	0.048	
8/25/2000	-0.824%	-0.031%	-0.547%	-0.478%	-0.348%	0.0173	-0.200	
8/28/2000	1.779%	0.518%	1.537%	2.169%	-0.381%	0.0173	-0.225	
8/29/2000	0.233%	-0.010%	-1.155%	-1.086%	1.334%	0.0173	0.763	
8/30/2000	-1.279%	-0.084%	-1.277%	-1.279%	0.000%	0.0173	0.000	
8/31/2000	-0.118%	1.192%	-1.054%	0.100%	-0.218%	0.0173	-0.126	
9/1/2000	1.297%	0.404%	0.754%	1.257%	0.039%	0.0173	0.023	
9/5/2000	0.000%	-0.922%	0.569%	-0.128%	0.128%	0.0173	0.074	
9/6/2000	1.981%	-1.187%	4.050%	3.228%	-1.208%	0.0174	-0.717	
9/7/2000	-2.286%	0.811%	-2.332%	-1.563%	-0.734%	0.0173	-0.417	
9/8/2000	-2.573%	-0.782%	-1.184%	-1.812%	-0.775%	0.0173	-0.440	
9/11/2000	4.202%	-0.411%	4.056%	3.932%	0.259%	0.0174	0.155	
9/12/2000	0.230%	-0.457%	0.244%	-0.045%	0.276%	0.0173	0.159	
9/13/2000	-4.023%	0.300%	-2.555%	-2.254%	-1.810%	0.0173	-1.022	
9/14/2000	-1.317%	0.025%	0.537%	0.892%	-1.995%	0.0173	-1.163	
9/15/2000	2.306%	-1.192%	2.137%	1.248%	1.045%	0.0173	0.610	
9/18/2000	-3.203%	-1.766%	-1.855%	-3.390%	0.194%	0.0174	0.108	
9/19/2000	-0.858%	1.253%	-3.236%	-2.099%	1.267%	0.0174	0.715	
9/20/2000	-3.832%	-0.395%	-1.945%	-2.249%	-1.619%	0.0173	-0.915	
9/21/2000	-2.185%	-0.519%	-1.197%	-1.589%	-0.606%	0.0173	-0.344	
9/22/2000	-1.051%	0.417%	-2.027%	-1.803%	0.561%	0.0173	0.319	
9/25/2000	-0.664%	-0.523%	0.484%	0.144%	-0.807%	0.0173	-0.467	
9/26/2000	1.872%	-0.913%	2.706%	2.087%	-0.211%	0.0173	-0.124	
9/27/2000	2.231%	-0.167%	2.141%	2.176%	0.054%	0.0173	0.032	
9/28/2000	-0.128%	2.331%	-1.814%	0.341%	-0.468%	0.0174	-0.270	
9/29/2000	0.643%	-1.219%	2.366%	1.460%	-0.805%	0.0174	-0.471	
10/2/2000	2.937%	-0.680%	2.340%	1.918%	1.000%	0.0173	0.589	
10/3/2000	-1.489%	-1.256%	0.112%	-0.901%	-0.593%	0.0173	-0.339	
10/4/2000	-6.549%	0.657%	-4.703%	-4.150%	-2.503%	0.0174	-1.380	
10/5/2000	-0.270%	-0.185%	-0.703%	-0.778%	0.513%	0.0173	0.294	
10/6/2000	-5.000%	-2.137%	0.586%	-1.204%	-3.842%	0.0174	-2.180	***
10/9/2000	0.996%	-0.362%	1.050%	0.873%	0.122%	0.0173	0.071	
10/10/2000	3.862%	-1.396%	4.262%	3.259%	0.390%	0.0174	0.231	
10/11/2000	0.951%	-1.727%	2.442%	1.081%	-0.129%	0.0174	-0.075	
10/12/2000	2.557%	-2.781%	4.004%	1.745%	0.799%	0.0176	0.463	
10/13/2000	-4.987%	3.855%	-6.398%	-3.020%	-2.028%	0.0178	-1.104	
10/16/2000	-4.558%	0.261%	-3.128%	-2.880%	-1.728%	0.0173	-0.969	
10/17/2000	0.434%	-1.913%	2.421%	0.891%	-0.453%	0.0174	-0.263	
10/18/2000	-1.153%	-0.811%	-0.003%	-0.619%	-0.537%	0.0173	-0.309	
10/19/2000	-0.146%	3.848%	-2.548%	0.768%	-0.907%	0.0176	-0.518	
10/20/2000	2.920%	0.932%	1.958%	2.975%	-0.054%	0.0173	-0.032	
10/23/2000	-6.525%	0.042%	-3.162%	-3.113%	-3.522%	0.0173	-1.970	***

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
10/24/2000	1.062%	-0.103%	-2.915%	-2.988%	4.175%	0.0173	2.338	****
10/25/2000	-10.961%	-2.455%	-2.496%	-4.674%	-6.596%	0.0175	-3.597	****
10/26/2000	0.169%	0.014%	0.858%	1.013%	-0.836%	0.0173	-0.489	
10/27/2000	-0.337%	0.947%	-4.480%	-3.659%	3.448%	0.0174	1.911	
10/30/2000	-0.676%	0.750%	0.737%	1.551%	-2.193%	0.0173	-1.288	
10/31/2000	0.850%	2.747%	-0.997%	1.559%	-0.698%	0.0175	-0.406	
11/1/2000	4.047%	-0.462%	5.373%	5.246%	-1.139%	0.0174	-0.689	
11/2/2000	-2.269%	1.065%	-2.946%	-1.969%	-0.306%	0.0173	-0.173	
11/3/2000	0.000%	-0.027%	0.473%	0.579%	-0.576%	0.0173	-0.335	
11/6/2000	1.493%	0.152%	-1.816%	-1.624%	3.168%	0.0173	1.802	
11/7/2000	-0.654%	-0.043%	1.638%	1.767%	-2.379%	0.0173	-1.400	
11/8/2000	1.316%	-1.916%	3.345%	1.843%	-0.518%	0.0174	-0.302	
11/9/2000	-1.461%	-0.930%	-1.554%	-2.327%	0.867%	0.0173	0.500	
11/10/2000	-2.142%	-2.637%	-0.610%	-2.889%	0.770%	0.0175	0.428	
11/13/2000	-1.010%	-1.344%	-2.313%	-3.484%	2.563%	0.0174	1.425	
11/14/2000	2.381%	2.647%	0.229%	2.736%	-0.345%	0.0175	-0.203	
11/15/2000	2.990%	0.623%	4.412%	5.232%	-2.130%	0.0174	-1.291	
11/16/2000	-1.452%	-1.815%	0.980%	-0.328%	-1.128%	0.0174	-0.647	
11/17/2000	-2.619%	-0.489%	-2.728%	-3.143%	0.542%	0.0173	0.303	
11/20/2000	-1.849%	-2.398%	-0.186%	-2.237%	0.397%	0.0174	0.222	
11/21/2000	-0.514%	-0.029%	0.779%	0.893%	-1.394%	0.0173	-0.814	
11/22/2000	-1.205%	-2.071%	-2.145%	-3.965%	2.874%	0.0174	1.584	
11/24/2000	3.136%	2.081%	1.127%	3.152%	-0.016%	0.0174	-0.009	
11/27/2000	-0.845%	0.321%	-2.082%	-1.746%	0.918%	0.0173	0.521	
11/28/2000	-2.215%	-1.628%	-0.661%	-2.034%	-0.184%	0.0174	-0.104	
11/29/2000	-2.967%	0.197%	-8.092%	-5.998%	3.225%	0.0174	1.738	
11/30/2000	-3.957%	-1.978%	-4.649%	-6.465%	2.682%	0.0175	1.435	
12/1/2000	1.498%	0.531%	3.381%	4.084%	-2.484%	0.0173	-1.492	
12/4/2000	0.923%	0.368%	0.823%	1.297%	-0.369%	0.0173	-0.216	
12/5/2000	1.463%	4.517%	-3.304%	0.771%	0.686%	0.0178	0.388	
12/6/2000	0.180%	-1.716%	0.486%	-0.929%	1.119%	0.0174	0.638	
12/7/2000	3.237%	-0.568%	2.497%	2.181%	1.033%	0.0173	0.610	
12/8/2000	2.439%	2.783%	-0.252%	2.361%	0.077%	0.0175	0.045	
12/11/2000	3.231%	1.172%	3.759%	5.052%	-1.733%	0.0174	-1.048	
12/12/2000	0.329%	-1.025%	1.625%	0.870%	-0.535%	0.0173	-0.312	
12/13/2000	-1.149%	-1.069%	-0.780%	-1.871%	0.530%	0.0173	0.301	
12/14/2000	-1.827%	-1.740%	-1.059%	-2.548%	0.737%	0.0174	0.413	
12/15/2000	0.846%	-1.896%	3.604%	2.128%	-1.255%	0.0174	-0.735	
12/18/2000	4.027%	0.624%	7.183%	8.094%	-3.762%	0.0175	-2.324	***
12/19/2000	0.806%	-1.580%	4.223%	3.052%	-2.179%	0.0174	-1.288	
12/20/2000	-3.380%	-3.510%	-1.288%	-4.355%	1.041%	0.0176	0.565	
12/21/2000	-1.987%	0.542%	-0.048%	0.555%	-2.528%	0.0173	-1.470	
12/22/2000	-2.703%	3.036%	-1.545%	1.253%	-3.907%	0.0175	-2.258	****
12/26/2000	4.514%	0.563%	4.983%	5.767%	-1.185%	0.0174	-0.721	
12/27/2000	-1.661%	1.390%	-1.569%	-0.253%	-1.411%	0.0173	-0.812	
12/28/2000	0.338%	0.896%	1.919%	2.903%	-2.493%	0.0173	-1.482	
12/29/2000	-2.357%	-1.196%	-0.832%	-1.822%	-0.545%	0.0173	-0.309	
1/2/2001	1.552%	-3.447%	3.132%	0.245%	1.303%	0.0176	0.740	
1/3/2001	-1.358%	5.341%	-7.494%	-2.814%	1.498%	0.0182	0.799	
1/4/2001	-0.344%	-1.251%	-2.634%	-3.731%	3.518%	0.0174	1.951	
1/5/2001	-0.345%	-2.907%	2.155%	-0.278%	-0.068%	0.0175	-0.038	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
1/8/2001	1.386%	-0.318%	1.298%	1.169%	0.215%	0.0173	0.126	
1/9/2001	4.103%	0.545%	0.533%	1.156%	2.913%	0.0173	1.704	
1/10/2001	3.284%	1.439%	0.976%	2.419%	0.845%	0.0173	0.499	
1/11/2001	2.067%	1.379%	0.054%	1.412%	0.645%	0.0173	0.378	
1/12/2001	-0.156%	-0.363%	0.129%	-0.079%	-0.076%	0.0173	-0.044	
1/16/2001	1.248%	0.700%	0.166%	0.917%	0.328%	0.0173	0.191	
1/17/2001	-3.852%	0.401%	-4.297%	-3.961%	0.113%	0.0174	0.063	
1/18/2001	-3.686%	1.180%	-4.987%	-3.972%	0.298%	0.0174	0.164	
1/19/2001	-1.165%	-0.506%	0.435%	0.109%	-1.272%	0.0173	-0.736	
1/22/2001	0.505%	0.017%	0.976%	1.138%	-0.626%	0.0173	-0.366	
1/23/2001	3.518%	1.573%	0.309%	1.849%	1.638%	0.0173	0.962	
1/24/2001	3.074%	0.351%	1.931%	2.425%	0.634%	0.0173	0.375	
1/25/2001	4.553%	-0.773%	4.414%	3.976%	0.555%	0.0174	0.332	
1/26/2001	-2.102%	-0.091%	-0.957%	-0.956%	-1.158%	0.0173	-0.664	
1/29/2001	-2.086%	0.928%	-2.308%	-1.432%	-0.663%	0.0173	-0.377	
1/30/2001	0.902%	0.651%	0.322%	1.034%	-0.130%	0.0173	-0.076	
1/31/2001	2.310%	-0.687%	1.534%	1.080%	1.217%	0.0173	0.711	
2/1/2001	-2.403%	0.405%	-1.916%	-1.499%	-0.918%	0.0173	-0.523	
2/2/2001	-0.224%	-1.875%	3.492%	2.032%	-2.211%	0.0174	-1.294	
2/5/2001	2.468%	0.172%	2.434%	2.783%	-0.306%	0.0173	-0.182	
2/6/2001	3.771%	0.064%	2.732%	2.993%	0.755%	0.0173	0.449	
2/7/2001	0.821%	-0.850%	0.701%	0.072%	0.748%	0.0173	0.432	
2/8/2001	-0.485%	-0.654%	0.118%	-0.352%	-0.113%	0.0173	-0.065	
2/9/2001	-0.771%	-1.382%	1.427%	0.335%	-1.102%	0.0173	-0.637	
2/12/2001	0.424%	1.110%	-4.912%	-3.957%	4.562%	0.0174	2.617	****
2/13/2001	1.407%	-0.862%	-0.909%	-1.800%	3.056%	0.0173	1.737	
2/14/2001	-0.254%	-0.020%	0.971%	1.099%	-1.339%	0.0173	-0.783	
2/15/2001	-3.732%	0.931%	-2.539%	-1.669%	-2.098%	0.0173	-1.190	
2/16/2001	0.891%	-1.875%	2.121%	0.616%	0.273%	0.0174	0.158	
2/20/2001	-0.501%	-1.883%	1.487%	-0.046%	-0.456%	0.0174	-0.262	
2/21/2001	-0.456%	-1.790%	-0.420%	-1.931%	1.505%	0.0174	0.849	
2/22/2001	-3.422%	-0.447%	-1.644%	-1.986%	-1.465%	0.0173	-0.830	
2/23/2001	-1.322%	-0.347%	-1.865%	-2.123%	0.818%	0.0173	0.463	
2/26/2001	3.058%	1.911%	2.550%	4.469%	-1.349%	0.0174	-0.810	
2/27/2001	1.846%	-1.116%	0.294%	-0.587%	2.447%	0.0173	1.405	
2/28/2001	-3.932%	-1.428%	-0.255%	-1.435%	-2.533%	0.0173	-1.440	
3/1/2001	0.979%	0.039%	0.118%	0.272%	0.706%	0.0173	0.410	
3/2/2001	2.781%	-0.489%	3.812%	3.610%	-0.820%	0.0174	-0.490	
3/5/2001	1.936%	0.544%	1.643%	2.301%	-0.357%	0.0173	-0.211	
3/6/2001	1.733%	1.068%	0.738%	1.839%	-0.104%	0.0173	-0.061	
3/7/2001	4.434%	0.589%	2.496%	3.223%	1.173%	0.0173	0.700	
3/8/2001	0.916%	-0.120%	-0.060%	-0.055%	0.971%	0.0173	0.562	
3/9/2001	-1.439%	-2.447%	0.745%	-1.319%	-0.122%	0.0175	-0.069	
3/12/2001	-3.258%	-4.244%	0.798%	-2.883%	-0.385%	0.0178	-0.211	
3/13/2001	-4.368%	1.599%	-3.961%	-2.535%	-1.878%	0.0174	-1.052	
3/14/2001	-0.777%	-2.451%	-0.178%	-2.274%	1.532%	0.0175	0.858	
3/15/2001	-2.129%	0.360%	-3.535%	-3.211%	1.118%	0.0173	0.624	
3/16/2001	-2.226%	-2.053%	-0.093%	-1.829%	-0.403%	0.0174	-0.228	
3/19/2001	3.862%	1.859%	1.495%	3.332%	0.513%	0.0174	0.305	
3/20/2001	1.207%	-2.334%	3.226%	1.344%	-0.136%	0.0175	-0.079	
3/21/2001	-5.620%	-1.821%	-1.107%	-2.668%	-3.033%	0.0174	-1.698	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
3/22/2001	-2.398%	-0.425%	-2.462%	-2.810%	0.424%	0.0173	0.238	
3/23/2001	2.615%	2.067%	0.829%	2.831%	-0.210%	0.0174	-0.125	
3/26/2001	0.309%	1.106%	0.770%	1.905%	-1.567%	0.0173	-0.922	
3/27/2001	-2.489%	2.382%	-3.522%	-1.377%	-1.128%	0.0175	-0.637	
3/28/2001	-3.184%	-2.524%	-1.696%	-3.909%	0.755%	0.0175	0.415	
3/29/2001	-4.512%	-0.489%	-4.045%	-4.502%	-0.010%	0.0174	-0.006	
3/30/2001	4.611%	1.195%	0.866%	2.085%	2.475%	0.0173	1.459	
4/2/2001	-6.939%	-1.547%	-3.886%	-5.291%	-1.740%	0.0174	-0.946	
4/3/2001	-5.234%	-3.614%	-1.180%	-4.358%	-0.916%	0.0176	-0.496	
4/4/2001	1.481%	-0.365%	3.726%	3.634%	-2.077%	0.0173	-1.241	
4/5/2001	4.135%	4.627%	1.830%	6.171%	-1.918%	0.0178	-1.142	
4/6/2001	-0.204%	-2.014%	1.285%	-0.372%	0.168%	0.0174	0.096	
4/9/2001	3.540%	0.873%	2.167%	3.138%	0.390%	0.0173	0.232	
4/10/2001	2.854%	2.834%	-0.002%	2.664%	0.185%	0.0175	0.109	
4/11/2001	-3.352%	-0.098%	-1.816%	-1.847%	-1.533%	0.0173	-0.870	
4/12/2001	-0.398%	1.555%	0.217%	1.739%	-2.100%	0.0173	-1.232	
4/16/2001	3.596%	-0.444%	1.587%	1.353%	2.213%	0.0173	1.296	
4/17/2001	2.287%	1.111%	0.474%	1.604%	0.672%	0.0173	0.394	
4/18/2001	-2.693%	3.888%	-5.842%	-2.416%	-0.284%	0.0178	-0.156	
4/19/2001	-2.491%	1.479%	-4.119%	-2.806%	0.325%	0.0174	0.181	
4/20/2001	5.109%	-0.841%	2.794%	2.243%	2.803%	0.0173	1.653	
4/23/2001	2.755%	-1.675%	4.192%	2.935%	-0.175%	0.0174	-0.104	
4/24/2001	-1.288%	-1.103%	0.499%	-0.364%	-0.927%	0.0173	-0.533	
4/25/2001	2.822%	1.675%	0.834%	2.484%	0.330%	0.0174	0.195	
4/26/2001	9.089%	0.481%	4.468%	5.161%	3.734%	0.0174	2.261	****
4/27/2001	-0.047%	1.474%	-1.835%	-0.452%	0.406%	0.0173	0.233	
4/30/2001	2.612%	0.049%	1.011%	1.202%	1.393%	0.0173	0.815	
5/1/2001	-1.736%	1.364%	-2.536%	-1.275%	-0.467%	0.0174	-0.266	
5/2/2001	-5.087%	0.331%	-6.532%	-6.332%	1.329%	0.0175	0.713	
5/3/2001	0.486%	-1.534%	0.409%	-0.844%	1.352%	0.0174	0.772	
5/4/2001	3.111%	1.441%	1.368%	2.824%	0.279%	0.0173	0.165	
5/7/2001	-1.628%	-0.319%	-1.332%	-1.548%	-0.082%	0.0173	-0.047	
5/8/2001	0.365%	-0.079%	-0.250%	-0.215%	0.581%	0.0173	0.336	
5/9/2001	3.105%	-0.460%	2.257%	2.031%	1.052%	0.0173	0.620	
5/10/2001	0.212%	-0.078%	-0.661%	-0.638%	0.855%	0.0173	0.491	
5/11/2001	-1.901%	-0.712%	-0.865%	-1.214%	-0.696%	0.0173	-0.397	
5/14/2001	5.169%	0.124%	2.462%	2.769%	2.335%	0.0173	1.387	
5/15/2001	3.185%	0.083%	2.310%	2.575%	0.595%	0.0173	0.353	
5/16/2001	0.132%	2.741%	-0.841%	1.714%	-1.555%	0.0175	-0.905	
5/17/2001	4.184%	0.532%	2.145%	2.809%	1.338%	0.0173	0.795	
5/18/2001	1.057%	0.240%	1.144%	1.512%	-0.449%	0.0173	-0.263	
5/21/2001	2.807%	1.855%	-0.761%	1.000%	1.888%	0.0174	1.098	
5/22/2001	-2.458%	-0.133%	-1.397%	-1.448%	-1.026%	0.0173	-0.585	
5/23/2001	-2.865%	-1.662%	-1.773%	-3.213%	0.370%	0.0174	0.206	
5/24/2001	-0.064%	0.423%	-2.926%	-2.525%	2.525%	0.0173	1.421	
5/25/2001	1.975%	-1.006%	1.907%	1.271%	0.695%	0.0173	0.406	
5/29/2001	-0.968%	-1.030%	-0.216%	-1.036%	0.069%	0.0173	0.039	
5/30/2001	-2.295%	-1.708%	-1.102%	-2.561%	0.273%	0.0174	0.153	
5/31/2001	1.675%	0.740%	0.791%	1.597%	0.077%	0.0173	0.045	
6/1/2001	-1.326%	0.548%	-0.720%	-0.136%	-1.192%	0.0173	-0.689	
6/4/2001	3.149%	0.508%	1.915%	2.548%	0.586%	0.0173	0.347	

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
6/5/2001	-0.232%	1.448%	-0.828%	0.563%	-0.790%	0.0173	-0.458	
6/6/2001	-5.063%	-0.934%	-3.955%	-4.810%	-0.266%	0.0174	-0.145	
6/7/2001	-1.289%	0.542%	-2.808%	-2.297%	1.032%	0.0173	0.582	
6/8/2001	0.855%	-0.960%	0.859%	-0.070%	0.926%	0.0173	0.534	
6/11/2001	-1.629%	-0.937%	-0.349%	-1.090%	-0.545%	0.0173	-0.311	
6/12/2001	1.588%	0.037%	1.463%	1.658%	-0.069%	0.0173	-0.040	
6/13/2001	-1.050%	-1.021%	0.582%	-0.194%	-0.858%	0.0173	-0.494	
6/14/2001	-2.325%	-1.915%	-1.178%	-2.826%	0.515%	0.0174	0.288	
6/15/2001	-0.347%	-0.435%	0.328%	0.061%	-0.407%	0.0173	-0.236	
6/18/2001	-1.693%	-0.601%	-1.210%	-1.676%	-0.017%	0.0173	-0.010	
6/19/2001	0.448%	0.213%	-1.253%	-0.988%	1.451%	0.0173	0.831	
6/20/2001	-2.536%	1.069%	-2.220%	-1.214%	-1.338%	0.0173	-0.763	
6/21/2001	-5.446%	0.974%	-4.888%	-4.055%	-1.449%	0.0174	-0.799	
6/22/2001	0.051%	-0.970%	-0.077%	-0.836%	0.897%	0.0173	0.514	
6/25/2001	0.841%	-0.520%	0.649%	0.316%	0.523%	0.0173	0.303	
6/26/2001	3.890%	-0.004%	2.090%	2.268%	1.585%	0.0173	0.937	
6/27/2001	-6.030%	-0.194%	-4.648%	-4.859%	-1.230%	0.0174	-0.674	
6/28/2001	-3.829%	1.312%	-4.733%	-3.581%	-0.247%	0.0174	-0.137	
6/29/2001	-4.224%	0.371%	-0.100%	0.345%	-4.554%	0.0173	-2.644	****
7/2/2001	-4.073%	0.573%	-2.855%	-2.318%	-1.797%	0.0173	-1.013	
7/3/2001	-0.293%	-0.189%	1.133%	1.115%	-1.392%	0.0173	-0.814	
7/5/2001	-0.323%	-1.209%	1.718%	0.800%	-1.115%	0.0173	-0.648	
7/6/2001	-2.269%	-2.213%	1.680%	-0.143%	-2.129%	0.0174	-1.219	
7/9/2001	-1.115%	0.572%	-4.084%	-3.587%	2.564%	0.0174	1.424	
7/10/2001	1.494%	-1.456%	-0.096%	-1.295%	2.825%	0.0173	1.608	
7/11/2001	-0.210%	-0.173%	-1.634%	-1.728%	1.545%	0.0173	0.878	
7/12/2001	-4.365%	2.406%	-6.218%	-4.139%	-0.235%	0.0176	-0.128	
7/13/2001	1.196%	0.552%	0.764%	1.400%	-0.201%	0.0173	-0.118	
7/16/2001	-5.443%	-1.132%	-5.021%	-6.089%	0.688%	0.0174	0.371	
7/17/2001	0.855%	1.050%	0.512%	1.589%	-0.722%	0.0173	-0.424	
7/18/2001	1.142%	-0.671%	0.283%	-0.197%	1.342%	0.0173	0.774	
7/19/2001	1.741%	0.521%	1.899%	2.545%	-0.783%	0.0173	-0.464	
7/20/2001	6.941%	-0.309%	5.292%	5.301%	1.558%	0.0174	0.943	
7/23/2001	-0.296%	-1.508%	2.036%	0.859%	-1.145%	0.0174	-0.665	
7/24/2001	-3.567%	-1.662%	-1.314%	-2.739%	-0.852%	0.0174	-0.477	
7/25/2001	5.580%	1.361%	3.021%	4.460%	1.072%	0.0174	0.645	
7/26/2001	3.650%	1.172%	-0.919%	0.221%	3.421%	0.0173	1.980	****
7/27/2001	1.690%	0.274%	0.611%	1.198%	0.486%	0.0173	0.285	
7/30/2001	0.970%	-0.110%	-0.015%	0.000%	0.969%	0.0173	0.561	
7/31/2001	-3.951%	0.505%	-4.233%	-3.802%	-0.155%	0.0174	-0.088	
8/1/2001	-1.800%	0.496%	-3.292%	-2.838%	1.274%	0.0173	0.714	
8/2/2001	3.019%	0.341%	0.728%	1.173%	1.824%	0.0173	1.068	
8/3/2001	-0.930%	-0.466%	-1.613%	-1.970%	1.061%	0.0173	0.601	
8/6/2001	0.398%	-1.123%	0.743%	-0.129%	0.528%	0.0173	0.305	
8/7/2001	0.170%	0.223%	-2.178%	-1.934%	2.145%	0.0173	1.216	
8/8/2001	-5.260%	-1.667%	-3.432%	-4.930%	-0.347%	0.0174	-0.190	
8/9/2001	-4.478%	-0.041%	0.657%	0.757%	-5.195%	0.0173	-3.028	****
8/10/2001	-1.563%	0.456%	0.905%	1.460%	-2.979%	0.0173	-1.748	
8/13/2001	-2.222%	0.238%	-0.372%	-0.065%	-2.166%	0.0173	-1.254	
8/14/2001	-0.844%	-0.268%	1.474%	1.398%	-2.209%	0.0173	-1.295	
8/15/2001	7.531%	-0.715%	6.743%	6.433%	1.032%	0.0175	0.628	

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Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
8/16/2001	-1.644%	0.214%	-1.566%	-1.309%	-0.340%	0.0173	-0.194	
8/17/2001	-1.176%	-1.583%	0.391%	-0.908%	-0.271%	0.0174	-0.155	
8/20/2001	-1.378%	0.712%	-2.372%	-1.694%	0.321%	0.0173	0.182	
8/21/2001	1.811%	-1.171%	1.559%	0.669%	1.134%	0.0173	0.659	
8/22/2001	-1.903%	0.710%	-0.681%	0.051%	-1.953%	0.0173	-1.130	
8/23/2001	-1.908%	-0.291%	-2.090%	-2.305%	0.406%	0.0173	0.229	
8/24/2001	0.778%	1.810%	-1.247%	0.457%	0.320%	0.0174	0.185	
8/27/2001	0.708%	-0.396%	0.746%	0.528%	0.178%	0.0173	0.104	
8/28/2001	-2.716%	-1.417%	-0.740%	-1.925%	-0.806%	0.0173	-0.456	
8/29/2001	-0.985%	-0.956%	0.161%	-0.579%	-0.406%	0.0173	-0.234	
8/30/2001	-7.131%	-1.571%	-2.505%	-3.887%	-3.376%	0.0174	-1.867	
8/31/2001	-0.500%	0.424%	0.563%	1.078%	-1.561%	0.0173	-0.913	
9/4/2001	3.814%	-0.100%	1.541%	1.616%	2.163%	0.0173	1.271	
9/5/2001	0.520%	-0.304%	-0.622%	-0.802%	1.332%	0.0173	0.764	
9/6/2001	0.689%	-2.093%	2.946%	1.272%	-0.576%	0.0174	-0.334	
9/7/2001	-3.184%	-1.786%	0.471%	-1.007%	-2.199%	0.0174	-1.253	
9/10/2001	1.591%	0.375%	-0.086%	0.384%	1.223%	0.0173	0.710	
9/17/2001	-7.240%	-4.957%	-0.232%	-4.589%	-2.778%	0.0179	-1.477	
9/18/2001	-8.068%	-0.772%	-4.033%	-4.745%	-3.488%	0.0174	-1.913	
9/19/2001	-7.551%	-1.661%	-5.918%	-7.492%	-0.063%	0.0175	-0.034	
9/20/2001	-4.812%	-3.021%	0.980%	-1.593%	-3.271%	0.0175	-1.835	
9/21/2001	4.731%	-1.925%	4.569%	3.099%	1.583%	0.0175	0.934	
9/24/2001	-6.112%	3.801%	-6.928%	-3.618%	-2.589%	0.0178	-1.399	
9/25/2001	-5.377%	0.769%	-4.573%	-3.915%	-1.522%	0.0174	-0.841	
9/26/2001	-1.795%	-0.813%	-1.556%	-2.044%	0.254%	0.0173	0.144	
9/27/2001	6.091%	1.102%	1.611%	2.770%	3.232%	0.0173	1.918	
9/28/2001	7.895%	2.248%	4.029%	6.299%	1.501%	0.0175	0.913	
10/1/2001	-2.882%	-0.427%	-1.879%	-2.211%	-0.687%	0.0173	-0.388	
10/2/2001	-2.182%	1.150%	-0.312%	0.828%	-2.995%	0.0173	-1.744	
10/3/2001	4.248%	2.234%	-0.562%	1.546%	2.661%	0.0174	1.553	
10/4/2001	6.358%	-0.083%	5.407%	5.823%	0.697%	0.0174	0.423	
10/5/2001	-1.558%	0.044%	-0.310%	-0.165%	-1.395%	0.0173	-0.806	
10/8/2001	2.866%	-0.772%	0.202%	-0.372%	3.250%	0.0173	1.871	
10/9/2001	0.956%	-0.489%	1.705%	1.434%	-0.471%	0.0173	-0.278	
10/10/2001	6.878%	2.325%	2.929%	5.233%	1.564%	0.0174	0.943	
10/11/2001	-0.809%	1.733%	-2.032%	-0.423%	-0.388%	0.0174	-0.222	
10/12/2001	-1.554%	-0.552%	0.912%	0.559%	-2.101%	0.0173	-1.222	
10/15/2001	-3.039%	-0.060%	-2.834%	-2.868%	-0.178%	0.0173	-0.100	
10/16/2001	1.221%	0.765%	2.756%	3.649%	-2.343%	0.0173	-1.402	
10/17/2001	-2.051%	-1.989%	1.248%	-0.388%	-1.669%	0.0174	-0.956	
10/18/2001	-5.378%	-0.706%	-2.513%	-3.116%	-2.333%	0.0173	-1.304	
10/19/2001	4.121%	0.524%	1.883%	2.530%	1.552%	0.0173	0.920	
10/22/2001	2.282%	1.482%	1.433%	2.928%	-0.619%	0.0173	-0.367	
10/23/2001	1.283%	-0.476%	1.362%	1.092%	0.169%	0.0173	0.099	
10/24/2001	0.362%	0.071%	-1.371%	-1.238%	1.620%	0.0173	0.925	
10/25/2001	9.619%	1.404%	5.554%	7.114%	2.339%	0.0175	1.435	
10/26/2001	2.084%	0.399%	4.161%	4.770%	-2.564%	0.0174	-1.548	
10/29/2001	-0.430%	-2.288%	1.203%	-0.704%	0.276%	0.0174	0.157	
10/30/2001	-5.216%	-1.713%	-3.390%	-4.928%	-0.303%	0.0174	-0.165	
10/31/2001	-6.300%	0.205%	-1.666%	-1.422%	-4.949%	0.0173	-2.821	****
11/1/2001	-2.876%	2.090%	-1.150%	0.809%	-3.655%	0.0174	-2.119	****

Exhibit 17

Date	Actual Return	Market Return	Industry Residual Return	Predicted Return	Residual Return	Standard Error	Z-Score	Sig.(****)
11/2/2001	-2.585%	0.172%	-2.621%	-2.437%	-0.152%	0.0173	-0.086	
11/5/2001	-3.296%	1.407%	-3.325%	-2.052%	-1.270%	0.0174	-0.716	
11/6/2001	-3.851%	1.441%	-1.872%	-0.314%	-3.548%	0.0173	-2.040	****
11/7/2001	1.980%	-0.215%	3.173%	3.197%	-1.180%	0.0173	-0.703	
11/8/2001	2.573%	0.084%	1.889%	2.141%	0.423%	0.0173	0.250	
11/9/2001	0.176%	0.068%	3.466%	3.755%	-3.449%	0.0173	-2.065	****
11/12/2001	0.132%	-0.062%	0.192%	0.257%	-0.125%	0.0173	-0.072	
11/13/2001	0.921%	1.848%	-0.408%	1.357%	-0.430%	0.0174	-0.251	
11/14/2001	-6.087%	0.352%	-7.833%	-7.450%	1.473%	0.0175	0.778	
11/15/2001	-7.176%	0.010%	-9.737%	-9.930%	3.058%	0.0177	1.559	
11/16/2001	1.047%	-0.239%	3.642%	3.660%	-2.520%	0.0173	-1.507	
11/19/2001	0.444%	1.137%	-0.500%	0.623%	-0.177%	0.0173	-0.103	
11/20/2001	4.668%	-0.788%	5.658%	5.247%	-0.550%	0.0174	-0.332	
11/21/2001	-1.878%	-0.456%	-1.010%	-1.339%	-0.546%	0.0173	-0.311	
11/23/2001	2.775%	1.168%	0.502%	1.684%	1.073%	0.0173	0.630	
11/26/2001	-1.816%	0.711%	-2.727%	-2.061%	0.251%	0.0173	0.142	
11/27/2001	3.947%	-0.533%	2.207%	1.913%	1.996%	0.0173	1.175	
11/28/2001	-2.516%	-1.745%	0.520%	-0.921%	-1.610%	0.0174	-0.918	
11/29/2001	1.830%	1.142%	1.230%	2.413%	-0.569%	0.0173	-0.337	
11/30/2001	-1.244%	-0 131%	0.342%	0.350%	-1.588%	0.0173	-0.922	
12/3/2001	2.940%	-0.837%	2.223%	1.657%	1.262%	0.0173	0.740	
12/4/2001	-0.725%	1.441%	1.622%	3.087%	-3.698%	0.0173	-2.199	****
12/5/2001	0.457%	2.283%	2.174%	4.415%	-3.791%	0.0174	-2.272	****
12/6/2001	-5.227%	-0.106%	-2.863%	-2.937%	-2.360%	0.0173	-1.323	
12/7/2001	-42.446%	-0.721%	0.985%	0.483%	-42.723%	0.0173	-24.808	****

Exhibit 18

News and Events for Halliburton: 6/3/1999 - 12/7/2001
Sources: FactSet Research Systems, Inc., Factiva, and Reuters Research on Demand
PAGE 1

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
06/03/1999	2,127,100	$42.875	3.313%	Factiva	Top End rail link bids low on cash. Original Article By Matthew Abraham Paul Toohey. A multinational consortium is believed likely to win the contract for the Darwin-Alice Springs railway project. It is Asia Pacific Transportation Consortium. This comprises United States ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	Halliburton to maintain contractor rate status quo. An attempt by the Offshore Contractors Association to drive down the rates paid to independent professional contractors crumbled further yesterday with Halliburton saying it was going to maintain the status quo. The Press and Journal ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	RESEARCH ALERT - Oil service sector started. NEW YORK, June 3 (Reuters) - Goldman Sachs analyst Terry Darling said he started the oil services sector as overweight and added Halliburton Co. Schlumberger Ltd. and Hanover Compressor Co. to the recommended list. ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	Oil shares up on bullish views - oil in late comeback. NEW YORK, June 3 (Reuters) - Oil shares outperformed the rest of the stock market on Thursday, reflecting more bullish views on the energy sector, while crude prices staged a late technical rebound. ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	Hot Stocks: INTD HAL SLB GOUY GWE Company Company News - - IntelliData Tech The co. ended merger talks with Home 2 3/4, DW 1/2 Financial Network Inc. (NFN). Instead, 15.4% Loss the companies plan to form a joint 322,200 Shares ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	N.Y. Late Market Comment -5: Oil Services Names Rise Shares of Texaco lost 2 3/16 to 62 3/16, while Chevron declined 7/16 to 81 9/16. Late Wednesday, the oil giants said they were halting merger discussions. ...
06/03/1999	2,127,100	$42.875	3.313%	Factiva	Goldman Starts Halliburton On Recommended List This rating change was reported by CNBC. 09:05 AM
06/04/1999	1,354,200	$43.000	0.292%	Factiva	Halliburton Files With SEC For 3M Shares To Buy PES DALLAS -(Dow Jones)- Halliburton Co. (HAL) filed with the Securities and Exchange Commission to issue three million common shares. The shares will be used directly to acquire all ordinary shares of PES International Ltd., a spokesman said. ...
06/04/1999	1,354,200	$43.000	0.292%	PR News	Halliburton Files Registration Statement to Cover Shares to Acquire Remainder of PES
06/05/1999		.	.	Factiva	Books - A high price for ivory. Rachel Halliburton trumpets the virtue of this unforgettable flight of fancy from a jumbo-sized talent The White Bone by Barbara Gowdy Flamingo, £16.99, 340pp ...

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Have [redacted] Events for Halliburton: 6/3/1999 - 12/7/[redacted]
Sources: FactSet Research Systems, Inc., Factiva, [redacted] Reuters Research on Demand
PAGE 2

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
06/07/1999	2,117,300	$44.438	3.3438	Factiva	S.Australia Names Consortium For Darwin-Adelaide Railway SYDNEY (Dow Jones)--The South Australian state government announced Monday the winning consortium that will build a A$1.2 billion railway linking the cities Darwin and Adelaide. ...
06/08/1999	1,601,800	$43.438	(2.2808)		
06/09/1999	1,459,100	$43.500	0.1448	Factiva	US firm offers $100m for PES. ENERGY services giant Halliburton has tabled a paper offer worth more than $100million to complete its takeover of technology-driven Petroleum Engineering Services (PES) of Aberdeen. ..
06/10/1999	1,452,600	$43.875	0.8824		
06/11/1999	2,657,500	$46.063	4.9868	Factiva	Barracuda gets some teeth. oo FOUR heavyweights presented Petrobras with bid documents for the giant Barracuda field development project on Monday. ABB, Kvaerner, Aker Maritime and Halliburton-Kellog submitted bids to act as main contractor for the $1.6 billion ...
06/14/1999	3,579,100	$46.188	0.2718	Factiva	AKER SALE NEAR? Stavanger - Several candidates have now expressed their interest in taking over, or joining up, with Aker Maritime with both Saipem and Halliburton being named as possible suitors in addition to ABB. ...
06/14/1999	3,579,100	$46.188	0.2718	Factiva	MOVES AND PROMOTIONS. The Petroleum Equipment Suppliers Association Houston, Tex., has named officers for the 1999-2000 term: W.J. (Beke) Beringue (Input/Output, Inc.) chairman; Peter D. Kinnear (FMC Corp.), vice chairman; Dwight E. Beach, Jr. (The Fleetalic ...
06/14/1999	3,579,100	$46.188	0.2718	Factiva	*Halliburton Raised, Dresser Industries Confirmed-Moody's (MORE) Dow Jones Newswires 06-14-99 1312EDT
06/14/1999	3,579,100	$46.188	0.2718	Factiva	Halliburton/Dresser/Moody's -2: Revised Legal Structure NEW YORK (Dow Jones)--Moody's Investors Service Monday upgraded the senior unsecured debt ratings of Halliburton Co. to Aa3 from A1 and confirmed the Aa3 senior unsecured debt ratings of Dresser Industries Inc. ...
06/15/1999	2,890,000	$47.938	3.7898	Factiva	RESEARCH ALERT-ING Barings rates petroleum,oil cos. NEW YORK, June 15 (Reuters) - ING Barings said Tuesday analyst Stephen Gengaro initiated coverage of Schlumberger Ltd. with a strong buy rating and Baker Hughes Inc. and Halliburton Co with a buy rating. ...
06/15/1999	2,890,000	$47.938	3.7898	Factiva	*Lehman Brothers Starts Halliburton At Neutral >HAL (END) DOW JONES NEWS 06-15-99 09:50 AM

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DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
06/15/1999	2,890,000	$47.938	3.788%	Factiva	*ING Barings Starts Halliburton At Buy >HAL (END) DOW JONES NEWS 06-15-99 10:00 AM
06/16/1999	2,611,200	$45.688	(4.69%)		
06/17/1999	2,358,800	$47.625	4.241%	Factiva	Halliburton unit to oversee Australian rail construction. Bloomberg News HALLIBURTON Co. said a group led by its Brown and Root Services engineering a nd construction unit was selected to oversee construction of a $782.4-million Australian rai lroad. ...
06/18/1999	2,918,300	$45.875	(3.67%)	Factiva	Company Profile For - Halliburton AS. 1. Transaction Type 01 2. Registration Number 971594934 3. Report Type M 4. Company Name Hal liburton AS 5. Address PB. 720 6. Postal Code 4003 ...
06/19/1999				Factiva	Going Out - Theatre Reviews. By Rachel Halliburton et al. Boyband Gielgud Theatre, London W1 (0171-494 5036) It is difficu lt to work out whether the makers of this musical are trying to create a new boy band, or m erely presenting a narrative about a fictitious one ...
06/21/1999	1,407,300	$43.813	(4.49%)	Factiva	Newcomers join growing band of high-spec deepwater vessels. TWO more construction/ support ships have just been completed in European yards for the offs hore market and have started work for Halliburton SubSea Systems. ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	ADDvantage Media Group, Inc. Signs Letter of Intent with vanAar,Inc. TULSA, Okla.--(BUSINESS WIRE)--June 22, 1999--ADDvantage Media Group, Inc. (NASDAQ:ADDM), an nounced today the signing of a letter of intent with vanAar, Inc. under which vanAar agreed to purchase from ADDvantage one million shares of common ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	Tri-Valley and Halliburton Team Up On Project Ekho BAKERSFIELD, Calif.--(BUSINESS WIRE)--June 22, 1999--Tri-Valley Oil & Gas Co. (TVOG) has rec eived a letter of intent from Halliburton Energy Services proposing an alliance on Project E kho, Tri-Valley's deep exploration play in the South San ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	WS ATKINS: Houston success for WS Atkins Celebrating the completion of its first year of operation in Houston is WS Atkins, one of th e world's largest and most successful multi-disciplinary consultancies. ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	Right of Reply - Patrick Healey. The director of Group K theatre responds to Rachel Halliburton's review of his production of Kristendom RACHEL HALLIBURTON'S review of my production of Kristendom at the Bridewell Thea

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
					Mrs. London, was so flippant as she claims the play was ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	Kellogg Brown & Root, TECHNIP will build petrochemicals plant inQatar. Brown & Root International, a subsidiary of Kellogg Brown & Root, with TECHNIP, have been se lected by Q-Chem to design and build a grassroot petrochemicals plant in Qatar. The plant wi ll be built in Mesaieed and is scheduled for completion ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	Halliburton Unit, Technip Get Qatar Plant Pact >HAL DALLAS (Dow Jones)--Halliburton Co.'s (HAL) Kellogg Brown & Root unit and Technip (F.THP) re ceived a contract from Q-Chem to design and build a petrochemical plant in Qatar. ...
06/22/1999	2,232,800	$42.063	(3.99%)	Factiva	U.S. CONSOLIDATED CLOSINGS. NAME LAST CHANGE B F GOODRICH CO 41/4 0 GOODYEAR TIRE 56/7 -0/3 WR GRACE CO 18/4 +0/2 HALLIB URTON CO 42.01 -1.12 H J HEINZ CO 48.09 +0.02 HERCULES INC 36.01 -0.03 HOMESTAKE MINING 7/5 0 HONEYWELL ...
06/23/1999	2,232,800	$42.063	(3.99%)	SunTrust Robinson	Oilfield Service Stocks Weak on Inventory Concerns
06/23/1999	3,089,200	$42.188	0.29%		
06/24/1999	2,309,500	$41.125	(2.51%)	Factiva	Fatal wreck Above: Firefighters hose down smoldering potatoes left in a truck involved in a fatal accide nt early Tuesday on Interstate 20 eastbound in Bossier City. Authorities said that a Hallibu rton pump truck and an 18-wheeler carrying potatoes ...
06/24/1999	2,309,500	$41.125	(2.51%)	Factiva	Tri-Valley Oil & Gas TRIL Halliburton Energy Services HA. Tri-Valley Oil & Gas Co. (TVOG) has received a letter of intent from Halliburton Energy Serv ices proposing an alliance on Project Ekho, Tri-Valleys deep exploration play in the south e ast Joaquin Valley of California. Halliburton will ...
06/25/1999	2,068,600	$40.375	(1.82%)	Factiva	Hi-tech kids get wired for sound ... and vision. A TRIO of Aberdeen schools are going on line after picking up a key computer donation. Dyce- based engineering firm Halliburton found they were overloaded with extra computers and decid ed to help turn pupils hi-tech. ...
06/28/1999	2,123,900	$41.625	3.09%	Factiva	DIGITAL CAMERA AND ACCESSORIES NOTICE TYPE: Potential Sources Sought NOTICE DATED: 062499 OFFICE ADDRESS: NASA/John F. Kenn edy Space Center, Procurement, Kennedy Space Center, FL 32899 ZIP CODE: 32899 SUBJECT: 67 - DIGITAL CAMERA AND ACCESSORIES RESPONSE DEADLINE: DUE ...
06/28/1999	2,123,900	$41.625	3.09%	Factiva	Polymer-based preflush allows fracing near water intervals. Carlos Brocco is a drilling and workover engineer for Pioneer Resources Inc., Buenos Aires. He previously was a drilling and workover engineer for Astrofer (now operated by Pride) and Perz Companc. He has an electrical engineering degree ...

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
06/28/1999	2,123,900	$41.625	3.0866	Factiva	Global positioning technologies provide essential exploration tool. Simon Corbett is a geodetic and software engineer and technical director for Quality Enginee ring & Survey Technology Ltd (Quest) a geodetic, geophysical and survey research and technic al development company. He holds a PhD in surveying ...
06/28/1999	2,123,900	$41.625	3.0866	Factiva	Dresser Equipment Group's. Dresser Equipment Group's Waukesha Engine Division has added a new distributor: CK Power Pro ducts of St. Louis, Missouri. The distributorship covers the Mid-western U.S. region. CK Powe r Products will sell and service Waukesha natural gas ...
06/29/1999	1,812,800	$43.375	4.2069	Factiva	Nuevo Energy In Consulting Pact With Halliburton Unit>NEV HOUSTON (Dow Jones)--Nuevo Energy Corp. (NEV) signed a multi-year consulting contract with H alliburton Co.'s (HAL) Landmark Graphics Corp. unit. ...
06/29/1999	1,812,500	$43.375	4.2069	PR News	Nuevo Contracts With Landmark Graphics Corporation for Entire Scientific Information Technol ogy Functions
06/30/1999	2,675,100	$45.250	4.3236	Factiva	OIL: August crude futures rose 21 cents to $18.44 a barrel yesterday on the New York Mercantile E xchange amid talk of an outage at a Mobil Corp. refinery in Beaumont, TX (Matthew F. Gallagh er, Wall Street Journal, June 30) ... ...
06/30/1999	2,675,100	$45.250	4.3236	Factiva	Halliburton cements Russian relationship. An alliance agreement has been settled between the Tyumen Oil Co and Halliburton Energy Serv ices. Tyumen Oil is one of the biggest oil producers in Russia. The alliance will be for the development and assessment of oil and gas assets. The ...
06/30/1999	2,675,100	$45.250	4.3236	Factiva	Halliburton sees 2000 net rise from 1999 "trough" HOUSTON, June 30 (Reuters) - Halliburton Co., the world's biggest oilfield services company, said on Wednesday that it saw earnings bottoming in 1999 but expected a significant increase in 2000. ...
07/01/1999	2,050,100	$43.750	(3.3156)	Factiva	COFLEXIP WINS NORWEGIAN SUBSEA Stavanger - The Coflexip Stena - Rockwater (Halliburton Subsea Systems) joint venture has wo n the last contract to be awarded for Statoil's upcoming Sygna subsea development project. ..
07/01/1999	2,050,100	$43.750	(3.3156)	Factiva	Refinery expansion work for Shell/Pemex, Deer Park Kellogg Brown & Root, a business unit of Halliburton Co. was selected by Shell Oil Co. and P etroleos Mexicanos (Pemex) to provide construction services for a multi-million dollar proje ct to expand the sulfur recovery and delayed coking ...
07/01/1999	2,050,100	$43.750	(3.3156)	Factiva	Five new drilling technologies emerging.(Brief Article) A few relatively new drilling technologies were introduced at this year's Offshore Technolog y Conference. They include casing drilling technologies from Tesco, a gyro in Well Done Dril

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
					ling Systems' rotary steerable tool, casing reaming ...
07/01/1999	2,050,100	$43.750	(3.315%)	Factiva	Seismic integration.(Landmark Graphics launches a cross-platformintegration tool for hydrogr A cross-platform integration tool designed to move seismic data and interpretations between Unix and Windows NT operating systems has been developed by Halliburton's Landmark Graphics. The tool, known as SeisXchange 4.7(TM), will allow ...
07/01/1999	2,050,100	$43.750	(3.315%)	Factiva	BRS wins embassy upgrade global contract Houston-based Brown & Root Services (BRS), a business unit of Halliburton Company, has been awarded a contract by the U.S. Department of State to perform fast-track delivery of securit y improvements at U.S. embassies and consulates ...
07/02/1999	1,046,900	$44.500	1.714%	Factiva	Tender - photographic equipment - 2 (English). Goods: 33400000. Digital camera and accessories. Federal Supply Classification (FSC) 67. HAS A/KSC is hereby soliciting information for potential sources for a Digital Camera, Kodak DCS -660; Battery Pack; Firewire (IEEE 1394) Host PC Card ...
07/02/1999	1,046,900	$44.500	1.714%	Factiva	ANALYSTS' VIEW *BHI management ANALYSTS' VIEW *BHI management has been saying for several years that the only major oilfiel d service areas they are not in are pressure pumping and construction, and they don't want t o be in construction. That leaves pumping with three ...
07/06/1999				Factiva	RICHARD HALLIBURTON He rode across the Alps on an elephant, swam the length of the Panama Canal, sailed the jour neys of Ulysses and followed the footsteps of Greek legends up Olympus. ...
07/06/1999	3,841,600	$45.250	1.685%		
07/07/1999	1,648,500	$44.125	(2.486%)		
07/08/1999	1,962,200	$45.688	3.541%	Factiva	HALLIBURTON HASN'T RULED OUT FURTHER ACQUISITIONS. Speaking in Aberdeen in May, Halliburton's Chief Executive Officer, Dick Cheney, indicated t hat restructuring in the oil and gas service industry had run its course following a number of mergers last year, including that between Halliburton ...
07/08/1999	1,962,200	$45.688	3.541%	Factiva	Appointment - Balmoral Group International. Balmoral Group International has appointed Gary L Brown as its new President, and Andy Bruce as Vice President - Finance. Brown was most recently Director of International Manufacturing with Halliburton Energy Services. Bruce has been with ...
07/09/1999	1,311,700	$45.938	0.547%	Factiva	BAR the front-runner. TME Anadarko-led consortium developing Hassi Berkine South field (HBNS) in Algeria is close to awarding an engineering, procurement and construction contract for the second stage. ...

Move [redacted]ents for Halliburton: 6/3/1999 - 12/7/2001
Sources: FactSet Research Systems, Inc., Factiva, and Reuters Research on Demand
PAGE 7

DATE	VOLUME	CLOSING PRICE	RETURN	SOURCE	EVENT
07/09/1999	1,311,700	$45.938	0.5476	Factiva	Statoil prizes. NORWAY'S Statoil has awarded eight new drilling and well service contracts with a combined v alue of some Nkr3.4 billion (£430 million). Six jobs worth £253 million went to Baker Hughes , Halliburton, Anchor/M-I Drilling Fluids, BJ Services ...
07/09/1999	1,311,700	$45.938	0.5476	Factiva	Sygna award. Coflexip Stena and Halliburton firm Rockwater have won a Nkr160 million (£20 million) contra ct from Norway's Statoil for subsea equipment, cables and pipes on the Sygna field in the No rth Sea. ...
07/10/1999	.		.	Factiva	War and piecework. While Asia's armies are busy sticking their noses into business, the converse is happening i n the developed world. Although people have sought to make a living by running errands for s oldiers since the first stone was slung, those charged ...
07/13/1999	1,397,600	$47.250	2.857%	Factiva	Schlumberger Deal Creates Offshore Drilling Leader >RIG NEW YORK (Dow Jones)--While the oil-services industry has been dominated for years by three majors - Schlumberger Ltd. (SLB), Halliburton Co. (HAL) and Baker Hughes Inc. (BHI) - a simi lar dynamic, or at least a clear front-runner, has been ...
07/13/1999	1,948,400	$46.500	(1.587%)	Factiva	Zero Halliburton Introduces New Family of Notebook Carrying Cassets Its Line of Products; Ne SALT LAKE CITY--(BUSINESS WIRE)--July 13, 1999--More than 583,000(a) notebooks were damaged in accidents last year, at a cost to businesses and consumers of over $1 billion(b). ...
07/13/1999	1,948,400	$46.500	(1.587%)	Factiva	ALGERIAN-AMERICAN JOINT OIL SERVICES COMPANY LAUNCHED. According to Al-Khabar newspaper (July 11, 1999), the Algerian National Well Services Compan y, a subsidiary of the "Sonatrach" Corporation, yesterday signed a contract the American "Ha lliburton" Corporation to establish a joint venture. The ...
07/13/1999	1,948,400	$46.500	(1.587%)	Factiva	Applied Power Unit Introduces New Computer Notebook Case SALT LAKE CITY (Dow Jones)--Zero Halliburton, a unit of APW Zero Cases, is introducing a new line of carrying cases for notebook computers, designed to protect the machines from damage ...
07/14/1999	1,805,000	$47.188	1.478%	Factiva	Metamor Worldwide Inc. METAMOR WORLDWIDE Inc. (Houston) -- Henry F. Holland, 50 years old, was named to the new pos ts of executive vice president and chief operating officer of this information-technology co ncern. He was executive vice president of Landmark ...
07/14/1999	1,805,000	$47.188	1.478%	Factiva	Young thespians bring the Bard's works to life Camp prepares group for participation in Shak With arms waving and fingers pointing, about two dozen Laurence Olivier wannabes practiced s word fighting using imaginary weapons at a Lenexa church on Friday. ...
07/15/1999	1,801,900	$47.063	0.795%	Factiva	UN awards $2.8-bil to oil firms for war damage The United Nations has awarded almost $2.8-bil to several oil companies, including $2.2-bil to Kuwait Oil Co and $305.4-mil to Texaco, for damage sustained at oil fields when Iraq inva

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
DEC 30 2013
OFFICE OF THE CLERK

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Court should overrule or substantially modify the holding of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of classwide reliance derived from the fraud-on-the-market theory.

2. Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

PARTIES TO THE PROCEEDINGS BELOW

Halliburton Company and David Lesar were the defendants in the district court, and the appellants in the court of appeals.

Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc. was the plaintiff in the district court, and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Halliburton Company states that it is a publicly held company, which has no parent company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Corporate Disclosure Statement	iii
Opinions Below	1
Statement of Jurisdiction	2
Statutes and Rules Involved	2
Preliminary Statement	2
Statement	4
I. Background	4
II. Proceedings Below	6
A. Initial proceedings below	6
B. This Court's opinion	7
C. Proceedings on remand	9
Summary of Argument	10
Argument	12
I. *Basic* Was Wrongly Decided And Does Not Merit *Stare Decisis* Protection	12
A. *Basic* was wrong when it was decided	12
B. Time has only magnified *Basic*'s flaws	14
1. Scholarship has fatally discredited *Basic*'s key premises	14
a. Academic consensus now rejects *Basic*'s view of market efficiency	15

TABLE OF CONTENTS—Continued

Page

b. New evidence demonstrates fundamental inefficiency that *Basic* did not anticipate 16

c. Irrationality is understandable and on the rise 19

d. *Basic*'s binary view of efficiency is invalid 20

2. Federal courts cannot consistently and reasonably apply *Basic* 22

3. State courts refuse to follow *Basic*'s lead 24

C. This Court's case law on class actions and Section 10(b) makes *Basic* increasingly anomalous 25

1. *Basic* is fundamentally at odds with this Court's class-certification cases 25

2. *Basic* is increasingly anomalous in light of this Court's Section 10(b) cases 27

D. *Stare decisis* is no bar to overruling or modifying *Basic* 29

1. *Basic* fails this Court's *stare decisis* tests 29

2. Congress has left the fate of *Basic* in this Court's hands 32

a. Correcting judicially created errors generally lies with the judiciary 32

TABLE OF CONTENTS—Continued

Page

b. Congress has not considered, much less embraced, the presumption of reliance 34

II. *Basic*'s Presumption Of Reliance Should Be Overruled Or Modified 35

A. The Court should overrule *Basic* and require actual reliance on misrepresentations 35

B. Alternatively, the Court should require class plaintiffs to prove that alleged misrepresentations affected the market price 37

C. Overruling or modifying *Basic* would advance the '34 Act's policies 39

1. The status quo undermines the Act's purposes 40

a. Modern securities class actions force settlement without regard to merit 40

b. Securities class actions poorly compensate investors 41

c. Securities class actions do not deter culpable parties 43

d. Securities class actions consume excessive judicial resources 44

2. Overruling or modifying *Basic* would facilitate the securities laws' objectives 45

TABLE OF CONTENTS—Continued

Page

a. Public enforcement provides superior deterrence and compensation 45

b. An artificially low bar for class certification is unwarranted for private Section 10(b) litigation 47

III. *Basic* Permits Defendants To Rebut The Presumption At Class Certification By Showing The Absence Of Price Impact 49

A. *Amgen* supports consideration of price-impact rebuttal at the class-certification stage 49

B. Price impact itself, not just its "predicates," must be rebuttable at class certification 53

Conclusion 56

Statutory Appendix 1a

TABLE OF AUTHORITIES

Page

CASES

Alexander v. *Sandoval*,
532 U.S. 275 (2001) 29

Allyn v. *Wortman*,
725 So. 2d 94 (Miss. 1998) 25

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133 S. Ct. 2304 (2013) 48

Amgen, Inc. v. *Conn. Ret. Plans & Trust Funds*,
133 S. Ct. 1184 (2013) ..... *passim*

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131 S. Ct. 1740 (2011) 41

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485 U.S. 224 (1988) ..... *passim*

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422 F.3d 307 (5th Cir. 2005) 19, 21

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402 U.S. 313 (1971) 34

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421 U.S. 723 (1975) 27, 41

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711 F. Supp. 1264 (D.N.J. 1989) 22, 23

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511 U.S. 165 (1994) 12, 28, 34

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133 S. Ct. 1426 (2013) 25, 26, 27, 36, 39

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437 U.S. 463 (1978) 41

TABLE OF AUTHORITIES—Continued

Page

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544 U.S. 336 (2005) 4, 36

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235 F.3d 865 (3d Cir. 2000) 52

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131 S. Ct. 2179 (2011) ..... *passim*

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425 U.S. 185 (1976) 12

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556 U.S. 502 (2009) 35

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133 S. Ct. 1216 (2013) 46

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368 F.3d 356 (4th Cir. 2004) 21

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457 U.S. 147 (1982) 25

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639 F.3d 623 (3d Cir. 2011) 23, 51

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432 F.3d 261 (3d Cir. 2005) 17

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544 F.3d 474 (2d Cir. 2008) 51, 56

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377 U.S. 426 (1964) 29

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131 S. Ct. 2296 (2011) 28, 36

TABLE OF AUTHORITIES—Continued

Page

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754 A.2d 1188 (N.J. 2000) 24, 25

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202 F.R.D. 467 (N.D. Tex. 2001) 23

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PSKS, Inc.,
551 U.S. 877 (2007) 33

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Barney, Inc.*,
416 F.3d 940 (9th Cir. 2005) 52

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131 S. Ct. 1309 (2011) 50

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494 F.3d 418 (3d Cir. 2007) 52

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858 P.2d 568 (Cal. 1993) 24

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556 U.S. 778 (2009) 31

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398 U.S. 375 (1970) 33, 34

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Ins. of Wausau*,
508 U.S. 286 (1993) 12, 33, 34

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States*,
435 U.S. 679 (1978) 33

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501 U.S. 808 (1991) 29

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555 U.S. 223 (2009) 29, 30, 31

TABLE OF AUTHORITIES—Continued

Page

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547 U.S. 715 (2006) 34

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533 U.S. 194 (2001) 30

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682 F.3d 934 (11th Cir. 2012) 46

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292 P.3d 525 (Or. 2012) 25

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Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 12, 27, 28, 29, 36, 46, 47

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551 U.S. 308 (2007) 49

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119 U.S. 199 (1986) 33

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401 F.3d 316 (5th Cir. 2005) 23, 39

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131 S. Ct. 2541 (2011) 5, 25, 26, 27, 36, 39

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Page

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Section 11, 15 U.S.C. § 77k 48

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Section 14, 15 U.S.C. § 78n 48

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Section 20, 15 U.S.C. § 78t 28

Section 21, 15 U.S.C. § 78u 46

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17 C.F.R. § 240.10b-5 ..... 2, 4

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Page

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IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

Petitioners Halliburton Co. and David Lesar (collectively Halliburton) respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-22a), on remand from this Court, see *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), is reported at 718 F.3d 423. The court of appeals' denial of rehearing (Pet. App. 23a-25a), and the opinion of the district court (*id.* at 26a-31a), are unreported. The court of appeals' previous opinion (*id.* at 32a-53a) is reported at 597 F.3d

330. The district court's previous opinion (Pet. App. 54a-99a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2013. The court of appeals denied rehearing on June 11, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 10(b) of the Securities Exchange Act is codified at 15 U.S.C. § 78j(b) and reproduced at App., *infra*, 1a.

Section 18(a) of the Securities Exchange Act is codified at 15 U.S.C. § 78r(a) and reproduced at App., *infra*, 2a.

SEC Rule 10b-5 is codified at 17 C.F.R. § 240.10b-5 and reproduced at App., *infra*, 3a.

Federal Rule of Civil Procedure 23 is reproduced at App., *infra*, 4a-12a.

Federal Rule of Evidence 301 is reproduced at App., *infra*, 13a.

PRELIMINARY STATEMENT

The presumption of reliance created by a four-Justice majority in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), rests on a two-part economic theory: that well-developed capital markets efficiently incorporate material information into a stock's market price and that investors purchase in reliance on the integrity of the market price. Under *Basic*, a putative class of investors is allowed to eschew actual proof of common reliance on a misrepresentation in order to obtain class certification and prevail on the merits. Instead, it can invoke a classwide presumption that all class members relied on the misrepresentation when they purchased stock at a price distorted by the misrepresentation.

Basic's substitution of nascent economic theory for bedrock securities and class-action law was questionable from the start, as Justices White and O'Connor argued in dissent. In the ensuing twenty-five years, *Basic*'s theoretical framework has been the subject of withering scholarly and empirical attack. Four Justices recognized as much in *Amgen, Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). See *id.* at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting).

Basic's simplistic understanding of market efficiency is at war with economic reality. It massively expands 10b-5 liability in stark contrast to the Court's consistent holdings that the judicially created action must be narrowly construed. And it undercuts this Court's insistence that plaintiffs invoking Rule 23 must *affirmatively show* that common issues predominate, not presume that they do. Unsurprisingly, lower courts struggle to rationalize *Basic*'s fictions with the facts of cases before them.

Accordingly, the Court should overrule *Basic*. Even if an outright reversal is not deemed appropriate, the Court should at least substantially modify the threshold for invoking its presumption of reliance. Even in well-developed markets, stock prices do not efficiently incorporate all types of information at all times. Thus, if *Basic* survives, plaintiffs seeking class certification should be required to prove that the alleged misrepresentations *actually* distorted the market price. This approach would more closely align the reliance presumption with economic reality and with Rule 23's requirement that common issues predominate.

The decision below illustrates the anomalies that *Basic* generates. The court of appeals previously found that no alleged misrepresentation affected Halliburton's stock price. Pet. App. 37a, 42a-53a. It nonetheless affirmed class certification under *Basic*'s presumption.

And while *Basic* permits defendants to rebut the presumption by showing the absence of price distortion, 485 U.S. at 248, the court below ruled that such rebuttal was prohibited at the class-certification stage—the very stage where the presumption matters most. This Court reserved that question in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) ("*EPJ Fund*"), and did not address it in *Amgen*. Even if the Court declines to overrule or modify *Basic*, it should at least clarify that price distortion—*Basic*'s "fundamental premise," *EPJ Fund*, 131 S. Ct. at 2186—may be rebutted at the class-certification stage.

STATEMENT

I. BACKGROUND

Respondent Erica P. John Fund, Inc. (the Fund) is the lead plaintiff in this securities-fraud class action against Petitioners Halliburton Company and its CEO David Lesar. Pet. App. 2a. The Fund alleges three divergent categories of misrepresentations. These concern Halliburton's (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-price construction contracts; and (3) potential benefits from a merger with Dresser Industries. *Id.* at 3a. The Fund contends investors lost money when Halliburton's stock price dropped following the release of negative news that touched on one or more of the categories of alleged misrepresentations. *Ibid.*

The Fund relies on the judicially created action fashioned from Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and from SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. To prevail on the merits, the Fund must prove: (1) a material misrepresentation; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. See *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

The Fund sought class certification under Rule 23(b)(3), which requires it to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." The Fund was required to "affirmatively demonstrate * * * compliance" with this requirement by "prov[ing] * * * *in fact*" that common issues predominate. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011).

To satisfy Rule 23(b)(3), the Fund relied exclusively on *Basic*. *Basic* recognized that, under traditional fraud and class-certification principles, securities-fraud plaintiffs could rarely satisfy Rule 23(b)(3)'s predominance requirement because, if proof of actual reliance were required, "individual issues" would "overwhel[m] the common ones." 485 U.S. at 230, 242; *EPJ Fund*, 131 S. Ct. at 2185.

To remedy this perceived problem, *Basic*'s four-Justice majority[1] created a "rebuttable presumption" of classwide reliance, available to plaintiffs who invoke the "fraud-on-the-market" theory. 485 U.S. at 242, 247. That theory assumes that in an efficient, well-developed market, all public information about a company is reflected in the company's stock price, *id.* at 246, and that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price," *id.* at 247.

To trigger the presumption at the certification stage, the plaintiff must show that (1) the misrepresentations were public; (2) the stock traded in an efficient market; and (3) the plaintiff traded between when the misrepre-

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[1] Only Justices Brennan, Marshall, and Stevens joined Justice Blackmun's opinion creating the presumption of reliance. Justices White and O'Connor dissented from that portion of the opinion. Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 225.

sentations were made and when the truth was revealed. *Amgen*, 133 S. Ct. at 1198; *EPJ Fund*, 131 S. Ct. at 2185. These "threshold facts," *Basic*, 485 U.S. at 248, establish that the "investor presumptively relie[d] on [the] defendant's misrepresentation if that information [was] reflected in the market price of the stock at the time of the relevant transaction." *EPJ Fund*, 131 S. Ct. at 2186 (quotation omitted).

Basic permits defendants to "rebut the presumption" with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." 485 U.S. at 248. The defendant may do so by "show[ing] that the misrepresentation in fact did not lead to a distortion of price." *Ibid.* Such rebuttal breaks the "causal connection" because "the basis for finding that the fraud had been transmitted through [the] market price would be gone." *Ibid.* In other words, a misrepresentation that "does not affect market price * * * cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Amgen*, 133 S. Ct. at 1195.

II. Proceedings Below

A. Initial proceedings below

1. On June 3, 2002, the Fund filed suit in the U.S. District Court for the Northern District of Texas. Pet. App. 26a. Five years later, the Fund moved to certify a class of all purchasers of Halliburton stock between June 1999 and December 2001. *Id.* at 3a. During those five years, the Fund amended its complaint four times and obtained more than 600,000 pages of discovery from Halliburton.

The district court denied certification because the Fund failed to establish loss causation, a requirement under then-governing Fifth Circuit case law. *Ibid.* "Loss

causation * * * requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *EPJ Fund*, 131 S. Ct. at 2186. The district court observed that the Fund did "not point to *any* stock price increases resulting from positive misrepresentations." Pet. App. 58a n.11.

2. The Fifth Circuit affirmed. It noted that the Fund made no attempt to prove that the stock price moved in response to Halliburton's alleged misrepresentations but instead "relie[d] only on stock price decreases following allegedly corrective disclosures by Halliburton." Pet. App. 36a. For a plaintiff who relies solely on such price declines, the evidence "must raise an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 37a. Without proof that the price decline was caused by a "correction to a prior misleading statement," *id.* at 36a, "there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with," *id.* at 37a.

The Fifth Circuit concluded that none of the disclosures raised the necessary inferences; consequently, the Fund failed to prove market movement and therefore loss causation. *Id.* at 42a-53a.

B. This Court's opinion

This Court granted the Fund's petition for certiorari. Halliburton conceded that a plaintiff need not prove loss causation—price impact *plus* a subsequent loss caused by the fraud—to invoke *Basic*'s presumption of classwide reliance. *EPJ Fund*, 131 S. Ct. at 2186. Halliburton argued instead that the lower courts properly denied certification because Halliburton had rebutted the presumption by showing the absence of "price impact"—*i.e.*, that the alleged misrepresentation did not affect the stock's market price in the first place. *Id.* at 2186-2187.

This Court vacated and remanded because, contrary to the Fifth Circuit's rule, plaintiffs need not show "loss causation" to invoke *Basic*'s presumption. "Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Id.* at 2186.

The Court began with *Basic*'s premise that "an investor presumptively relies on a defendant's misrepresentation if that 'information is reflected in [the] market price' of the stock at the time of the relevant transaction." *Ibid.* (quoting *Basic*, 485 U.S. at 247). While *Basic*'s presumption focuses on price impact at the time of the transaction, "[l]oss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* Consequently, an investor may have "purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price," yet "not be able to prove loss causation." *Ibid.* The court of appeals' loss-causation rule, therefore, "contravene[d] *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price at the time of his transaction.*" *Ibid.* (emphasis added).

The Court acknowledged Halliburton's argument that it was entitled to rebut the presumption—and thereby defeat class certification—by showing an absence of "price impact." *Id.* at 2187. The Court declined to reach that issue, however, concluding only that "the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage." *Ibid.* The Court "d[id] not * * * address any other question about *Basic*, its presumption, or how and when it may be rebutted." *Ibid.* It remanded so that Halliburton's price-impact argument could "be addressed in the first instance by the Court of Appeals." *Ibid.*

C. Proceedings on remand

1. The court of appeals remanded to the district court, see Pet. App. 4a, which certified the class. The five-page certification order contained only one sentence implicitly rejecting Halliburton's argument that it could rebut the classwide reliance presumption by showing the absence of price impact: "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required." *Id.* at 30a.

2. The Fifth Circuit granted leave to appeal. Before oral argument, this Court issued its decision in *Amgen*, 133 S. Ct. 1184, holding that plaintiffs need not establish that misrepresentations were material to gain class certification via the presumption of reliance. Four Justices signaled their willingness to reconsider the validity of *Basic*'s presumption of reliance. *Id.* at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting).

The court of appeals affirmed. It identified "[t]he pivotal question in this case [as] whether a defendant should be permitted to show the absence of price impact at the class certification stage * * * to establish that common issues among class members do not predominate and that class certification is inappropriate." Pet. App. 5a. The court acknowledged that *Amgen* prohibited consideration of materiality at the class-certification stage "[b]ecause materiality is an element of every fraud claim" and thus "[t]he absence of materiality 'ends the case for one and for all.'" *Id.* at 17a (quoting 133 S. Ct. at 1196). A decision on materiality could never cause individual questions to predominate.

The court acknowledged that *Amgen* requires certain fraud-on-the-market predicates to be considered at class certification, including market efficiency and whether the misrepresentation was made publicly. *Id.* at 11a-12a (cit-

ing *Amgen*, 133 S. Ct. at 1198-1199). These issues properly pertain to class-certification because they are not 10b-5 elements; "[a] plaintiff can fail to establish publicity [or] market efficiency * * * and therefore lose the class-wide presumption of reliance, but still establish individual reliance and prove fraud." *Id.* at 12a-13a (citing *Amgen*, 133 S. Ct. at 1198-1199).

Despite conceding that price impact is similarly not a 10b-5 element, Pet. App. 17a, the court of appeals characterized price impact as more analogous for Rule 23 purposes to materiality than to publicity and market efficiency. It reasoned that, even though price impact is not an element, "a plaintiff must nevertheless prevail on this fact in order to establish [the element of] loss causation." *Ibid.* According to the court, "if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action." *Id.* at 18a. Under that premise, price impact is not relevant to common-issue predominance and therefore is off-limits at class certification. *Ibid.* Consequently, the court of appeals refused to consider "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11.

3. Halliburton sought rehearing *en banc*, which was denied. *Id.* at 23a-25a.

SUMMARY OF ARGUMENT

Basic's presumption of reliance rests on two premises: that (1) an efficient market accurately reflects all "public material misrepresentations" and that (2) "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." 485 U.S. at 247. Both premises have proven unsound and are widely rejected by economists, the very scholarly community that *Basic* thought had irrevocably endorsed

them. Today, even scholars who support a wide-ranging presumption for policy reasons almost uniformly attack *Basic*'s efficient-markets underpinnings. *Basic* was wrong when decided, and time has only made things worse. *Basic* carved a gaping hole in this Court's class-certification case law—an escape hatch available only to securities plaintiffs. It contravenes this Court's otherwise cautious approach to Section 10(b), has been impossible for federal courts to apply consistently, and has been roundly rejected by state courts.

Given these manifold flaws, the simplest and best solution is to overrule *Basic* altogether. As a procedural and evidentiary rule that creates no reliance interests (because it does not regulate primary conduct), *Basic* merits minimal *stare decisis* protection. The private right of action would remain available. Institutional-investor actions and increasingly frequent opt-outs from securities classes demonstrate that classes are not essential. Moreover, SEC enforcement does not require reliance at all. Overruling *Basic* would not disturb those core conduits of deterrence and compensation; it would preclude the least meritorious cases and create enormous savings for the very investors Section 10(b) is supposed to help.

Even if the Court decides to retain the presumption, plaintiffs should be required to demonstrate that the alleged misrepresentations actually affected the stock price, because the *Basic* presumption cannot spring to life until such a showing is made. And at the very least, the Court certainly should permit defendants to *rebut* the presumption by showing that the misrepresentation did not distort the market price, thereby defeating class certification.

ARGUMENT

I. *BASIC* WAS WRONGLY DECIDED AND DOES NOT MERIT *STARE DECISIS* PROTECTION

A. *Basic* was wrong when it was decided

1. The Section 10(b) action is a "judicial construct that Congress did not enact * * * ." *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). In limning its contours, the Court has long looked to "the express causes of action in the securities Acts as the primary model for the § 10(b) action" "to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 165, 173, 178 (1994). See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 206-211 (1976). Specifically, the Court must identify—and borrow from—the express provision that is "most analogous to the private 10b-5 right of action." *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 294 (1993). See *id.* at 295-296 (identifying Sections 9 and 18(a) as analogous to Section 10(b)). In this way, the Court "ensure[s] the [10b-5] action does not conflict with Congress' own express rights of action." *Id.* at 295.

Basic fails that elementary test. Section 18(a) of the '34 Act is the closest textual analogue to the Section 10(b) action. See Br. for Former SEC Commissioners et al. as *Amici Curiae* 11-18; Grundfest, Damages and Reliance Under Section 10(b) of the Exchange Act, Rock Center for Corporate Governance at Stanford University Working Paper No. 150 (Aug. 28, 2013).[2] Only Section 18(a), codified at 15 U.S.C. § 78r(a), broadly authorizes damages for misrepresentations by a defendant who did not buy from or sell to the plaintiff when those statements affect

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[2] http://ssrn.com/abstract=2317537. All Internet sources cited in this brief are on file with counsel.

aftermarket trading—the basis for most Section 10(b) suits. Section 18(a) expressly requires actual reliance, allowing recovery only by those "who, in reliance upon such [false or misleading] statement, shall have purchased or sold a security at a price which was affected by such statement," 15 U.S.C. § 78r(a).

The Act's legislative history confirms the importance of the actual-reliance requirement. Congress discarded a preliminary version of Section 18(a) because it lacked such a requirement, and instead substituted the version that exists today specifically to require reliance. See Br. for Former SEC Commissioners at 16-17; see also *Basic*, 485 U.S. at 257 (White, J., dissenting) (observing that the rejected version of Section 18(a) was "closely akin" to the fraud-on-the-market presumption). *Basic*, in other words, adopted a rule for Section 10(b)'s *implied* action that Congress specifically considered and rejected in Section 18(a)'s analogous *express* action.

That was error. Once Congress required an affirmative showing of actual reliance for causes of action that Congress felt were important enough to create, what could justify permitting a far *lesser* showing for causes of action that the *judiciary* crafted? By disregarding the Act's textual command in favor of a fictional presumption of reliance, *Basic* exceeded the Court's proper judicial role. The fraud-on-the-market presumption of reliance for Section 10(b) actions was wrong in 1988, and remains wrong today.

2. Justices White and O'Connor made the statutory-construction argument just described. See 485 U.S. at 257-258 (White, J., dissenting). They also offered other compelling reasons to reject the presumption.

The dissent found it extraordinary that the Court "embrace[d]" the fraud-on-the-market theory "with the sweeping confidence usually reserved for more mature

legal doctrines." *Id.* at 251. "[D]angers" lurk "when economic theories replace legal rules as the basis for recovery. Yet the Court today ventures into this area beyond its expertise," and does so "with no staff economists, no experts schooled in the 'efficient-capital-market hypothesis,' [and] no ability to test the validity of empirical market studies * * * ." *Id.* at 253. The dissent's skepticism of engrafting this nascent economic theory into law presaged scholars' later condemnation of *Basic*'s economic foundations.

The dissent further argued that even if market realities justified major adjustments to the judicially created cause of action, "such changes [should] come from Congress in amending § 10(b). The Congress, with its superior resources and expertise, is far better equipped than the federal courts for the task of determining how modern economic theory" should affect the law. *Basic*, 485 U.S. at 254. "In choosing to make these decisions itself, the Court, I fear, embarks on a course that it does not genuinely understand, giving rise to consequences it cannot foresee." *Ibid.*

The dissent presciently "fear[ed] that the Court's decision may have many adverse, unintended effects as it is applied and interpreted in the years to come." *Id.* at 251. *Basic*'s freewheeling approach to securities class actions has in fact imposed huge costs on the very investors Section 10(b) aims to protect. See *infra* Part II.C.

B. Time has only magnified *Basic*'s flaws

Basic was legally wrong from day one. And it did not take long for the academy to decisively reject its underlying economic theory as well.

1. *Scholarship has fatally discredited* Basic's *key premises*

Basic relied upon "[r]ecent empirical studies" to incorporate into federal law a robust view of market effi-

ciency, where "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." 485 U.S. at 246. The dissent was underwhelmed: while the "theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are—in the end—nothing more than theories which may or may not prove accurate upon further consideration." *Id.* at 254. "[F]urther consideration" has devastated *Basic*'s core premises. Economists now largely agree that *Basic*'s efficient-markets hypothesis does not reflect reality.

a. Academic consensus now rejects *Basic*'s view of market efficiency

Basic's economic theory enjoyed support at the time. Prompted by the "applau[se]" of several "commentators," *Basic*, 485 U.S. at 247, the majority proclaimed fraud-on-the-market's apotheosis from theory into law. But "*Basic* came at the *end* of a long line of legal scholarship that, nearly universally, supported the efficient capital markets hypothesis," a "scholarly consensus" that "has now evaporated." Rapp, Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in *Cammer* v. *Bloom* and Its Progeny, 10 U. Miami Bus. L. Rev. 303, 323 (2002) (emphasis added).

A new "consensus," that *Basic*'s efficient-markets theory "simply did not work in practice," emerged quickly. Bratton & Wachter, The Political Economy of Fraud on the Market, 160 U. Pa. L. Rev. 69, 74 (2011). Shortly after *Basic*, a leading professor explained that "the *opposite*" of *Basic*'s presumption "appears to be true." Macey, The Fraud on the Market Theory: Some Preliminary Issues, 74 Cornell L. Rev. 923, 925 (1989) (emphasis added). That is partly because many investors' "strategies" involve "attempt[ing] to locate undervalued stocks

in an effort to 'beat the market,'" meaning that they "are in essence betting that the market for the securities they are buying *is in fact inefficient*." *Ibid.* (emphasis added). At most, therefore, "[s]ome investors rely on market integrity and others do not." *Id.* at 926.[3]

Thus, while "under the efficient market hypothesis, investors are likely to display similar, or common, behavior, at least in terms of relying on the market price," that "likelihood no longer holds if different investors are behaving according to different behavioral rules." Dunbar & Heller, Fraud on the Market Meets Behavioral Finance, 31 Del. J. Corp. L. 455, 520-521 (2006). For instance, some investors may rationally purchase a stock "on the probability that a bubble will continue," while others "rationally her[d] because they weigh more the decisions of others" than information about the stock. *Id.* at 521 (listing seven different types of purchasers). *Basic* simplistically presumed that investors generally purchase in reliance on the integrity of the market price. See 485 U.S. at 244, 247. But reality demonstrates otherwise: the commonality of reliance generated by the *Basic* presumption is fictional.

b. **New evidence demonstrates fundamental inefficiency that *Basic* did not anticipate**

As importantly, "overwhelming empirical evidence" now "suggests that capital markets are not fundamentally efficient." Lev & de Villiers, Stock Price Crashes and 10b-5 Damages: A Legal, Economic and Policy Analysis, 47 Stan. L. Rev. 7, 20 (1994). As "empirical research became more specialized and sophisticated," the evidence

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[3] Justice White recognized that "'many investors purchase or sell stock because they believe the price *inaccurately* reflects the corporation's worth.'" 485 U.S. at 256 (quoting Black, Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions, 62 N.C. L. Rev. 435, 455 (1984)).

mounted, producing "hundreds of papers documenting pricing anomalies, even for *the most actively traded* common stocks." Cornell, Market Efficiency and Securities Litigation: Implications of the Appellate Decision in *Thane*, 6 Va. L. & Bus. Rev. 237, 243-244 (2011) (emphasis added). *Basic*'s presumption of reliance cannot coexist with the reality that where one would expect maximum market efficiency and rationality, markets can prove extraordinarily *in*efficient and *ir*rational.

Even in these well-developed markets, public information is often not incorporated immediately (much less rationally) into market prices. For example:

> On May 3, 1998, the Sunday *New York Times* carried a front-page story on recent innovations in cancer research, and featured EntreMed prominently. The next day, Monday, May 4, EntreMed stock, which had closed the previous Friday at $12/share, shot up on heavy volume, ending the day at $52/share.
>
> What is remarkable about this episode is that the front-page *Times* story contained essentially no real news: the substance of the story had been reported five months earlier * * * in the scientific journal *Nature*, as well as in the popular media (including the *Times* itself, in a less high-profile article on page A28).

Hong & Stein, Disagreement and the Stock Market, 21 J. Econ. Persp., Spring 2007, at 109, 116-117. Similarly, Wall Street Journal reports on insider trades appear to quickly affect a stock's trading price, despite the SEC's earlier disclosure of the same information. See Chang & Suk, Stock Prices and the Secondary Dissemination of Information, 33 Fin. Rev. 115, 115-117 (1998). See also *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 263-271 (3d Cir. 2005) (similar example of Wall Street Journal report af-

fecting price weeks after the information was publicly released in an SEC filing).

This fundamental criticism of *Basic*'s premise extends to entire exchanges. For instance, just two weeks before oral argument in *Basic* was "Black Monday," October 19, 1987, which

> provides strong and direct evidence that the New York Stock Exchange (NYSE) is not fundamentally efficient because it is impossible to locate any information that could be responsible for a twenty-two percent devaluation of corporate assets on that single day, or a thirty-six percent devaluation from the market's peak in late August.

Ayres, Back to *Basics*: Regulating How Corporations Speak to the Market, 77 Va. L. Rev. 945, 974 (1991). The NYSE may be America's most efficient exchange—but not efficient enough to justify *Basic*'s breezy confidence.

Many other examples disprove "the assumption that the market acts rationally," an assumption "[i]mplicit in the notion of an efficient market * * * as courts understand the securities markets to be * * * ." Fisher, Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?, 54 Emory L.J. 843, 898 (2005). The 1998-2001 technology bubble is one, "with stock prices far away from fundamental values," thus "dissolv[ing] the link between the efficient market theory and the normative notions underlying 10b-5 elements." *Id.* at 847. The "economic crisis" of 2008 is another, further "undermin[ing] 'efficient markets' theory." Posner, On the Receipt of the Ronald H. Coase Medal, 12 Am. L. & Econ. Rev. 265, 278 (2010).

The bottom line is that "[t]he fraud-on-the-market (FOTM) cause of action just doesn't work. At least that is the consensus view among academics respecting the primary class action vehicle under federal securities

laws." Bratton & Wachter, *supra*, at 72 & n.1 (2011) (describing how even the views of academic proponents have evolved in recent years).

c. Irrationality is understandable and on the rise

Basic assumed that the market "act[s] as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price." 485 U.S. at 244. But what is rational behavior for the "market professionals" on which *Basic* relied, *id.* at 247 n.24, often is not rational for the market as a whole and does not translate into rational prices or market efficiency. "[S]ophisticated investors may be able to make money in the short term by exploiting their understanding of the herd mentality of other, less able investors," meaning that "even these sophisticated investors will appear, at times, to behave irrationally, leading to a feedback effect which enhances the inefficiency of the market." Rapp, Proving Markets Inefficient, *supra*, at 324; see also Dunbar & Heller, *supra*, at 520-521 (observing distinct "behavioral rules" that affect price formation). What is lost, of course, is the link between a market price and the stock's value as disclosed by *actual market information.*

Trades based on things *other than* material information about the company inevitably limit the efficiency of the market—and generate what has been called a "noisy market." See generally Ribstein, Fraud on a Noisy Market, 10 Lewis & Clark L. Rev. 137 (2006); see also Burch, Reassessing Damages in Securities Fraud Class Actions, 66 Md. L. Rev. 348, 379 n.155 (2007) (describing "the large body of literature on behavioral finance and noise traders"). Relatedly, the Fifth Circuit has observed that market makers and analysts often do not advance—and even frustrate—market efficiency. *Bell* v. *Ascendant Solutions, Inc.*, 422 F.3d 307, 315 &

nn.16-17 (5th Cir. 2005).

Worse, human market professionals are increasingly supplanted by computerized trading programs using complex algorithms that aim to beat the market, executing trades based on predetermined metrics, not rationally assimilating public disclosures. These trading programs sometimes compound market irrationality by generating price fluctuations unrelated to material information about particular securities. Mehta et al., Futures Sale Caused May 6 Panic as Traders Lost Faith in Data, Bloomberg, Oct. 1, 2010 (describing SEC and CFTC report on 998-point drop in 20 minutes caused by trading algorithms).[4] See generally Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC (Sept. 30, 2010).[5]

d. ***Basic*'s binary view of efficiency is invalid**

The academic and empirical assault on *Basic* does not mean that there is *never* efficiency in any market. The point is that "efficiency is not a binary, yes or no question." Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 167. Yet *Basic* subjects courts and litigants to "the misleading notion of binary market efficiency," Cornell, *supra*, at 250. It is thumbs-up or thumbs-down under *Basic*: "[I]f *a market* is shown to be efficient, courts may presume" investors' reliance on *all* "public, material misrepresentations regarding those securities." *Amgen*, 133 S. Ct. at 1192 (emphasis added).

As a binary concept, efficiency has almost no real meaning. "A stock might trade efficiently some of the time, for some information types, but then trade ineffi-

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[4] http://www.bloomberg.com/news/2010-10-01/automatic-trade-of-futures-drove-may-6-stock-crash-report-says.html

[5] http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/staff-findings050610.pdf

ciently at other times, for other information types." Rapp, Rewiring the DNA of Securities Fraud Litigation: *Amgen*'s Missed Opportunity, 44 Loy. U. Chi. L.J. 1475, 1484 (2013). "Information that is easy to understand and that is trumpeted in the business media * * * may be incorporated into market prices almost instantaneously," Stout, The Mechanisms of Market Inefficiency, 28 J. Corp. L. 635, 656 (2003), although counterexamples abound. The more difficult information is to understand, the more likely it will take longer "to be fully incorporated into prices," if it is indeed ever "incorporated at all." *Ibid.* "[T]reat[ing] market efficiency in a binary manner," therefore, "often makes case law irreconcilable with the actual behavior of markets." Cornell, *supra*, at 255.

Basic consequently mandates both under- and overinclusive results. If a market for a given stock is generally inefficient or undeveloped, defendants who made affirmative misrepresentations may escape certification and liability, even if the misrepresentation unquestionably distorted the stock's price. See, *e.g.*, *Bell*, 422 F.3d at 316 & n.18 (rejecting class certification because price decline following alleged corrective disclosure was insufficient to prove market efficiency); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 364 n.*, 368 (4th Cir. 2004) (similar). Yet, as this case demonstrates, if a stock trades on a market that is generally efficient or well-developed, that says little about whether it was efficient with respect to a particular misrepresentation and whether the market in fact reacted to the information. The examples above confirm as much.

Indeed, many scholars who favor the result in *Basic* now repudiate *Basic*'s economic premise precisely because efficiency is far from a binary question. See, *e.g.*, Black, Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets, 44 Loy. U. Chi.

L.J. 1493, 1500 (2013). "Because the notion of information efficiency *upon which the fraud-on-the-market presumption rests* is crumbling under sustained academic scrutiny, the future of securities fraud class action litigation—dependent on this presumption—may be in jeopardy." *Id.* at 1502 (emphasis added).

2. *Federal courts cannot consistently and reasonably apply* Basic

Justice White correctly prophesied that "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252. By requiring courts to assess whether "shares were traded on an efficient market," *id.* at 248 n.27 (maj. op.), *Basic* insists that judges perform a task that flummoxes economic scholars. Experts "have yet to observe a workable test for determining whether the market for a particular security is efficient." Macey, *supra*, at 926. Eugene Fama, the father of the efficient-capital-markets hypothesis and recent Nobel laureate in economics, pronounced shortly after *Basic* that "market efficiency per se is not testable." Fama, Efficient Capital Markets: II, 46 J. Fin. 1575, 1575 (1991). Financial economists still "do not know how to calculate the price that fully reflects the available information," meaning that there is no baseline to gauge efficiency. Brav & Heaton, Market Indeterminacy, 28 J. Corp. L. 517, 525 (2003).

"*Basic*'s obfuscation about the role of efficiency sent the [lower] courts off on a long journey without a particularly good compass." Langevoort, *Basic* at Twenty, *supra*, at 167. Unable to measure efficiency itself, judges have gamely searched for market features that tend to accompany efficiency as an imperfect proxy. Factors listed in two district court cases are most commonly cited when courts grapple with this problem. See *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1286-1287 (D.N.J. 1989);

Krogman v. *Sterritt*, 202 F.R.D. 467, 477-478 (N.D. Tex. 2001).

But applying those factors to a given fact pattern generates a mirage of accuracy at best. The *Cammer* factors "do not directly speak to efficiency * * * [and] are best understood as constituting an indirect test by which courts infer efficiency for reliance purposes." Cornell & Rutten, Market Efficiency, Crashes, and Securities Litigation, 81 Tul. L. Rev. 443, 455 (2006).

Nor are they especially helpful. One frequently cited study of eight leading factors (including the *Cammer* factors and supplements) found that *only two*—the average volume and the number of analysts who track a given stock—"systematically differentiate[d] between efficiently and inefficiently priced stocks." Barber et al., The Fraud-on-the-Market Theory and the Indicators of Common Stocks' Efficiency, 19 J. Corp. L. 285, 285-286 (1994). And at least some heralded factors, like the number of market makers, proved incapable of "discriminat[ing] between efficient and inefficient stocks." *Id.* at 290. The factors are indeterminate and frequently self-correlating, and have deservedly been criticized. See, *e.g.*, *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 324-325 (5th Cir. 2005); Erenburg et al., The Paradox of "Fraud-on-the-Market" Theory: Who Relies On the Efficiency of Market Prices?, 8 J. Empirical Legal Stud. 260, 289-291 (2011) (explaining how the *Cammer* factors are often useless or deceptive); Bernard et al., Challenges to the Efficient Market Hypothesis: Limits to the Fraud-on-the-Market Theory, 73 Neb. L. Rev. 781, 796-797 (1994).

Not surprisingly, the effort to accommodate *Basic*'s theoretical construct has produced wildly disparate outcomes. See *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (3d Cir. 2011). "[S]imilar factual circumstances have led to different conclusions by courts about market efficiency." Rapp, Proving Markets Inefficient, *supra*, at

305, 306. Each passing year has more clearly demonstrated the "high level of inconsistency in the courts regarding what makes a market sufficiently efficient to trigger the fraud-on-the-market presumption." Rapp, Rewiring the DNA, *supra*, at 1484. As long as *Basic* remains binding, courts will generate this "massive hodgepodge of * * * outcomes." Ferrillo et al., The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases, 78 St. John's L. Rev. 81, 102 (2004).

3. *State courts refuse to follow* Basic*'s lead*

State courts, of course, are not bound by *Basic*, and thus it is a marked critique that they have overwhelmingly refused to adopt its fraud-on-the-market approach.

States that have considered *Basic*'s argument have rejected it because "the persuasiveness of [*Basic*'s] intellectual underpinning, the Efficient Capital Markets Hypothesis," was found wanting. *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1198 (N.J. 2000). *Kaufman* concluded that "[a]s more time has passed, and there has been greater opportunity to examine and test market efficiency, the hypothesis has shown greater weakness." *Ibid.* The California Supreme Court observed that "to permit common law claims based on the fraud-on-the-market doctrine would open the door to class action lawsuits based on exceedingly speculative theories." *Mirkin* v. *Wasserman*, 858 P.2d 568, 584 (Cal. 1993). "[S]uch decisions are more appropriately the subject of legislative deliberation and resolution" than adoption by courts. *Id.* at 582.

Twelve years in, "*no* state court with the authority to consider whether *Basic* is persuasive ha[d] chosen to apply it" under state law. *Kaufman*, 754 A.2d at 1198 (em-

phasis added).[6] *Basic*'s record has continued to deteriorate. Beyond New Jersey and California, many other state courts have rejected the principles of *Basic* in securities-fraud contexts, with none going the other way. And only one legislature has adopted the fraud-on-the-market doctrine. See *State* v. *Marsh & McLennan Cos.*, 292 P.3d 525, 527-528, 535-536 (Or. 2012).

C. This Court's case law on class actions and Section 10(b) makes *Basic* increasingly anomalous

Basic is not merely unsound on its own terms. It also undermines this Court's class-certification jurisprudence and its approach to Section 10(b).

1. Basic *is fundamentally at odds with this Court's class-certification cases*

This Court has long insisted that "actual, *not presumed*, conformance with [Rule 23] remains * * * indispensable." *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). Rule 23 permits certification only after "the court *finds* that the questions of law or fact common to class members predominate over" individual ones. Fed. R. Civ. P. 23(b)(3) (emphasis added).

Basic flouts that principle by presuming common reliance in the face of near-certain falsity. Recent cases have insisted with increasing rigor that plaintiffs *show* compliance with Rule 23, deepening the divide between *Basic* and the Court's class-certification jurisprudence. See, *e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). *Basic* opens an escape hatch for 10b-5 plaintiffs alone.

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[6] *Kaufman* noted that the Mississippi Supreme Court had "accepted the theory in dictum, but no claim based directly on the theory appears to have been adjudicated in the jurisdiction." 754 A.2d at 1194 (citing *Allyn* v. *Wortman*, 725 So. 2d 94 (Miss. 1998)). Nothing appears to have changed since then.

In any non-securities context, the class in this case could not be certified. In *Wal-Mart*, the Court required a putative class to "affirmatively demonstrate * * * compliance" with Rule 23, and thereby "prove * * * *in fact*" that the issues were common. 131 S. Ct. at 2551. *Basic*'s presumption treats reliance issues as common in ways that *Wal-Mart* rejected. The alleged gender discrimination in *Wal-Mart* purportedly was "common to *all* Wal-Mart's female employees," because all women would be affected by the "strong and uniform 'corporate culture'" that plaintiffs had described. *Id.* at 2548. To establish this commonality, plaintiffs offered "statistical evidence about pay and promotional disparities" and sociological testimony that Wal-Mart's culture "was 'vulnerable' to gender discrimination." *Id.* at 2549. The Court rejected all of that as failing to *prove* the bare existence of common issues, given the diversity of outcomes among class members. *Id.* at 2554-2557. *Basic*'s presumption erases equally plain distinctions by treating all investors as relying in common on market prices presumptively affected by misrepresentations—despite economic evidence showing that no such common reliance, and no such consistent price distortion, exists.

Comcast reinforced that certification is improper when proponents do not actually "establis[h]" predominance under Rule 23(b)(3). 133 S. Ct. at 1433. Thus, it was error to certify a class without determining "whether the methodology" that purported to show predominance of common damages issues "[was] a just and reasonable inference or [was] speculative." *Ibid.* (quotation omitted). Different class members in *Comcast* would likely have had damages of vastly differing amounts, if any, because the basis for the damages would vary widely. *Id.* at 1434-1435. Equally, different class members in securities suits may have vastly different forms of reliance, if any at all. Merely identifying a method that "can be applied class-

wide," while ignoring "how arbitrary the measurements may be," cannot satisfy Rule 23 without "reduc[ing] Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 1433.

Basic's entire *raison d'être* is reducing predominance "to a nullity." It acknowledges that the presumption is necessary precisely because, if left to actual facts, *individual* issues of reliance would predominate. 485 U.S. at 242. And *Basic*'s binary market-efficiency test does not remotely establish that alleged misrepresentations actually distorted market price—thus failing to produce even *theoretical* common reliance. *Basic* impermissibly embraced the "speculative" and "arbitrary" proxies for actual predominance that *Comcast* emphatically rejected. 133 S. Ct. at 1433.

Nothing justifies insisting that all plaintiffs *except securities plaintiffs* must actually demonstrate predominance, rather than assume it. Because *Basic*'s discredited vision of market efficiency does not supply the requisite "glue holding the alleged *reasons* for [investors'] decisions together," *Wal-Mart*, 131 S. Ct at 2552, securities classes should not be exempt from Rule 23's requirements.

2. Basic *is increasingly anomalous in light of this Court's Section 10(b) cases*

Basic also runs counter to the Court's repeated admonitions that extension of the judicially created Section 10(b) action "is for Congress, not for us." *Stoneridge*, 552 U.S. at 165. *Basic* stands virtually alone in disregarding "caution against [the] expansion" of the private right of action, *ibid.*, and ignoring the longstanding rejection of "expansive imposition of civil liability" under Section 10(b), see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975) (limiting 10b-5 liability to "purchasers and sellers"). Even as this Court has reaffirmed that

it "must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law,'" *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge*, 552 U.S. at 167), *Basic*'s contrary approach continues to generate liability that would not otherwise be countenanced under this Court's 10b-5 jurisprudence.

Central Bank illustrates this point. There, the Court refused to imply a "private right of action for aiding and abetting a § 10(b) violation." *Stoneridge*, 552 U.S. at 155 (citing *Cent. Bank*, 511 U.S. at 191). Following established methodology, see *supra* Part I.A, *Central Bank* concluded that private aiding-and-abetting claims should not be judicially recognized under the Section 10(b) action, in part because no express action in the securities laws authorized such a claim. 511 U.S. at 180. Congress responded by authorizing aiding-and-abetting claims *only for the SEC.* See 15 U.S.C. § 78t(e) (Section 20(e) of the '34 Act, adopted as Section 104 of the PSLRA, Pub. L. 104-67, 109 Stat. 737, 757 (1995)). Congress thereby reaffirmed its preference that any expansion of Section 10(b) should not extend to private actions.

The Court has especially avoided diminishing the required showing of reliance in private Section 10(b) actions. "Were we to allow the aiding and abetting action proposed in this case," the Court explained in *Central Bank*, "the defendant could be liable *without any showing that the plaintiff relied* upon the aider and abettor's statements or actions." 511 U.S. at 180 (emphasis added). *Stoneridge* reaffirmed *Central Bank*'s strong view of "[r]eliance by the plaintiff upon the defendant's deceptive acts" as "an essential element of the § 10(b) private cause of action." 552 U.S. at 157, 159. Plaintiffs therefore could not recover from secondary actors who had made no statements upon which plaintiffs could rely.

Id. at 160 (expressly refusing to extend *Basic*'s presumption). These cases cement *Basic*'s outlier status.

In short, *Basic* is an accidental anachronism of the "*ancien regime*," in which the Court created and expanded causes of actions "to provide such remedies as are necessary to make effective the congressional purpose." *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). For the last 35 years, the Court has almost unerringly "sworn off" that approach in interpreting the '34 Act. See *ibid.* (collecting cases narrowly construing 10b-5 action). *Basic* is the notable exception, and no good reason exists to perpetuate its transgression of the judicial function.

D. *Stare decisis* is no bar to overruling or modifying *Basic*

Given the foregoing, *stare decisis* is the last hope for salvaging *Basic*. But it offers no reprieve.

1. Basic *fails this Court's* stare decisis *tests*

Whether viewed as a procedural rule or a substantive securities-law principle, *Basic* is not due *stare decisis* protection.

a. *Basic*'s presumption is largely a procedural and evidentiary construct implicating Rule of Civil Procedure 23 and Rule of Evidence 301. See 485 U.S. at 242, 245. These aspects of *Basic*'s holding are uniquely within the judicial ken and subject to lessened precedential weight. *Stare decisis* concerns are at their nadir "in cases * * * involving procedural and evidentiary rules." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). That is because a "procedural rule" like the *Basic* presumption "does not serve as a guide to lawful behavior." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995).

In *Pearson* v. *Callahan*, 555 U.S. 223 (2009), the Court revisited the procedure in Section 1983 cases for addressing questions of qualified immunity set forth in *Saucier* v.

Katz, 533 U.S. 194, 200 (2001). The Court unanimously found no *stare decisis* bar to "modif[ying] or abandon[ing]" the *Saucier* procedure. *Pearson*, 555 U.S. at 233. "[T]he *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations." *Id.* at 233-234. Moreover, although *Saucier*'s rule affected Section 1983, an *express* statutory cause of action, "[a]ny change should come *from this Court*, not Congress." *Id.* at 234 (emphasis added). "Where a decision has been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts, these factors weigh in favor of reconsideration. Collectively, the factors we have noted make our present reevaluation * * * appropriate." *Id.* at 235 (quotation and citations omitted).

Like *Saucier*, *Basic* "has been questioned by Members of the Court in later decisions." *Ibid.* Indeed, only last Term, four Justices—the same number that constituted the *Basic* majority—expressly indicated that *Basic* may be ripe for reconsideration. See *Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., dissenting, joined by Scalia and Kennedy, JJ.). All nine Justices at least recognized serious problems with *Basic*'s economic foundations. See *id.* at 1197-1198 n.6 (maj. op.) (acknowledging "modern economic research" that rejects a binary notion of efficiency). And, as described above, lower courts attempting to comply with *Basic* have been unable to achieve "consistent application" or results. *Pearson*, 555 U.S. at 235.

Pearson also examined the costs and benefits of the *Saucier* rule. "[E]xperience has pointed up the precedent's shortcomings," and "the rigid *Saucier* procedure c[ame] with a price." 555 U.S. at 233, 236. The "price" of *Basic* appears quite costly when viewed through *Pearson*'s lens:

- *"[S]ubstantial expenditure of scarce judicial re-*

sources on difficult questions * * *." 555 U.S. at 236-237. As this case and broader data show, Section 10(b) class actions ravenously consume judicial resources. See *infra* Part II.C.1.d. And *Basic*'s efficiency requirement is difficult, if not impossible, for judges to administer. See *supra* Part I.B.2.

- *"Unnecessary litigation" that "also wastes the parties' resources."* 555 U.S. at 237. *Basic*'s smooth path to class certification incentivizes weak claims, and litigation costs are borne almost entirely by the very shareholders who are supposedly being protected. See *infra* Part II.C.1.b.
- *"Adherence to" precedent "departs from the general rule" and contravenes principles in "other analogous contexts,"* 555 U.S. at 241. *Basic*'s presumption "departs from the general rule" that predominance must be affirmatively established rather than presumed under Rule 23, and that the Section 10(b) cause of action should be narrowly constrained. See *supra* Part I.C.

b. *Basic* may be even more vulnerable if it is assessed as "a substantive doctrine of federal securities-fraud law * * *." *Amgen*, 133 S. Ct. at 1193. The Court's *stare decisis* factors test a precedent's durability, correctness, and utility. "[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 792-793. *Basic* cannot satisfy any of those four criteria.

First, *Basic* is especially "unworkable." It offers no reliable methodology and cannot generate consistent,

predictable, justifiable results. See *supra* Part I.B.2.

Second, *Basic* is not a case from "antiquity."

Third, there are no "reliance interests at stake." *Basic*'s presumption does not "serve as a guide to lawful behavior," *Gaudin*, 515 U.S. at 521, but merely facilitates establishing the reliance element in litigation.

Fourth, *Basic* was not "well reasoned." Its presumption flows from serious misjudgments about the nature of securities markets, and it impinges on other important jurisprudence. This Court has historically reconsidered precedents when necessary to "bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (quotation marks omitted). This factor strongly supports a course correction.

2. *Congress has left the fate of* Basic *in this Court's hands*

If *Basic* is in error, this Court has the authority—and responsibility—to correct it. There is no occasion for applying the heightened form of *stare decisis* that attends statutory construction, for *Basic*'s presumption stems from a judicially implied cause of action. Congress, moreover, while constraining private Section 10(b) litigation in multiple ways, has remained silent about the validity of the presumption of reliance itself, leaving any revisions to this Court. The Court should not "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U.S. 61, 70 (1946) (overruling Naturalization Act precedent).

a. **Correcting judicially created errors generally lies with the judiciary**

Section 10(b) case law is particularly suited for judicial self-scrutiny and revision. "The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and

the definition of the duties it imposes." *Musick, Peeler*, 508 U.S. at 292. There is, therefore, "a judicial authority to shape, within limits, the 10b-5 cause of action." *Id.* at 293. Those "limits" are important; they require fidelity to statutory guidance, which *Basic* contravened. See *supra* Part I.A. But beyond that elementary principle, ensuring the integrity of the Section 10(b) action remains this Court's responsibility.

Antitrust provides a close analogue. Like Section 10(b), "Congress 'expect[s] the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition.'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (quoting *Nat'l Soc. of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978)). In *State Oil*, the Court overruled a 29-year old precedent and cited multiple similar overrulings. *Id.* at 20-22. Where "changed circumstances and the lessons of accumulated experience" undermine precedent, *stare decisis* poses no bar. *Id.* at 20. And where "respected authorities in the economics literature suggest[ed]" that a *century-old* precedent was "inappropriate," the Court overruled it. See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899-900 (2007). That test is almost custom-built for overruling *Basic*.

Similarly, in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Court overturned *The Harrisburg*, 119 U.S. 199 (1886), which had adopted a substantive rule against certain wrongful-death recoveries in federal maritime cases. The ordinary *stare decisis* factors supported overruling it: *The Harrisburg*'s "dubious foundation when announced," its status as "an increasingly unjustifiable anomaly" in the law, and its "litigation-spawning confusion." *Id.* at 404. Supposed congressional acquiescence over the preceding *84 years* posed no bar: "To conclude that Congress, by not legislating * * *, has in effect foreclosed * * * reconsideration of prior judicial

doctrine would be to disregard the fact that Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Id.* at 405 n.17.

Absent direction from Congress, this Court retains full discretion to overrule the judicially fashioned presumption of reliance.

b. **Congress has not considered, much less embraced, the presumption of reliance**

Congress has not addressed *Basic*'s presumption. The PSLRA's targeted *restrictions* on plaintiffs, which govern private Section 10(b) cases, do not somehow cement by implication every other pre-existing feature of Section 10(b) litigation. To the contrary, even before the PSLRA, the Court explained that "Congress has acknowledged the 10b-5 action without any further attempt to define it." *Cent. Bank*, 511 U.S. at 187 (citing *Musick, Peeler*, 508 U.S. at 293-294). Congressional-acquiescence arguments did not stop *Central Bank* from rejecting aiding-and-abetting liability, despite various other amendments to the securities laws. *Id.* at 186. Nor does congressional silence about the fraud-on-the-market theory and the presumption of reliance constitute Congress's "attempt to define" them.

Congressional silence only reflects "Congress's failure to express any opinion." *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality op.). Congress never voted—affirmatively or negatively—on the presumption. To be sure, a bill that would have effectively eliminated *Basic*'s presumption was proposed in the House of Representatives during the run-up to the PSLRA. See Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong. (1995); *Amgen*, 133 S. Ct. at 1201 (noting that bill). But the full House, much less Congress as a whole, never considered that bill. See *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 327 n.17, 340 n.34

(1971) (no congressional approval of Court precedent where statute was otherwise revised and provisions of bills to overrule precedent "disappeared" from proposed legislation). The Senate bill, S.240, said nothing about the fraud-on-the-market theory, and neither did the Conference Committee's reconciliation that ultimately became the PSLRA. Only "[t]he intent of the full Congress (or at least a majority of each House) is thought relevant to the interpretation of statutes, since they must be passed by the entire Congress." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 525 n.5 (2009). Congressional silence leaves the fate of the reliance presumption where it originated—with this Court.

II. *BASIC*'S PRESUMPTION OF RELIANCE SHOULD BE OVERRULED OR MODIFIED

A. The Court should overrule *Basic* and require actual reliance on misrepresentations

1. The Court should overrule the fraud-on-the-market presumption of reliance for the 10b-5 implied cause of action. This approach would respect the text of the Act and alleviate the conflict between the implied cause of action and the most analogous express cause of action—Section 18(a) of the Securities Exchange Act. While Section 18(a) requires actual reliance in private claims challenging an issuer's misleading disclosures to the SEC, *Basic* allows plaintiffs bringing an *identical* claim—as well as a swath of other aftermarket-liability claims—to proceed without showing actual reliance. There is no reason to allow this anomaly to persist. While Congress has modified or codified various other aspects of the 10b-5 cause of action, it has never suggested that presumed—rather than actual—reliance is sufficient. Section 18's enacted text stands undisturbed as the best indicium of Congressional intent regarding the necessary reliance showing here.

Requiring actual reliance would also bring *Basic* into line with this Court's consistent admonition that the implied action "must" be "give[n] 'narrow dimensions.'" *Janus*, 131 S. Ct. at 2302 (quoting *Stoneridge*, 552 U.S. at 167). By drastically expanding 10b-5 liability, *Basic* departed from this well-trodden path of judicial humility in elucidating a cause of action Congress did not enact. Nothing prevents the Court from revisiting that error and electing Section 18(a)'s and the common law's narrower understanding of reliance. Cf. *Dura*, 544 U.S. at 345 (adopting narrower common-law conception of loss causation rather than Ninth Circuit's looser approach).

2. An actual-reliance requirement would also best respond to the erosion of empirical support for the fraud-on-the-market presumption. Investors do not uniformly rely on the integrity of the market price, which does not rationally reflect all public information, even in developed markets. When these premises seemed more plausible, the policy justification for dispensing with actual reliance appeared stronger. With the dissolution of those premises, *Basic* rests on nothing more than a naked desire to "facilitat[e] class certification," *Amgen*, 133 S.Ct. at 1193, and lighten plaintiffs' burdens. That cannot justify departing from the actual-reliance test dictated by cognate portions of the Act and this Court's narrow-construction approach to the 10b-5 action.

3. Because *Basic* created the presumption of reliance to ease class certifications that would otherwise be impossible, developments in Rule 23 case law provide an additional reason for requiring actual reliance. As discussed, *Wal-Mart* and *Comcast* require that common-issue predominance be proven, not presumed. Thus, in a 10b-5 action, plaintiffs must be able to demonstrate that common issues of reliance in fact exist. Because the presumption of classwide reliance unjustifiably eliminates this burden, it should be overruled. Returning to a tradi-

tional understanding of reliance would be most consistent with this Court's holdings under Rule 23.

B. Alternatively, the Court should require class plaintiffs to prove that alleged misrepresentations affected the market price

If the Court retains *Basic*'s presumption, it should nonetheless modify what plaintiffs must show to invoke it. *Basic*'s binary market-efficiency test for invoking the presumption conflicts with modern economics and Rule 23. If courts are to presume classwide reliance on misrepresentations via reliance on a distorted market price, plaintiffs should first be required to demonstrate that the misrepresentations actually distorted the market price.

1. The "fundamental premise" of *Basic*'s presumption remains "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added).[7] If misrepresentations were not "reflected in the security's market price," there is "no grounding for any contention that investors indirectly relied on those misrepresentations through their reliance on the integrity of the market price." *Amgen*, 133 S. Ct. at 1199; accord *id.* at 1195 (information that "does not affect market price * * * cannot be relied upon indirectly by investors"). In that instance, the "causal connection" between the misrepresentation and the transaction would be "broken" because "the basis for finding that the fraud had been transmitted through [the] market price would be gone." *Basic*, 485 U.S. at 248.

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[7] See also *ibid.* ("an investor presumptively relies on a defendant's misrepresentation *if* that 'information is reflected in [the] market price' of the stock at the time of the transaction"); *ibid.* (*Basic*'s presumption applies when "the investor purchased the stock *at a distorted price*, and thereby presumptively relied on the misrepresentation *reflected in that price*.") (emphases added).

Incongruously, the current test for invoking the presumption of reliance does not require plaintiffs to show, in the first instance, that the alleged misrepresentations distorted the market price. Instead, plaintiffs must establish certain "predicates" that allow a rebuttable "presum[ption]" that the misrepresentations affected the market price. *Amgen*, 133 S. Ct. at 1199. At the class-certification stage, those predicates include market efficiency, publicity, and trade timing (materiality must be shown later). *Ibid.* Defendants may then rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion of price." *Basic*, 485 U.S. at 248.

2. If the presumption is to be retained, the Court should place the initial burden on plaintiff to establish the presumption's "fundamental premise" of price impact.

a. As discussed, post-*Basic* economic research shows that the current "predicates" for invoking the presumption—chiefly, market efficiency—do not confidently predict whether a particular misrepresentation will distort the market price. Merely showing that a stock is widely traded and generally responds to unexpected news is no guarantee that the stock quickly assimilates all types of public information, much less the representations at issue in a given case.

Consequently, *Basic*'s focus on a binary notion of market efficiency simply misses the point. The heart of presumed classwide reliance is not the character of the market in which the stock trades, but whether the misrepresentation actually distorted the market price. It makes scant sense to presume that plaintiffs relied on alleged misrepresentations by purchasing at a distorted market price without asking whether the misrepresentation actually distorted that price in the first place. A price-distortion test would eliminate the false positives and false negatives that result at the class-certification

stage when courts focus on market efficiency rather than the effect of the alleged misrepresentations. See *supra* Part I.B.1.d; *Unger*, 401 F.3d at 322 n.4 (noting "persuasive[ness]" of scholarly advocacy for price-distortion test); Bebchuk & Ferrell, Rethinking *Basic*, Discussion Paper No. 756, Harvard Olin Ctr. for Law, Bus. & Econ. 2-3, 11-14 (Dec. 2013)[8] (proposing price-distortion test and providing examples of price distortion in inefficient markets). It would also refocus courts on the misrepresentations that, after all, must be the subject of common reliance, rather than vexing questions of market efficiency that strain judicial competence and produce wildly disparate results. *Id.* at 20.

b. While any fraud-on-the-market presumption of common reliance is problematic under *Wal-Mart* and *Comcast*, see *supra* Part I.C.1, requiring plaintiffs to initially prove price distortion to invoke the presumption would be more consistent with Rule 23 than the current approach. Plaintiffs bear the burden under Rule 23 to prove that common issues predominate. *Comcast*, 133 S. Ct. at 1432. Because price distortion is the key to even *presuming* common issues of reliance, plaintiffs ought to bear the initial burden on that question. *Basic* improperly places the initial burden on defendants to rebut price impact. 485 U.S. at 248.

C. Overruling or modifying *Basic* would advance the '34 Act's policies

Securities class actions premised on *Basic*'s presumption of reliance hinder the goals of the '34 Act generally and Section 10(b) specifically. They harm innocent shareholders and minimally deter wrongdoers. Given that there are better alternatives, there is no reason to retain a presumption that lacks a legal or economic foundation and that wreaks havoc on this Court's general case

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[8] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371304

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1. *The status quo undermines the Act's purposes*

"[T]he fundamental problem" for *Basic* is that 10b-5 class actions "produce wealth transfers among shareholders that neither compensate nor deter." Coffee, Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1535-1536 (2006). Yet they impose great costs—on the parties, shareholders, and the judicial system.

a. **Modern securities class actions force settlement without regard to merit**

Basic's presumption ineffectively compensates and deters because it has generated a system of settlements that correspond to the threat of certification, not merit. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009).

Securities settlements are routine tolls that large companies must pay. In any given five-year period, the odds of a public corporation being sued by a putative class for a Section 10(b) claim are about 10%. Coffee, *supra*, at 1548 (citation omitted). Some early proponents of the efficient-market hypothesis believed that its adoption would curtail the number of securities-fraud class actions, see, *e.g.*, Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. L. 1, 16 (1982), but they were proven wrong. Between 1988 and 1991, the number of such suits nearly tripled, see O'Brien, The Class-Action Shakedown Racket, Wall St. J., Sept. 10, 1991, at A20, and notwithstanding the enactment of the PSLRA, the number increased still further over the ensuing decades. Comolli et al., Recent Trends in Securities Class Action Litigation:

2012 Full-Year-Review 3 (2013).[9] From the enactment of the PSLRA through 2012, plaintiffs have filed 3,988 securities class actions, but a mere 14—about one-third of 1%—went to verdict. *Id.* at 38. Indeed, there were *no* verdicts in 2012. *Id.* at 23. From 1996 to 2012, securities class settlements amounted to $73 billion, with over $53 billion paid since 2005. *Id.* at 31 (sums in Figure 28).

This Court has long recognized that defendants in a certified securities class face such "increase[d] * * * potential damages liability and litigation costs that [they] may find it economically prudent to settle and to *abandon a meritorious defense*." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (emphasis added). Accord *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("even a small chance of a devastating loss" pressures defendants "into settling questionable claims," amounting to "'in terrorem' settlements"). Judge Friendly aptly called them "blackmail settlements."[10] All class actions raise this problem, but "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Beyond a potentially staggering judgment, "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.* at 740. In short, securities litigation is costly, and, like the rain, it falls both "on the just and on the unjust." Matthew 5:45 (King James Version).

b. **Securities class actions poorly compensate investors**

Despite these enormous costs, the *Basic*-generated system poorly compensates investors, who *themselves* pay the judgments. As Judge Friendly and Justice

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[9] http://www.nera.com/nera-files/PUB_Year_End_Trends_2012_1113.pdf.

[10] Friendly, Federal Jurisdiction: A General View 120 (1973).

White long foresaw, expansion of private class actions "'lead[s] to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.'" *Basic*, 485 U.S. at 262 (White, J., dissenting) (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (*en banc*) (Friendly, J., concurring)). Indeed, settlements merely "shif[t] money from one shareholder pocket to another at enormous expense." Pritchard, *Stoneridge Investment Partners* v. *Scientific-Atlanta*: The Political Economy of Securities Class Action Reform, 2008 Cato S. Ct. Rev. 217, 255 (2008).

"[T]he costs of securities class actions—both the settlement payments and the litigation expenses of both sides—fall largely on the defendant corporation," which means that "its shareholders ultimately bear these costs indirectly and often inequitably." Coffee, *supra*, at 1536. Diversified investors, the bulk of any class, cannot win; they are both "plaintiffs and defendants," members of "both classes, having bought stock at different times." *Id.* at 1556. Given transaction costs and the likelihood of retaining more shares than were sold during a class window, "most of the plaintiff class will lose more as holders than they gain as buyers." Booth, Class Conflict in Securities Fraud Litigation, 14 U. Pa. J. Bus. L. 701, 701 (2012); see *id.* at 716.

Settlements are even worse for smaller *undiversified* shareholders. They are more likely to "be * * * 'buy and hold' investor[s]," meaning that they more frequently "purchased their stock before the class period commenced," Coffee, *supra*, at 1559-1560, and therefore share the costs of the litigation, but no benefits. The only "clear winner[s]" from *Basic*'s settlement system fit "the profile of the contemporary hedge fund"—not quite the earnest investors *Basic* had in mind. *Id.* at 1560.

Except for those few, "the cost of class actions—in at-

torney fees and other expenses—constitutes a deadweight loss," simply "rearrang[ing]" shareholders' own money, "minus a cut for the lawyers." Booth, *supra*, at 706. And that is a prime, juicy "cut." Plaintiffs' attorney fees amount to somewhere between 23% and 32% of aggregated settlement amounts; defense fees, generally paid regardless of outcome, rival that amount overall. *Id.* at 703 n.1; Coffee, *supra*, at 1546-1547.

Securities class actions would still poorly compensate investors even without these structural impediments. "From 1996 to 2010, median settlements returned only 2.8%" of alleged plaintiff losses. Bratton & Wachter, *supra*, at 77. In 2012, that number was even lower—1.8%. Ryan & Simmons, Securities Class Action Settlements: 2012 Review & Analysis 8 (2012).[11] And that is *before* the huge transaction costs—attorneys' fees, litigation expenses, D&O insurance, "and the possible costs of disruption, stigma, and adverse publicity." Coffee, *supra*, at 1545-1546.

Thus, it is a decided understatement to observe that "[t]here are serious questions about whether fraud-on-the-market lawsuits generate more costs than benefits for investors and/or our capital markets, much more so than in 1988 when *Basic* was decided." Langevoort, Judgment Day for Fraud-on-the-Market? Reflections on *Amgen* and the Second Coming of *Halliburton*, Georgetown Public Law and Legal Theory Research Paper No. 13-058, at 21 (Nov. 16, 2013).[12]

c. Securities class actions do not deter culpable parties

Any "deterrent effect" from securities class litigation

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[11] http://securities.stanford.edu/Settlements/REVIEW_1995-2012/Settlements_Through_12_2012.pdf.

[12] http://ssrn.com/abstract=2281910.

"is significantly muted" because, "rather than the corporation's culpable agents," it is "the corporation and its insurance company [that] make the [settlement] payments * * * ." Bratton & Wachter, *supra*, at 77. "To punish the corporation and its shareholders * * * is much like seeking to deter burglary by imposing penalties on the victim for having suffered a burglary." Coffee, *supra*, at 1537.

Culpable individuals pay less than one-half of 1% of class-action settlements, while insurers pay about 68%, and companies pay 31%. *Id.* at 1550. Since even that minuscule amount of individual payment is typically indemnified by the company, it is extremely rare for executives or directors to personally pay *anything* from their own assets. *Id.* at 1567-1568; Grundfest, Damages and Reliance, *supra*, at 59.

This state of affairs—where the innocent pay and the guilty do not—*undermines* deterrence, because "securities fraud appears to be primarily motivated by the manager's own personal interests * * * ." Coffee, *supra*, at 1562. When "insiders who are most culpable can apparently escape personal liability in securities class actions, then the deterrent rationale * * * seems largely undercut." *Id.* at 1553. Injecting the fraud-on-the-market theory into securities litigation does "[s]o little" to achieve deterrence that, "it seems, * * * the system has begun to evolve around [fraud-on-the-market]," rather than the other way around. Bratton & Wachter, *supra*, at 115.

d. **Securities class actions consume excessive judicial resources**

Making matters worse, fraud-on-the-market class actions are gluttonous consumers of judicial resources. It is a "myth" that "securities class actions are simply one of many varieties of class action * * * ." Coffee, *supra*, at 1539. "[S]ecurities class actions disproportionately claim

judicial time and attention" because "they take longer to resolve" and "require the court to play a more active monitoring role" than other class actions. *Id.* at 1540; see Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 820 (2010) (comparing settlement times). Indeed, 60-70% of securities-fraud cases *that settle* take more than three years to resolve (and 20% take more than five years). Ryan & Simmons, *supra*, at 6. The present case pended for more than five years before the Fund even filed its motion for class certification and generated more than 400 docket entries before the first class-certification appeal. Fraud-on-the-market class actions are truly "the 800-pound gorilla that dominates and overshadows other forms of class actions." Coffee, *supra*, at 1539.

2. *Overruling or modifying* Basic *would facilitate the securities laws' objectives*

Basic's presumption of reliance is not essential for Section 10(b) private actions, much less for vindicating the securities laws more generally. Justice White's dissent fiercely opposed the presumption, but "[did] not propose that the law retreat from * * * § 10(b) and Rule 10b-5, as interpreted in our prior cases * * *." 485 U.S. at 256. Beyond private litigation, many other mechanisms achieve the goals of Section 10(b). Overruling or modifying *Basic* would advance those goals without any meaningful downside—and considerable upside, because it would mitigate the deficiencies described above.

a. **Public enforcement provides superior deterrence and compensation**

Public enforcement is now the most potent mechanism for achieving the goals of the securities laws, marking a considerable change from *Basic*'s day. In 1988, the SEC's budget was $135.2 million; by 2013, it had reached $1.26 billion—a five-fold increase in inflation-adjusted

dollars. See 1988 SEC Annual Report 186;[13] U.S. SEC, Fiscal Year 2013 Agency Financial Report 38.[14] "[P]ublic antifraud enforcement has become a growth industry," Bratton & Wachter, *supra*, at 115-116, and "disgorgement and penalties" now "dwarf those imposed by financial regulators in other jurisdictions," such as the United Kingdom. Rose, Reforming Securities Litigation Reform, 108 Colum. L. Rev. 1301, 1346 (2008). With "over $10 billion in disgorgement and penalties" collected from 2002-2007 alone, SEC "enforcement power" is decidedly "not toothless." *Stoneridge*, 552 U.S. at 166.

The SEC can target securities fraud unconstrained by the requirements of private litigation. "[R]eliance, damages, and loss causation are not required elements." *SEC* v. *Goble*, 682 F.3d 934, 943 (11th Cir. 2012). "Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1222 (2013). Unlike private actions, which generate only compensatory damages (mostly through settlements), SEC enforcement "permit[s] a panoply of remedies, enabling [it] to perform its deterrent function in a finely calibrated manner." Rose, *supra*, at 1310-1311. The SEC can obtain injunctive relief and bar individuals from being officers or directors of publicly traded companies. 15 U.S.C. §§ 78u, 78u-3. While class actions typically do not affect culpable individuals, "93.4% of managers identified as culpable by government enforcers lose their jobs." Bratton & Wachter, *supra*, at 112 (citing Karpoff et al., The Consequences to Managers for Financial Misrepresentation, 88 J. Fin. Econ. 193, 201 (2008) (table 3)).

The Government also prosecutes securities fraud *as a*

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[13] http://www.sec.gov/about/annual_report/1988.pdf.

[14] http://www.sec.gov/about/secpar/secafr2013.pdf.

crime. See, *e.g.*, 15 U.S.C. § 78ff. "Criminal enforcement of the securities laws, once rare, is now institutionalized," with "almost 1300 convictions (including those of 200 CEOs)," just from 2002 to 2008. Bratton & Wachter, *supra*, at 115-116. It is commonly agreed that "criminal penalties are a strong deterrent." *Stoneridge*, 552 U.S. at 166.

Critically, SEC enforcement also can now "act as a substitute" for the compensatory role of private litigation. Grundfest, *supra*, at 40. The SEC can use penalties or disgorged funds to compensate defrauded private investors. See 15 U.S.C. § 7246 ("Fair Funds for Investors"); Rose, *supra*, at 1350. Under this Sarbanes-Oxley provision, "$2.1 billion flowed out in 2009 alone." Bratton & Wachter, *supra*, at 161-162. See also *Stoneridge*, 552 U.S. at 166.

By directing a public-enforcement surge even as it has constrained private securities litigation, Congress has demonstrated a "preference for public enforcement of the securities laws over private enforcement through Section 10(b) litigation or other means." Grundfest, *supra*, at 38; see *id.* at 38-40 (describing statutory changes that uniformly prioritize public enforcement while constraining or ignoring private Section 10(b) litigation).

b. **An artificially low bar for class certification is unwarranted for private Section 10(b) litigation**

Basic adopted the presumption of reliance because it viewed the presumption as necessary for most class actions. See 485 U.S. at 242. But nothing supports the implicit premise that class actions are essential to vindicating federal securities claims. Just last Term, the Court held as much in the antitrust context. Plaintiffs sought to disregard their arbitration agreements' class waiver because the minimum costs of proceeding individually

dwarfed the maximum potential individual recovery. But the Court reasoned that "[t]he Sherman and Clayton Acts"—like the '34 Act—antedate Rule 23 and "make no mention of class actions." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). The antitrust laws simply "do not guarantee an affordable procedural path to the vindication of every claim." *Ibid.* Thus, "the individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.* at 2311. For the same reasons, *Basic* erred in diluting Rule 23 and the reliance element to enable Section 10(b) class actions.

Eliminating or modifying the presumption of reliance will, in any event, not preclude private litigation. "[S]ophisticated investors" will be able to "demonstrate * * * that they reviewed documents containing the alleged misrepresentations or omissions," and can "demonstrate actual reliance" in individual actions. Grundfest, *supra*, at 66. Indeed, institutional investors—such as pension funds representing the interests of many small stakeholders—are already opting out of class actions in "increasing numbers" "to pursue individual claims and settlements." *Id.* at 67 (citing Vinik et al., Why Institutional Investors Are Opting Out of Class-Action Litigation, Pensions & Investments (July 25, 2011)[15]).

Aside from Section 10(b), "[c]lass action litigation asserting violations of Sections 11 and 12 of the Securities Act, and Section 14 of the Exchange Act," among others that do not require actual reliance, "would continue unaffected." Grundfest, *supra*, at 66 (noting that "the largest recoveries in class action securities fraud history arise from Section 11 claims").

Thus, even if "*meritorious* private actions to enforce

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[15] http://www.pionline.com/article/20110725/PRINT/307259985.

federal antifraud securities laws" remain an "essential supplement to criminal prosecution and civil enforcement actions," *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (emphasis added), it does not follow that easily certified 10b-5 *class* actions of doubtful merit are "essential" to that goal, or even further it at all.

III. *BASIC* PERMITS DEFENDANTS TO REBUT THE PRESUMPTION AT CLASS CERTIFICATION BY SHOWING THE ABSENCE OF PRICE IMPACT

Even if this Court declines to overrule or modify *Basic*, the court of appeals erred by prohibiting Halliburton from rebutting the presumption of reliance at the certification stage with evidence that the alleged misrepresentations did not affect the market price. *Basic* itself could hardly be clearer: defendants may "rebut the presumption" by "show[ing] that the misrepresentation in fact did not lead to a distortion of price." 485 U.S. at 248. By precluding this rebuttal at the class-certification stage, the court disregarded *Basic* and failed to grasp that the absence of price impact causes individual issues of reliance to predominate. Nothing in *Basic* or *Amgen* allows plaintiffs to invoke a *rebuttable presumption* to obtain certification, while prohibiting rebuttal of the presumption's "fundamental premise," *EPJ Fund*, 131 S. Ct. at 2186, at that stage.

A. *Amgen* supports consideration of price-impact rebuttal at the class-certification stage

The court of appeals misread *Amgen*'s rationale as foreclosing Halliburton from making a price-impact rebuttal at class certification. In fact, *Amgen* dictates the opposite.

1. *Amgen* holds that, to invoke the presumption at certification, plaintiffs need not establish (and thus defendants may not rebut) the "materiality" of alleged mis-

representations.[16] 133 S. Ct. at 1199. Materiality is at that stage altogether irrelevant, because "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating." *Id.* at 1196; *id.* at 1203-1204. This is so "[b]ecause materiality is an essential element of a Rule 10b-5 claim," and "the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196. A case involving immaterial misrepresentations fails "as a matter of law" regardless of whether the plaintiff seeks to prove actual or presumed reliance. *Id.* at 1199. The Court emphasized *four more times* that materiality is irrelevant to class certification because materiality is an "element" of a Rule 10b-5 claim. *Id.* at 1191, 1196, 1197, 1199.

The Court contrasted materiality with other fraud-on-the-market predicates that *must* be addressed at class certification: "that the alleged misrepresentations were publicly known" and "that the stock traded in an efficient market." *Id.* at 1198. "[U]nlike materiality, market efficiency and publicity are *not indispensable elements of a Rule 10b-5 claim.*" *Id.* at 1199 (emphasis added). "[W]here the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption," but individual plaintiffs could attempt to establish actual reliance without resort to the

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[16] Materiality is distinct from price impact. A misrepresentation is material "when there is a substantial likelihood that the disclosure * * * would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. at 1309, 1318 (2011) (quotation omitted). Price impact says nothing about the content of the misstatement; it "simply refers to the effect of a misrepresentation on a stock price." *EPJ Fund*, 131 S. Ct. at 2187.

presumption. *Ibid.* "Individualized reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action." *Ibid.* (citation omitted).

2. The Fifth Circuit erred by treating price impact as more analogous for Rule 23 purposes to materiality than to publicity and market efficiency. Like publicity and market efficiency, price impact is "not [an] indispensable elemen[t] of a Rule 10b-5 claim." *Amgen*, 133 S. Ct. at 1199. And as with publicity and market efficiency, the absence of price impact would mean that "a plaintiff cannot invoke the fraud-on-the-market presumption." *Ibid.*; see *Basic*, 485 U.S. at 248. Precisely because plaintiffs in that instance would have to show reliance on an individual basis, price-impact rebuttal must be entertained at the class-certification stage. See *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484-485 (2d Cir. 2008) (allowing price-impact rebuttal "prior to class certification" because "successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement"); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011) (same).[17]

The root of the Fifth Circuit's error was its misapprehension that a successful price-impact rebuttal would automatically defeat the loss-causation element. Pet. App. 17a-18a. But price impact is essential to loss causation only in *fraud-on-the-market* cases where the plaintiff necessarily looks to an exchange-traded price to establish reliance and loss causation. Yet even in that context, price impact is indistinguishable from publicity: if alleged

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[17] *Amgen* disapproved of the Second and Third Circuits' holdings that "materiality" may be considered at class certification, 133 S. Ct. at 1194, but did not address their independent holdings that a defendant may defeat class certification by showing the absence of price impact.

misrepresentations are nonpublic, by definition those misrepresentations could not affect market price and loss causation could not be established. See *EPJ Fund*, 131 S. Ct. at 2185 (questioning "how," if misrepresentations are not "publicly known," "would the market take them into account?"). Consequently, the fact that price impact is necessary to proving loss causation in a *fraud-on-the-market case* offers no logical basis for excluding such evidence at class certification.

Equally telling, in explaining why publicity may be considered at certification, the Court declared that in a *non-fraud-on-the-market case*, an individual plaintiff "can * * * attempt to establish reliance through the traditional mode of demonstrating that she was personally aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Amgen*, 133 S. Ct. at 1199 (quotation omitted). That is no less true where the defendant directly shows that the misrepresentations did not distort the market price; plaintiffs can still establish personal reliance and loss causation in non-fraud-on-the-market cases where misstatements were nonpublic or otherwise did not affect an exchange-traded price. See, *e.g.*, *EP Medsystems, Inc.* v. *EchoCath, Inc.*, 235 F.3d 865, 871 (3d Cir. 2000) (plaintiff sufficiently alleged a 10b-5 claim against a publicly traded company even though the plaintiff "d[id] not base its claim on public misrepresentations or omissions that affected the price of the stock"); *Livid Holdings Ltd.* v. *Salomon Smith Barney, Inc.*, 416 F.3d 940, 949 & n.2 (9th Cir. 2005) (purchaser in "private sale" adequately pleaded loss causation without reference to exchange-listed price); *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 425-426 (3d Cir. 2007) (distinguishing, in case involving private purchase of public company's stock, methods of proving loss causation in "typical" and "non-typical" cases).

Therefore, the absence of price impact does *not* mean "as a matter of law" that "no claim would remain in which individual reliance issues could potentially predominate." *Amgen*, 133 S. Ct. at 1196, 1199. Indeed, because a price-impact rebuttal would require each plaintiff to individually prove reliance—and because it does not defeat loss causation as a matter of law—individual questions would overwhelm common ones. Thus, price impact, just like publicity, is a proper subject for the certification stage.

B. Price impact itself, not just its "predicates," must be rebuttable at class certification

Amgen requires consideration of publicity and market efficiency at class certification solely because such evidence bears upon whether misrepresentations distorted the market price. Consequently, there is no conceivable reason to prohibit defendants from *directly* establishing the absence of price impact at class certification.

1. The "fundamental premise" of *Basic*'s presumption posits "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Information that "does not affect market price * * * cannot be relied upon indirectly by investors." *Amgen*, 133 S. Ct. at 1195. For that reason, *Basic* guaranteed defendants the right to rebut the presumption by controverting "proof of the elements giving rise to the presumption, *or* show[ing] that the misrepresentation in fact did not lead to a distortion of price." 485 U.S. at 248 (emphasis added). *Amgen* clarified that defendants may rebut the presumption at the class-certification stage by controverting market efficiency and publicity because "[u]nless those predicates are established, there is no basis for presuming that the de-

fendant's alleged misrepresentations were reflected in the security's market price."[18] 133 S. Ct. at 1199.

Thus, all rebuttal allowed by *Basic* is either direct or indirect price-impact rebuttal. It would make no sense to allow defendants at the certification stage to indirectly rebut price impact by rebutting the presumption's publicity and market-efficiency "predicates" while prohibiting defendants from directly contraverting price impact. Both modes of defeating price impact must rise or fall together.

Instead of recognizing that market efficiency, publicity, and materiality are mere "predicates" for price impact, the court of appeals believed it had to determine which particular predicate Halliburton's price-impact evidence was intended to rebut, and from that divine whether the evidence was permissible at class certification. Pet. App. 13a-15a & n.7, 18a-19a n.10. That gets it exactly backwards. A direct price-impact rebuttal is always relevant at class certification because it erases any possibility that there could be classwide reliance via reliance on a distorted market price.

2. Limiting defendants to indirect price-impact rebuttal would render *Basic*'s rebuttal right useless in the very cases where it is most essential—where the presence of the presumption's predicates demonstrates that (under existing precedent) "it is reasonable to presume [price impact]," *Amgen*, 133 S. Ct. at 1192, and yet price impact is in fact lacking. Modern economic analysis teaches that even well-developed markets are frequently irrational or inefficient in incorporating certain types of public statements. See *supra* Part I.B.1. In this very case, the Fund established the predicates of the pre-

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[18] Materiality is likewise a predicate of the presumption, but it is irrelevant at class certification because it is also an element of a 10b-5 claim. See *supra* Part III.A.1.

sumption, but the price-impact evidence failed to "raise an inference that the price was actually affected by [the] alleged misrepresentations." Pet. App. 37a, 42a-53a. Yet the court of appeals refused to consider "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11. Permitting defendants to directly rebut price impact avoids such absurd results, prevents erroneous certifications, and follows ineluctably from allowing consideration of publicity and market efficiency.

Indeed, the need for certification-stage rebuttal is more acute for price impact than for market efficiency or publicity. Although price impact is "*Basic*'s fundamental premise," *EPJ Fund*, 131 S. Ct. at 2186, it is not currently a "predicate" of *Basic*'s presumption. Thus, plaintiffs need not prove it to invoke the presumption in the first instance; rebuttal is therefore the *only* way to challenge it. Without certification-stage price-impact rebuttal, plaintiffs can invoke the presumption even when its fundamental premise is glaringly absent. Demanding that mere predicates of the presumption be present and yet dispensing with its fundamental price-impact premise is worse than illogical; it is incoherent.

3. Allowing price-impact rebuttal is consistent with the relevant federal rules and the policy considerations that govern 10b-5 claims. *Basic* invoked Federal Rule of Evidence 301 when it recognized the utility of its presumption "for allocating the burdens of proof between parties." 485 U.S. at 245. Rule 301 provides that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301. Thus, despite the presumption of price impact that arises when plaintiffs establish the fraud-on-the-market predicates, defendants must have the opportunity to "produc[e] evidence to rebut the presumption"

and plaintiffs always retain the ultimate burden of persuasion on the price-impact issue. *Ibid.*

By depriving defendants of the opportunity to directly rebut the presumption's fundamental premise at the certification stage, the court of appeals relieved plaintiffs of their burden to prove the efficacy of the presumption and, ultimately, of their Rule 23 burden to show that common issues predominate. The denial of direct price-impact rebuttal at the certification stage betrays Rule 301's promise to defendants of the *rebuttal* opportunity enshrined in *Basic*, and it defies Rule 23's bedrock mandates.[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[19] Certifying sprawling classes based on an embattled presumption of price impact, without testing whether that presumption is in fact justified, also contravenes the notions of "fairness, public policy, * * * probability, [and] judicial economy," on which *Basic* itself relied. 485 U.S. at 245. On the other hand, by allowing price-impact rebuttal prior to class certification, "[t]he law guards against a flood of frivolous or vexatious lawsuits." *Salomon*, 544 F.3d at 484.

Respectfully submitted.

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STATUTORY APPENDIX

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TABLE OF CONTENTS

	Page
Section 10(b) of the Securities Exchange Act, codified at 15 U.S.C. § 78j(b)	1a
Section 18(a) of the Securities Exchange Act, codified at 15 U.S.C. § 78r(a)	2a
SEC Rule 10b-5, codified at 17 C.F.R. § 240.10b-5	3a
Federal Rule of Civil Procedure 23	4a
Federal Rule of Evidence 301	13a

APPENDIX

Section 10(b) of the Securities Exchange Act, codified at 15 U.S.C. § 78j(b)

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

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(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 18(a) of the Securities Exchange Act, codified at 15 U.S.C. § 78r(a)

Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

SEC Rule 10b–5, codified at 17 C.F.R. § 240.10b–5

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rule of Civil Procedure 23

Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantial-

ly impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must deter-

mine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii)the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amend-

ed from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in

the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's

fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Federal Rule of Evidence 301

Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

RESPONDENT'S BRIEF

NO. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR, PETITIONERS,
v.
ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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QUESTIONS PRESENTED

1. Whether this Court should overrule or modify *Basic v. Levinson*, 485 U.S. 224 (1988), a statutory interpretation precedent that Congress has left unchanged for more than a quarter century while enacting major legislation concerning private securities actions and which properly construed the Securities Exchange Act of 1934.

2. Whether evidence of price impact may be considered at class certification to rebut the fraud-on-the-market presumption even though price impact turns on common evidence and absent price impact, all class members' claims will fail.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, the Erica P. John Fund, Inc., formerly known as the Archdiocese of Milwaukee Supporting Fund, Inc., states that it has no parent corporation and no stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 8

I *BASIC* SHOULD NOT BE OVERRULED 8

A. *Basic*'s Common-Sense Rationale and Application 8

B. *Stare Decisis* Strongly Favors Preserving The Fraud-On-The-Market Presumption Recognized In *Basic* 11

1. *Stare Decisis* Applies With Special Force To *Basic*, Which Congress Declined To Disturb. 13

2. Halliburton's Arguments For *Departing* From *Stare Decisis* Are Meritless 18

C. *Basic* Was Correctly Decided 19

D. Overturning *Basic* Would Have Drastic and Untoward Consequences Reaching Far Beyond Private Securities Actions 24

1. Overruling *Basic* Would Mean the Demise of Private Securities Actions And The Deterrent And Compensatory Role They Serve 24

2. Numerous SEC Regulations And The Practice Of Proving Market Effects Through Event Studies Are Based On The Premise That Securities Prices React To Material Information.....27

II. PETITIONER'S ARGUMENTS FOR OVERRULING *BASIC* LACK MERIT..... 29

A. Halliburton's Reliance On Section 18 Is Misguided 29

B. Criticism Of Aspects Of The Efficient Capital Market Hypothesis Does Not Justify Overruling *Basic*.....32

C. *Basic* Is Administrable In Practice 39

D. *Basic* Is Consistent With This Court's Recent Class-Certification Jurisprudence 41

E. Defendants' Assorted Policy Arguments Are Exaggerated And Misleading 43

F. State Courts Do Not Refuse To Follow *Basic* 46

G. The Presumption Recognized in *Basic* is Rebuttable 47

III. THIS COURT SHOULD REJECT HALLIBURTON'S ARGUMENTS FOR SUBSTANTIALLY MODIFYING *BASIC* 49

A. Adjudicating Price Impact At Class Certification Is Contrary to *Amgen* And *Halliburton* Because It Is a Merits Issue, Not Tethered to Rule 23 50

B. Adjudicating Price Impact At Class Certification Is Inappropriate Because It Often Requires Merits Discovery 54

C. To Rebut the Presumption, Halliburton Bears The Burden Of Persuasion To Prove No Price Impact By A Preponderance Of The Evidence 55

IV. CONCLUSION 57

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

Page

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1998 WL 142353 (S.D.N.Y. Mar. 27, 1998).....29

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810 F.2d 336 (2d Cir. 1987).....29, 48

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572 F.3d 221 (5th Cir. 2009).....55

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725 So. 2d 94 (Miss. 1998).....46

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377 F.3d 727 (7th Cir. 2004).....29

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711 F. Supp. 1264 (D.N.J. 1989) 39, 40, 41

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828 F.2d 75 (2d Cir. 1987) 56

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206 P.3d 812 (Col. 2009) 46

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915 F.2d 193 (6th Cir. 1990) 39, 40

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502 U.S. 197 (1991) 11

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265 F.R.D. 157 (S.D.N.Y. 2010) 47

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886 F.2d 1109 (9th Cir. 1989) 47

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708 F. Supp. 2d 110 (D. Mass. 2010) 47

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114 F.3d 1410 (3d Cir. 1997) 48

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2010 WL 3522090 (E.D. Pa. Sept. 3, 2010) 10

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261 F.R.D. 616 (N.D. Ala. 2009) 40

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274 F.R.D. 480 (S.D.N.Y. 2011) 47

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505 F. Supp. 2d 501 (N.D. Ill. 2007) 54

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251 F.R.D. 656 (D. Utah 2008) 40

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267 F.R.D. 536 (N.D. Ill. 2010) 40

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375 F. Supp. 2d 278 (S.D.N.Y. 2005) 51

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432 F.3d 1 (1st Cir. 2005) 10, 40

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236 F.R.D. 431 (D. Minn. 2006) 40

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544 F.3d 474 (2d Cir. 2008) 47

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414 F.3d 187 (1st Cir. 2005) 31

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558 F.3d 1130 (10th Cir. 2009) 54

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634 F. Supp. 2d 352 (S.D.N.Y. 2009) 51

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430 F.3d 503 (1st Cir. 2005) 53

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322 F. Supp. 2d 764 (S.D. Tex. 2003) 48

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377 U.S. 426 (1964) 25

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366 U.S. 213 (1961) 12

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131 S. Ct. 2296 (2011) 45

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552 U.S. 130 (2008) 11

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754 A.2d 1188 (N.J. 2000) 46

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552 U.S. 248 (2008) 11

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551 U.S. 877 (2007) 18, 19

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396 F.3d 161 (2d Cir. 2005) 51

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722 A.2d 5 (Del. 1998) 46

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716 F.3d 229 (1st Cir. 2013) 55

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174 U.S. 639 (1899) 22

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130 S. Ct. 1784 (2010) ..... *passim*

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710 F.3d 1189 (11th Cir. 2013) 48, 55

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396 U.S. 375 (1970) 19, 23

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5 Cal. 4th 1082 (Cal. 1993) 46

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130 S. Ct. 2869 (2010) 30

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508 U.S. 286 (1993) 17, 30

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730 F.3d 1111 (9th Cir. 2013) 55

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226 F.3d 275 (3d Cir. 2000) 48

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555 U.S. 223 (2009) 12

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504 U.S. 298 (1992) 24

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478 U.S. 647 (1986) 25

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3 Maule & S. 67 (1814) 22

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116 F.3d 1441 (11th Cir. 1997) 54

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121 F.2d 818 (3d Cir. 1941) 22

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607 F.2d 545 (2d Cir. 1979) 32

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430 U.S. 462 (1977) 31

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533 U.S. 194 (2001) 12

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618 F.3d 679 (7th Cir. 2010) 33, 34, 52

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472 U.S. 1 (1985) 22

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557 F.3d 736 (7th Cir. 2009) 29

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738 F.3d 14 (2d Cir. 2013) 29

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845 F.2d 1360 (5th Cir. 1998) 48

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[1884] H.L. 9 App. Cas. 187 23

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464 U.S. 417 (1984) 18

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509 U.S. 502 (1993) 56

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522 U.S. 3 (1997) 18

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292 P.3d 525 (Or. 2012) 46

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108 A. 270 (Vt. 1919) 23

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401 F.3d 316 (5th Cir. 2005) 10, 41

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728 F.3d 184 (2d Cir. 2013) 29

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795 F. Supp. 2d 219 (E.D.N.Y. 2011) 29

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132 S. Ct. 1836 (2012) 11

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617 F.3d 612 (2d Cir. 2010) 28

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Section 11, 15 U.S.C. § 77k 29, 45, 48
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Securities Act of 1934 ..... *passim*
Section 9, 15 U.S.C. § 78i 30-32
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Transcript of Oral Argument, Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011) (No. 09-1403) 57

STATEMENT OF THE CASE

Respondent Erica P. John Fund, Inc. (the "EPJ Fund" or "Plaintiff") brought this securities-fraud action against petitioners Halliburton Company and its president and chief executive officer (collectively, "Halliburton" or "Defendants"). The operative fourth amended complaint alleges that the Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and U.S. Securities and Exchange Commission's ("SEC") Rule 10b-5. Plaintiff alleges that Defendants falsified Halliburton's financial results and misled the public about: (1) Halliburton's liability for asbestos claims, including the adequacy of its reserves for pending claims, and its liability for potential claims, including those arising from the operations of Harbison-Walker Refractories Company, a former subsidiary of Dresser Industries ("Dresser"), R4558; (2) its probability of collecting revenue on unapproved claims on fixed-price construction contracts, which Halliburton knew its customers were not likely to pay, R4562-63 (Record ("R.")); and (3) the touted efficiencies of its merger with Dresser, which Halliburton knew would not be realized, R4236.

Plaintiff sought class certification, invoking the fraud-on-the-market presumption recognized by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Halliburton stock is closely watched, as it trades on the New York Stock Exchange ("NYSE"); there are 848 million shares outstanding. But Plaintiff did not merely rely on those facts to show the market's efficiency. Instead, Plaintiff showed that the market for Halliburton's stock efficiently incorporates material information. See J.A. (joint appendix) 149a-152a, 549a n.8.

Specifically, Plaintiff submitted an extensive report by an expert financial economist, presenting an event study demonstrating that Halliburton's stock price generally moved in response to unexpected news. See J.A. 167a-208a, 263a-327a, S.A. (supplemental appendix) 9-453, J.A. 585a-629a. Plaintiff's expert conducted a regression analysis to filter out movements in Halliburton stock that were driven by market-wide and industry-wide developments. The expert identified 31 days on which there was a Halliburton-specific, statistically significant movement in the stock's price. App. 012, 016, 018-19. On about two-thirds of those days, there was significant, unexpected Halliburton-specific news to which the market was reacting. The share price increased with positive news and dropped with negative news. The expert found that the data demonstrated that Halliburton's stock as a general matter reacted promptly to unexpected news. App. 018-022; App. 039-66. She concluded: "In general, large significant changes in Halliburton's stock price are associated with material, new and unexpected information about the Company." App. 019.

Further, with respect to the specific allegations of Plaintiff's complaint, Halliburton's stock dropped a statistically significant amount net of market and industry movements at the time of each of its corrective disclosures. Most significantly, on December 7, 2001, the stock plunged more than 42% when Halliburton announced the last in a series of adverse asbestos verdicts and judgments it disclosed in a single week. J.A. 230, 343-44. Halliburton submitted its own expert report in opposition to class certification. But its expert could not identify any other adverse news that day that would explain the price drop, except a change in Moody's rating of Halliburton, which the expert admitted itself reflected recent information regarding Halliburton's asbestos exposure. Brief in Opposition App. 23a-26a.

The evidence was so plain that Halliburton *conceded* that the market for its stock is efficient. J.A. 753. Halliburton instead argued that the class should not be certified because Plaintiff had failed to establish "loss causation"—*i.e.*, that the alleged fraud had caused Plaintiff's loss. J.A. 348, 399. Applying Fifth Circuit precedent, the district court agreed and denied class certification. Pet. App. 55a.[1] The court of appeals affirmed. Pet. App. 34a.

This Court granted certiorari and reversed, ruling that loss causation is not relevant to certifying a securities-fraud class. *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton")*, 131 S. Ct. 2179, 2183 (2011). The Court reasoned that loss causation does not inform whether the purchasers relied in common on the defendant's misrepresentations. See *id.* at 2185-86.

On remand, the district court granted Plaintiff's motion to certify the class. Pet. App. 26a. The Fifth Circuit

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[1] Based on the limited discovery which was available to Plaintiff at that early stage of the case and which primarily concerned accounting issues, the district court deemed the information Halliburton disclosed in December 2001 to be unexpected bad news, not corrective disclosures. Subsequently, Plaintiff has obtained through discovery evidence that in fact the information was not unexpected. For instance, Halliburton disclosed three adverse judgments (totaling $35.7 million) handed down on December 5, 2001. But those judgments resulted from motions filed by plaintiffs long before (in June 2001) to enforce *binding* settlement agreements. See *infra* Part III.B (explaining that requiring plaintiffs to demonstrate price impact at class certification with limited discovery creates a substantial risk of wrongful denials of certification in meritorious actions).

affirmed, holding that price impact should not be decided as part of the class-certification determination. Pet. App. 2a. The court, relying on both *Halliburton* and this Court's subsequent ruling in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), reasoned that "price impact evidence is common to the class." Pet. App. 16a. Further, "because a showing of negative price impact is required to establish loss causation, plaintiffs who cannot establish price impact cannot establish loss causation." *Ibid.* Thus, if the defendant proved the absence of price impact, either at the time of the fraudulent statement or corrective disclosure, all the plaintiffs' claims would fail, and individual questions could not predominate. *Id.* at 11a, 18a.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

In *Basic*, this Court recognized the "fraud-on-the-market" presumption in private suits under Section 10(b) of the Exchange Act and the SEC's Rule 10b-5. *Basic* is now well-settled. This Court has repeatedly cited its holding favorably, including just three years ago in a unanimous opinion in this very case. *Halliburton*, 131 S. Ct. at 2185. For decades, the SEC has consistently supported private securities actions employing the *Basic* framework as an essential supplement to federal securities enforcement efforts. Individuals and institutions have relied on the deterrent effect of the legal regime for private securities actions—of which *Basic* is a central component—in investing in U.S. markets. Without *Basic*, securities-fraud class actions and many individual fraud actions simply could not be brought in 10(b) and 10b-5 cases based on affirmative misrepresentations.

Nonetheless, Halliburton asks this Court to do something it has not done in decades—reverse a settled statutory precedent in a field that Congress has closely superintended without disturbing the Court's prior interpretation. Congress has expressly considered overturning *Basic*, and could have done so at any time over the past quarter century. But it has chosen another route as it repeatedly revised the Exchange Act, leaving in place the ability to bring such suits under the *Basic* framework but imposing rigorous standards on, for example, pleading securities-fraud actions and the appointment of lead counsel. Indeed, as this Court recently recognized, in enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress considered overruling *Basic* but ultimately "rejected calls to undo the fraud-on-the-market presumption." *Amgen*, 133 S. Ct. at 1201.

Not only is the question of whether to overrule *Basic* the prerogative of Congress under well-established principles of *stare decisis*, but *Basic* was correctly decided. This Court's holding faithfully tracks the Securities Act of 1933 ("1933 Act") and the Exchange Act and closely parallels two other opinions of this Court construing reliance requirements under the Exchange Act. *Basic* also gives effect to Congress's intent in adopting the Exchange Act and is consistent with the common-law treatment of fraud disseminated into a public market.

Halliburton argues that certain academic economists have discredited the efficient capital market hypothesis ("ECMH") and especially proponents' claims that markets incorporate material information to reach a "correct" valuation for securities. But as *Basic* itself makes clear, the long-standing economic debate over the ECMH is irrelevant

to the Court's holding. *Basic* is built upon the obvious fact recognized in the history of the Exchange Act—which even critics of the ECMH almost uniformly accept—that stock prices generally react reasonably promptly to material, public information by incorporating that information into the stock price. In turn, investors typically rely in common on the stock price as reflecting the available material information about the stock. *Basic* accounts for the fact that not all markets are efficient by requiring plaintiffs to submit proof sufficient to trigger the presumption and by permitting defendants to rebut it.

Halliburton's remaining arguments for overruling *Basic* both highlight that Congress is the correct forum to resolve them and dramatically understate the significant burdens that securities-fraud plaintiffs bear in securing class certification. Indeed, Halliburton's policy arguments were generally aired in the congressional hearings on the PSLRA. Contrary to Halliburton's submission that the *Basic* presumption arises automatically and cannot as a practical matter be defeated, district courts regularly require plaintiffs to demonstrate the existence of an efficient market, and in many cases have found that proof wanting and denied class certification. Halliburton's parade of horribles is an exaggerated, one-sided account because private securities class actions in fact play an essential role in deterring securities fraud and compensating defrauded investors when deterrence fails.

If this Court were to embrace Halliburton's criticism of the ECMH to overturn *Basic* on the ground that markets are "fundamental[ly] inefficient[]" (Pet. Br. 16 (quoting heading)), it would call into question an array of settled securities law principles. Several SEC regulations rest squarely on the principle that issuers need only disclose

information to the market, which will incorporate that information into the price as a matter of course. If this Court overturns *Basic*, the SEC might have to adopt substantially more onerous disclosure or substantive requirements. Further, in pursuing criminal and civil violations of federal securities laws, the Department of Justice and the SEC regularly rely on the assumption that information is generally incorporated into the market price of stocks, including through the use of "event studies" that parallel those used in private suits under *Basic*. Defendants likewise rely on event studies to defend against some securities-fraud claims.

As a fallback, Halliburton argues that this Court should modify *Basic* by requiring plaintiffs to demonstrate at the class-certification stage that defendant's fraud had an impact on the stock price in order to trigger the presumption. That attempt to insert a merits inquiry into the class-certification process cannot be reconciled with Rule 23 or this Court's indistinguishable decisions in *Halliburton* and *Amgen*. As the Fifth Circuit correctly recognized, the existence of "price impact" does not inform whether common questions predominate over individual ones. Instead, absent price impact, all the plaintiffs' claims fail together.

Halliburton further argues that the Court should permit defendants to rebut the presumption at class certification through evidence of a lack of price impact. Not only is that approach inconsistent with *Basic*, which indicated such rebuttal was a matter for trial, 485 U.S. at 249 n.29, it is also conflicts with Rule 23 and this Court's opinion in *Amgen*, because a successful rebuttal would not cause individual questions to predominate; rather, it would defeat the claims of all class members.

Finally, to the extent a defendant seeks an earlier ruling on price impact, it is free to move for summary judgment on that issue.

ARGUMENT

I. *BASIC* SHOULD NOT BE OVERRULED

A. *Basic*'s Common-Sense Rationale and Application

In *Basic*, this Court—agreeing with the SEC's *amicus curiae* brief and "nearly every court" that considered the question—adopted a rebuttable fraud-on-the-market presumption. 485 U.S. at 241-50 & n.25. The Court explained that in modern security markets with millions of shares changing hands daily, "the market is interposed between seller and buyer and ideally transmits information to the investor in the processed form of a market price." *Id.* at 244. The Court noted that the presumption recognizes that, in well-developed markets, material public information is generally reflected in the market price of a security and that investors generally rely in common on the integrity of this market price in making investment decisions. *Id.* at 245-47. The presumption of reliance is thus "consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act," because "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets * * * ." *Id.* at 245-46.

In markets to which the presumption applies, material statements typically affect the price of a stock through the conduct of analysts who report on significant public

statements and market professionals and others who trade on that information. Ordinary investors generally rely on the integrity of the market price, rather than studying the myriad disclosures of publicly-traded companies. When the stock price is inflated or kept from declining in value by a material misrepresentation, all purchasers are effectively relying in common on that misrepresentation. Under such circumstances, there is no fraud-free price at which anyone can buy the stock. The presumption thus rests not on economic theory, see *id.* at 246 n.24 ("[w]e need not determine by adjudication what economists and social scientists have debated"), but rather on "common sense and probability"—namely, that "*most* publicly available information is reflected in [the] market price," and therefore "market professionals *generally* consider most publicly announced material statements about companies." *Id.* at 246 & n.24, 247.[2]

The *Basic* presumption does not arise from the mere fact that a security is publicly traded. Plaintiffs must first establish that the market for the security at issue is "open and developed" or "well-developed," that the defendant made public misrepresentations, and that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed in order to give rise to the presumption. *Id.* at 241, 244, 246-48 & nn.27 & 29. Establishing these predicates demonstrates that reliance for all class members will rise or fall together, and that common questions will predominate over individual ones. See *Amgen*, 133 S. Ct. at 1192-93, 1198. If the plaintiffs fail to carry their burden on any of the three prerequisites

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[2] Unless otherwise indicated, all internal quotations and citations are omitted and all emphasis added.

(efficiency, publicity, or timing), the presumption does not attach.

To invoke this fraud-on-the-market presumption, plaintiffs, whether pursuing claims individually or as a class, must establish, not simply allege, that all three prerequisites have been met, especially that a market is well-developed, and district courts must weigh all competing evidence. *E.g.*, *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5-6 (1st Cir. 2005). In determining whether the market is in fact well-developed because the stock price responds to material news, courts typically look to so-called "event studies," which even Halliburton acknowledged are "a reliable and court-endorsed method to isolate the effects of particular statements on a company's stock price." USCA5 7466. For over thirty years, courts have relied on event studies, which use widely-accepted statistical methods to isolate the impact of company-specific information on prices. See, *e.g.*, *In re DVI, Inc. Sec. Litig.*, 2010 WL 3522090, at *13 (E.D. Pa. Sept. 3, 2010) (event study is "accepted method" of analysis for market efficiency), aff'd 639 F.3d 623 (3d Cir. 2011). Academics have also embraced event studies. See, *e.g.*, Bhagat & Romano, Event Studies and the Law: Part I: Technique and Corporate Litigation, 4 Am. L. & Econ. Rev. 141, 142 (2002) ("Event study methodology is well accepted and extensively used.").

Courts have frequently found that plaintiffs have failed to establish the market is efficient and have denied class certification on that basis or remanded for a more rigorous examination. See, *e.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008); *Unger v. Amedisys Inc.*, 401 F.3d 316, 322-25 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004).

Importantly, once the presumption attaches, defendants may rebut it with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248. This Court indicated in *Basic* and reiterated recently that such rebuttal should be considered at summary judgment or trial. *Id.* at 249 n.29; *Amgen*, 133 S. Ct. at 1203-04. The case law shows the presumption is genuinely rebuttable. See *infra* Part II.G.

B. *Stare Decisis* Strongly Favors Preserving The Fraud-On-The-Market Presumption Recognized In *Basic*

Time and again, this Court has affirmed that "*stare decisis* in respect to statutory interpretation has special force," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), for in cases involving statutory interpretation, "the legislative power is implicated, and Congress remains free to alter what we have done." *Hilton v. South Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); see also *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 260 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) ("principles of *stare decisis* have their greatest effect" in "matters of statutory interpretation"). On numerous occasions, this Court has treated its prior construction of a statute as absolutely settling the statute's meaning. See, *e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1375 n.2 (2013) (Ginsburg, J., dissenting) (joined by Kennedy, J. and Scalia, J.).

Principles of *stare decisis* apply with full force to *Basic*, a twenty-five-year-old precedent that this Court has cited favorably five times within the last ten years (including in this very case three years ago). See *Amgen*, 133 S. Ct. at 1192; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011); *Halliburton*, 131 S. Ct. at 2185; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 US 148, 159 (2008); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Congress has not disturbed *Basic* despite twice engaging in a comprehensive reappraisal of the law governing private securities actions. Halliburton thus asks this Court to reverse a statutory precedent in an area where Congress has repeatedly passed significant legislation without disturbing the Court's prior construction. The Court has not done so in over fifty years, since at least *James v. United States*, 366 U.S. 213 (1961) (overruling its previous statutory interpretation of "gross income" in *Comm'r of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946)); see *id.* at 230-32 (Black, J., concurring in part and dissenting in part).[3] *Basic* is a quintessential statutory interpretation case that this Court should not overrule.

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[3] *Pearson v. Callahan*, 555 U.S. 223, 233-43 (2009), in which the Court modified its prior opinion in *Saucier v. Katz*, 533 U.S. 194 (2001) regarding qualified immunity claims, is not to the contrary. While the Court's understanding of qualified immunity indirectly "affected Section 1983 [litigation]," (Pet. Br. 30), a qualified immunity defense arises from the common law and the Constitution, not Section 1983.

1. *Stare Decisis* Applies With Special Force To *Basic*, Which Congress Declined To Disturb.

Halliburton's claim that "Congress has not addressed *Basic*'s presumption" is wrong. (Pet. Br. 34). In enacting the PSLRA, Congress considered many of the very arguments that Halliburton and its *amici* advance here. Congress specifically considered overruling *Basic*, but "rejected" calls to do so. *Amgen*, 133 S. Ct. at 1201. Despite taking substantial "steps to curb abusive securities-fraud lawsuits [in the PSLRA], Congress rejected calls to undo the fraud-on-the-market presumption of class-wide reliance endorsed in *Basic*." *Ibid.*

Congress thus had before it—but did not adopt—a specific proposal to overturn *Basic*. The initial version of the House of Representatives bill that culminated in the PSLRA "would have required actual reliance on a fraudulent misstatement or omission, a requirement which would have effectively eliminated cases brought under a fraud on the market theory of liability." H.R. Rep. No. 104-50, at 44 (1995); see Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong. (1995). As this Court recognized in *Amgen*, the bill "would have undone *Basic*," and was supported by testimony before Congress criticizing the fraud-on-the-market presumption. 133 S. Ct. at 1201 (quoting Langevoort, *Basic* at Twenty, Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 153 & n.8). The provision was defeated in substantial part because of staunch opposition from the SEC, which favored retention of the presumption to allow private parties to continue supplementing the SEC's limited enforcement resources. H.R. Rep. No. 104-50, at 44 ("The Commission[ ] appreciates the Committee's recognition of the need to

preserve this important concept [fraud on the market]."). This history shows that "Congress has homed in on the precise" issue now raised by Halliburton. *Amgen*, 133 S. Ct. at 1201. Thus, *Basic* "was squarely on Congress' plate," yet Congress chose to retain the fraud-on-the-market presumption. Langevoort, Judgment Day for Fraud-on-the-Market?: Reflections on *Amgen* and the Second Coming of *Halliburton*, Georgetown Public Law and Legal Theory Research Paper No. 13-058, at 21.[4]

Moreover, the PSLRA's entire framework is premised on the existence of the regime of private securities litigation—including the *Basic* presumption—which Halliburton attacks. This Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). But here there is much more. The PSLRA was a direct response "to the flood of securities class actions that *Basic* spawned." Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta:* The Political Economy of Securities Class Action Reform, 2008 Cato. Sup. Ct. Rev. 217, 244 (2007-08). "Indeed, the structure of the PSLRA makes no sense except when read as a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs [to] bring, plead and prove a successful claim * * *." Langevoort, Judgment Day, *supra*, at 6. "Congress chose some very aggressive reforms * * * but all within the framework established by *Basic*, without fundamentally altering the presumption." *Id.* at 21. In short, the "statute was *about* fraud-on-the-market litigation." *Id.* at 6 n.17 (emphasis in original). Referencing

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[4] http://ssrn.com/abstract=2281910 (Nov. 16, 2013). All internet sources are on file with counsel.

the PSLRA, *Stoneridge* explained that "Congress thus ratified the implied right of action," and "[i]t is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action *as then defined* but chose to extend it no further." 552 U.S. at 165-66.[5]

In the PSLRA, Congress thus addressed perceived abuses in private securities-fraud actions by, *inter alia*, establishing procedures for appointment of lead plaintiffs

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[5] An *amicus* brief on behalf of certain members of Congress and others unconvincingly seeks to rewrite the history of the PSLRA. The legislative record demonstrates that Congress was aware of the *Basic* presumption and adopted restrictions on securities-fraud actions that assume the presumption's vitality. The suggestion that a majority of Congress might have voted to repeal or modify *Basic* absent a need for a super-majority to override a threatened presidential veto (see Amicus Br. 22-23), effectively concedes that Congress considered repealing the fraud-on-the-market presumption, but did not do so. In any event, President Clinton had not threatened a veto before the bill was sent to him for signature. See Gordon, Clinton Still Mum on Possible Veto of Securities Fraud Bill, Associated Press, Dec. 6, 1995. And, notably, only one of the legislative-inaction cases cited by *amici* occurred in the *stare decisis* context, where it is unnecessary to show ratification of a judicial decision, just that Congress had the opportunity but chose not to overrule this Court. That case is not on point because there was no indication Congress had its attention directed to the Court's prior decision, "even by any bill that found its way into a committee pigeon-hole." *Helvering v. Hallock*, 309 U.S. 106, 120 (1940).

and lead counsel in class actions, 15 U.S.C. § 78u-4(a)(3); heightening pleading requirements, *id.* § 78u-4(b)(1)-(2); mandating a discovery stay pending resolution of a motion to dismiss, *id.* § 78u-4(b)(3)(B); codifying a loss causation requirement, *id.* § 78u-4(b)(4); creating a safe-harbor for forward-looking statements, *id.* § 78u-5; authorizing sanctions for abusive litigation, *id.* § 78u-4(c); and limiting damages and attorney's fees, *id.* § 78u-4(a)(6) and (e).

Another provision can only fairly be characterized as resting on the validity of the *Basic* presumption. Before the PSLRA, an "investor's damages [were] presumed to be the difference between the price the investor paid for the security and the price of the security on the day the corrective information gets disseminated to the market." H.R. Conf. Rep. No. 104-369, at 42 (1995). Damages thus rested on the premise that material information affects stock prices. Congress did not disturb that principle. But to prevent plaintiffs from achieving a windfall where there was a price overcorrection following the revelation of fraud, Congress limited damages to the purchase price of the security, reduced by its mean trading price for the 90–day period after the corrective disclosure. 15 U.S.C. § 78u-4(e)(1); see H.R. Conf. Rep. No. 104-369, at 42 (provision is a "[l]imitation on 'windfall' damages"); S. Rep. No. 104-98, at 20 & n.58 (1995) (citing Lev & de Villiers, Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis, 47 Stan. L. Rev. 7, 9-11 (1994)). While "[s]ome have read this as undermining the fraud on the market presumption because of this realization of market inefficiency," in fact "it seems to do just the opposite." Langevoort, Judgment Day, *supra*, at 21 n.77. Indeed, it illustrates that Congress specifically considered "[r]ecent theoretical work in financial economics" discussing "fundamental" inefficiencies in the market, Lev & de Villiers, *supra*, at 10—the same type of

work that Halliburton relies on here—yet found no reason to modify *Basic* or even question it.[6]

In the wake of the PSLRA, securities-fraud plaintiffs increasingly filed their actions in state court. Congress responded by modifying the securities laws, again without modifying *Basic*. It enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, to prevent private plaintiffs from proceeding under state law to circumvent the PSLRA requirements. Subsequently, Congress has enacted three more major reforms to the 1934 Act,[7] including extending the time to file private actions, see *Merck*, 559 U.S. at 646-47, all without altering the fraud-on-the-market presumption.[8]

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[6] Contrary to *amici*'s assertion (Former SEC Comm'rs Br. 26-27), *Basic* reserved ruling only on the "proper *measure* of damages in litigation of this kind," not the *requirements* for obtaining damages. 485 U.S. at 248 n.28. Moreover, Congress has since addressed the measurement of damages in the PSLRA without requiring actual reliance.

[7] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[8] Citing *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292 (1993), Halliburton argues that federal courts have accepted "principal responsibility" for 10b-5 claims. (Pet. Br. 32-33). But *Musick* was decided in 1993—two years *before* the major, modern securities-fraud

2. Halliburton's Arguments For Departing From *Stare Decisis* Are Meritless

Halliburton argues that *Basic* is entitled to less deference as a statutory precedent because "the presumption is largely a procedural and evidentiary construct." (Pet. Br. 29). That is inaccurate. As this Court recently recognized, the presumption is in fact "a substantive doctrine of federal securities-fraud law." *Amgen*, 133 S. Ct. at 1193; see also *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174-75 (1993) (*Basic* presumption is a "judicially created presumption[ ] *under [a] federal statute[ ]*"). In interpreting statutory schemes, this Court frequently establishes presumptions to fulfill congressional policy. See, *e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650-51 (1986); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-55 (1981). Those presumptions warrant no less deference than any other form of statutory construction.

Alternatively, Halliburton attempts to draw a parallel between *Basic* and precedents interpreting the Sherman Act, where the force of statutory *stare decisis* is reduced because "Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); (see Pet. Br. 33) (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007)). But in *Stoneridge*, a securities case, this Court expressly rejected that analogy and

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litigation reform bills governing private securities actions under 10(b) and 10b-5 were passed.

the relevance of *Leegin*, explaining "[t]his is not a case in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability." 552 U.S. at 163. *Stoneridge* explained that, unlike in the antitrust field, Congress has been heavily involved in amending the laws governing private securities class actions. See *id.* at 162-66.

C. *Basic* Was Correctly Decided

In *Basic*, this Court properly interpreted federal securities statutes in construing the reliance component of a Section 10(b) claim. *Basic* applied the same methodological approach of this Court's prior decisions in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) interpreting the Exchange Act's reliance requirements. In each case, the Court tailored the required proof of reliance to the role of the particular statutory provision before it. On that basis, the *Basic* Court correctly rejected an actual-reliance requirement for 10b-5 actions.

The Court in *Basic* grounded its decision in the securities laws, particularly the Exchange Act, which Congress enacted "to facilitate an investor's reliance on the integrity of [the securities] markets." *Basic*, 485 U.S. at 246. In enacting those laws in the midst of the Great Depression, "Congress expressly relied on the premise that securities markets are affected by information," notwithstanding the

dramatic, and still-fresh evidence that the market also could be infected by speculation and bubbles. *Ibid.*[9]

As the Court recognized, "[u]nderlying the adoption of extensive disclosure requirements was a legislative philosophy: 'There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.'" *Id.* at 230 (quoting H.R. Rep. No. 73-1383, at 11 (1934)); see *id.* at 246 ("The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price.") (quoting H.R. Rep. No. 73-1383, at 11). The same passage quoted in *Basic* continues: "The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market." H.R. Rep. No. 73-1383, at 11. And the legislative history of the 1933 Act endorsed the fraud-on-the-market doctrine in all but name:

> The statements for which [issuers] are responsible, although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those

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[9] See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (1991) (Kennedy, J., dissenting) ("rules facilitating § 10b litigation 'suppor[t] the congressional policy embodied in the 1934 Act' of combatting all forms of securities fraud") (quoting *Basic*, 485 U.S. at 245).

> manifold causes that are the impelling motive of the particular purchase. The connection between the statements made and the purchase of the security is clear * * *.

H.R. Rep. No. 73-85, at 10 (1933).

Congress also enacted the 1933 and 1934 Acts against the backdrop of widespread acceptance of the fraud-on-the-market principle. For example, then-Professor William O. Douglas, who was deeply involved in drafting the securities laws and later served as SEC Chairman, touted the doctrine. See Douglas, Protecting the Investor, 23 Yale Rev. 522, 524 (1934) ("[E]ven though an investor has neither the time, money, nor intelligence to assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the market price. Through them investors who seek advice will be able to obtain it."). In addition, Adolph Berle, Jr., Columbia Law Professor and member of President Franklin Roosevelt's "brain trust," wrote in 1931:

> Is it necessary that the purchaser knows of the specific false statement? Probably not * * *. The chain of causation between the statement relied upon and price adopted by the investor is slightly longer than in the ordinary case of deceit, but is no less direct. If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market price, he has relied on the

> market situation, which in turn resulted from the false statement.

Berle, Jr., Liability for Stock Market Manipulation, 31 Colum. L. Rev. 264, 269-70 (1931).

Congress was also informed by early judicial decisions embracing the doctrine. In 1899, this Court approvingly quoted an English case stating that manipulation "'strikes at the price of a vendible commodity in the market, and, if it gives it a fictitious price by means of false rumors, it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.'" *McMullen v. Hoffman*, 174 U.S. 639, 649 (1899) (quoting *Rex v. De Beringer*, 3 Maule & S. 67, 72 (1814)). This passage, a clear endorsement of the doctrine, was also quoted in an important market manipulation case decided in November 1933. *United States v. Brown*, 5 F. Supp. 81, 86 (S.D.N.Y. 1933), aff'd 79 F.2d 321 (2d Cir. 1935) (Hand, J.); see *Rosenberg v. Hano*, 121 F.2d 818, 820 & n.9 (3d Cir. 1941) (1934 Act "gave statutory sanction" to *Brown* and other case law). Indeed, "[t]he gist of the decisions at common law seems to be that interference with a free market is actionable." *Goess v. Lucinda Shops, Inc.*, 93 F.2d 449, 453-54 (2d Cir. 1937) (Manton, J., dissenting) (citing cases); cf. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 & n.4 (1985) (interpreting Exchange Act "consistent with" common law and citing *Brown*).[10]

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[10] This accords with early fraud cases, where evidentiary rules precluded parties from testifying; instead, plaintiffs proved reliance circumstantially, typically by showing that action was taken consistent with reliance upon the

Basic also properly considered the structure of the securities laws and related provisions. In endorsing the fraud-on-the-market presumption, *Basic* cited and followed the methodological approach of this Court's earlier decisions in *Affiliated Ute* and *Mills*. 485 U.S. at 243, 245. In *Affiliated Ute*, this Court "dispensed with a requirement of positive proof or reliance" in cases under 10(b)—the statute at issue here—which primarily involve omissions. *Id.* at 243; see *Affiliated Ute*, 406 U.S. at 153-54. The Court relied heavily on, and sought to effectuate, "the congressional philosophy and purpose, so clearly emphasized by the Court," of full disclosure embodied in the Exchange Act. *Affiliated Ute*, 406 U.S. at 151.

Affiliated Ute relied in turn on *Mills*, *id.* at 154, which held that plaintiffs alleging a Section 14(a) claim based on a false proxy statement need not prove reliance *at all*, since such proof would "not be feasible." See 396 U.S. at 381-85 & n.5. The Court held that the required causal connection between falsity and injury was established by showing that the misstatement or omission was material, because materiality demonstrated that it "*might* have been considered important by a reasonable shareholder[.]" *Id.* at 384. In doing so, the Court relied on Section 14(a)'s legislative history and repeatedly sought to "effectuate the congressional policy of ensuring" full disclosure. *Id.* at 381-83, 385. *Basic* faithfully applied these precedents.

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misrepresentation. See, *e.g.*, *Ste. Marie v. Wells*, 108 A. 270, 270-71 (Vt. 1919) (discussing *Smith v. Chadwick*, [1884] H.L. 9 App. Cas. 187, 196 (Lord Blackburn)).

D. Overturning *Basic* Would Have Drastic and Untoward Consequences Reaching Far Beyond Private Securities Actions

Modern enforcement of the securities laws, both by public and private actors, has grown up around *Basic*'s fraud-on-the-market presumption. Adopting Halliburton's position would disrupt broad swaths of the enforcement regime. See *Quill Corp. v. N.D. By and Through Heitkamp*, 504 U.S. 298, 317 (1992) ("adher[ing] to settled precedent" where it had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry").

1. Overruling *Basic* Would Mean the Demise of Private Securities Actions And The Deterrent And Compensatory Role They Serve

Overruling *Basic* would preclude certification in the vast majority of private securities-fraud class actions, as this Court has recognized. See *Amgen*, 133 S. Ct. at 1193; *Wal-Mart*, 131 S. Ct at 2552 n.6; *Halliburton*, 131 S. Ct. 2185; *Basic*, 485 U.S. at 242.[11] In fact, if this Court were to eliminate the fraud-on-the-market presumption, most defrauded investors would be left without any legal recourse from fraud. That is particularly true for individual investors, who simply do not have the time to review financial statements, SEC filings, and the like, and thus could never establish actual reliance even in an individual action.

The legal landscape would be worse for the change. This Court has repeatedly characterized private securities

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[11] In omission cases, plaintiffs could invoke the presumption of reliance recognized in *Affiliated Ute*, 406 U.S. at 153-54.

litigation as an "*essential supplement* to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); see *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964))); see also *Dura*, 544 U.S. at 345; *Lampf*, 501 U.S. at 376 (Kennedy, J., dissenting).

The SEC also recognizes the importance of private actions. See, *e.g.*, Brief of the United States as Amicus Curiae Supporting Respondents, *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010) (No. 08-905), 2009 WL 3439204, at *1; Brief of the SEC, Amicus Curiae, *In re WorldCom, Inc. Sec. Litig.*, No. 03-9350 (2d Cir. Apr. 19, 2004), 2004 WL 1432278.

While there are limits to the deterrent effect of private actions, "[a] stack of empirical studies confirms that [fraud-on-the-market] actions have some deterrent impact." Bratton & Wachter, The Political Economy of Fraud on the Market, 160 U. Pa. L. Rev. 69, 111 (2011). Indeed, one study found that "private plaintiffs' attorneys, if anything, providing greater deterrence against more serious securities law violations compared with the SEC." Choi & Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, Mich. Law & Econ. Research Paper No. 12-202, at 38-39.[12] Concerned about being sued, managers are "motivated to avoid * * * violations in order to avoid the issuer losses involved in paying damages[.]" Fox, Civil Liability and Mandatory Disclosure, 109 Colum. L.

[12] http://ssrn.com/abstract=2109739 (Jan. 20, 2014).

Rev. 237, 281 (2009). This motivation stems from fear of dismissal, see Coffee, Reforming the Securities Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1554 (2006); fear of reputational harm, see Pritchard, Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers, 85 Va. L. Rev. 925, 996 (1999); and fear of personal, financial consequences, see Coffee, *supra*, at 1551-53. When deterrence fails, private actions are the principal vehicle for compensating investors for their losses caused by securities fraud. *Id.* at 1536.

Government enforcement, which Halliburton promotes as a panacea (Pet. Br. 45-47), is only a partial solution. Even with a significant increase in the SEC's budget over the last twenty-five years (*id.* at 45-46), the SEC remains an "overworked, underfunded agency that is subject to severe resource constraints." Coffee, SEC Enforcement: What Has Gone Wrong?, Nat'l L.J., Dec. 3, 2012. Some 85% of settled private cases do not have a parallel SEC action. Cox & Thomas, SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L.J. 737, 777 (2003). Given its limited resources and wide-ranging responsibilities, the government must give priority to the most egregious examples of corporate fraud, especially during times of financial crisis. Coffee, SEC Enforcement. And criminal prosecution is not appropriate where the misconduct, no matter how harmful to investors, does not rise to a criminal level or where there is not sufficient evidence to support prosecution. See Eric Holder, U.S. Att'y Gen., Speech at

Columbia Univ. Law School on Preventing and Combating Fin. Fraud, Feb. 23, 2012.[13]

2. Numerous SEC Regulations And The Practice Of Proving Market Effects Through Event Studies Are Based On The Premise That Securities Prices React To Material Information

Halliburton's argument challenges the very premise of the federal securities laws that "[t]he investing public has a legitimate expectation that the prices of actively traded securities reflect publicly available information about the issuer of such securities." H.R. Rep. No. 100-910, at 8 (1988). Accordingly, a holding in Halliburton's favor would indirectly call into question numerous SEC regulations and policies that are based on the presumption that markets efficiently process information.

For example, "[t]he Commission's system of integrated disclosure [via Form S-3] has, since its inception [in 1982], been premised on the idea that a company's disclosure in its registration statement can be streamlined to the extent that the market has already taken that information into account." Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, 72 Fed. Reg. 73,534, 73,536 (Dec. 27, 2007); see also *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 510 (7th Cir. 1989); Shelf Regulation, 48 Fed. Reg. 52,889, 52,892 (Nov. 23, 1983). The SEC has also enacted numerous regulations premised on the notion that prices react to material

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[13] http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120223.html.

information. See, *e.g.*, Amendments to Regulation SHO, 75 Fed. Reg. 11,232, 11,234 & n.18 (Mar. 10, 2010); Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,719, (Aug. 24, 2000); Self-Regulatory Organizations, Exchange Act Release No. 30,569, 1992 WL 81728, at *3 (Apr. 10, 1992).

Basic's understanding that public, material statements generally affect the price of securities also serves as the basis for event studies, which are regularly used by federal prosecutors, SEC attorneys, and defendants alike in an array of public and private securities enforcement actions. A decision by this Court adopting Halliburton's position that markets are "fundamental[ly] inefficient[]" (Pet. Br. 16 (quoting heading)) or even generally not efficient would raise questions about these practices, and also raise concerns about the reliability of expert testimony based on event studies. See Fed. R. Evid. 702.

For criminal prosecutions, often "the most significant determinant of [a securities-fraud defendant's] sentence is the guidelines loss calculation," *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005), and "[t]he entire theory of market loss is premised on the efficient capital markets hypothesis that securities markets reflect all publicly available information." McCormick, Comment, Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing, 82 Tul. L. Rev. 1145, 1175 (2008); see *United States v. Peppel*, 707 F.3d 627, 646 (6th Cir. 2013). When calculating loss, courts must exclude losses caused by factors unrelated to the fraud. See, *e.g.*, *United States v. Berger*, 587 F.3d 1038, 1045-47 (9th Cir. 2009). The government often uses event studies to perform this calculation, *e.g.*, *United States v. Kumar*, 617 F.3d 612, 631-35 (2d Cir. 2010); as well as to prove materiality, *e.g.*, *United States v. Schiff*, 602

F.3d 152, 171-77 (3d Cir. 2010); calculate restitution, *e.g.*, *United States v. Gushlak*, 728 F.3d 184, 198-203 (2d Cir. 2013); and calculate forfeiture, *e.g.*, *United States v. Hatfield*, 795 F. Supp. 2d 219, 231-36 (E.D.N.Y. 2011).

Likewise, the SEC routinely uses event studies to prove materiality in civil enforcement actions. See, *e.g.*, *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009). And it frequently uses event studies to seek disgorgement of illicit profits. See, *e.g.*, *SEC v. Razmilovic*, 738 F.3d 14, 22-23, 33-35 (2d Cir. 2013).

Even defendants rely on event studies to establish a "negative causation" defense under Sections 11(e) and 12(b) of the Securities Act of 1933. See, *e.g.*, *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 342-43 (2d Cir. 1987). Indeed, negative causation is seldom proven without an event study. See *Adair v. Kaye Kotts Associates, Inc.*, 1998 WL 142353, at *6-7 (S.D.N.Y. Mar. 27, 1998) (Sotomayor, J.). On Halliburton's view, cautionary language and disclaimers upon which defendants rely, see, *e.g.*, 15 U.S.C. § 78u-5(c) (safe-harbor provision), presumably would no longer be reflected in the market price, see *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 732 (7th Cir. 2004), and thus defendants would have to demonstrate that plaintiffs actually relied on such language.

II. PETITIONER'S ARGUMENTS FOR OVERRULING *BASIC* LACK MERIT

A. Halliburton's Reliance On Section 18 Is Misguided

Halliburton argues that the majority in *Basic* erred in not accepting the argument of the dissenters, 485 U.S. at

257-58, that plaintiffs under Section 10(b) claims must prove actual reliance because Section 18 contains a reliance requirement. (Pet. Br. 12-13). Even assuming *arguendo* that Section 18's reliance requirement does not permit indirect proof of reliance, a proposition never addressed by this Court, this is precisely the type of argument that should not cause this Court to revisit its prior construction of a statute.

The PSLRA in particular makes Halliburton's argument unpersuasive. Although, prior to Congress's enactment of the PSLRA, this Court sought "to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act," even then it recognized that "historical reconstruction" is "not a promising venture." *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 294-95 (1993); see also *Lampf*, 501 U.S. at 359 (referring to historical reconstruction as an "awkward task"). But that venture need not be undertaken here because the 1995 Congress actually considered, and chose not to overrule, *Basic*'s interpretation of Section 10(b) when enacting the PSLRA. See *supra* Part I.B.1. The Court in *Stoneridge* similarly did not speculate about the 1934 Congress' views on secondary-actor liability under Section 10(b) because Congress effectively addressed that issue in the PSLRA. See 552 U.S. at 157-58, 162-63; cf. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2880-81 (2010) (historical reconstruction inappropriate where Congress has considered the issue).

In any event, Halliburton's reliance on Section 18 is misguided. Halliburton's argument that this Court has favorably compared Sections 10(b) and 18 omits that those comparisons have also always included the cause of action in Section 9, 15 U.S.C. § 78i, which prohibits certain practices manipulating securities prices. See *Musick*, 508 U.S. at 295

("There are * * * two sections of the 1934 Act, §§ 9 and 18 (15 U.S.C. §§ 78i and 78r), that, as we have noted, are close in structure, purpose, and intent to the 10b–5 action."). Critically, however, Section 9 does *not* contain an actual-reliance requirement. Compare 15 U.S.C. § 78r(a) with 15 U.S.C. § 78i(f).

Section 9 is more analogous than Section 18. Section 18 does not address price manipulation and is narrowly limited to misleading statements in documents publicly filed with the SEC. By contrast, Sections 9 and 10 are codified side-by-side and each explicitly addresses "manipulation." See 15 U.S.C. § 78i ("Manipulation of security prices"); *id.* § 78j ("Manipulation and deceptive practices"); see also *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977).[14] This Court has explained that "[u]se of the word 'manipulati[on]' is especially significant," because it is "virtually a term of art when used in connection with securities market." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

"Manipulation," moreover, "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ibid.* Thus, in asking "what could justify permitting a far *lesser* showing" for Section 10(b) than for Section 18 (Pet. Br. 13), Halliburton overlooks that, unlike Section 10(b), Section 18 does not require *scienter*. See *In re Stone & Webster, Inc. Sec. Litig.*, 414 F.3d 187, 193 (1st Cir. 2005).[15] Thus, even assuming that Section 18 requires actual reliance,

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[14] Notably, Section 9(a)(4) prohibits false statements.

[15] Section 18 recognizes a good faith, affirmative defense. 15 U.S.C. § 78r(a).

importing actual reliance into Section 10(b) would destroy the symmetry between those two sections, see *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 556 (2d Cir. 1979) ("the far more difficult task which confronts a plaintiff seeking to proceed under § 10(b) provides a rationale for dispensing with the reliance requirement inherent in § 18"), and impose a significant additional burden on a 10b-5 claim that is not supported by the statutory structure. See *Stoneridge*, 552 U.S. at 165-66.

Notably, the Court has addressed a circumstance in which differences between Sections 9 and 18 required it to choose between the two in construing Section 10(b). The Court chose Section 9. In *Lampf*, this Court relied on the limitations periods in Sections 9 and 18 in determining the statute of limitations for Section 10(b). 501 U.S. at 359-61 & n.6. While the limitations periods in Sections 9 and 18 were the same, the statutory terminology differed. In addressing that difference, the Court stated: "To the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e) of the 1934 Act." *Id.* at 364 n.9; see also *Merck*, 559 U.S. at 646-47. There is no reason why Section 9 should govern Section 10(b)'s statute of limitations but Section 18 its reliance requirement.

B. Criticism Of Aspects Of The Efficient Capital Market Hypothesis Does Not Justify Overruling *Basic*

Halliburton relies heavily on criticisms of certain versions and aspects of the efficient capital market hypothesis ("ECMH") by various academic economists.

(Pet. Br. 14-22).[16] These economists dispute, *inter alia*, that markets are "fundamentally efficient" in the sense of setting the "correct" price for individual securities. (See *id.* at 16-18).

Halliburton's argument misses the mark because those criticisms are not responsive to *Basic*'s reasoning. Instead, *Basic* rests on a simple economic truth: markets generally react reasonably promptly to material public information. See *supra* Part I.A. Most behavioral economists, even those highly critical of the ECMH, do not purport to refute that modest claim. For example, behavioral economist Robert Shiller recently described his differences with Eugene Fama, his co-Nobel laureate, the "father of the modern efficient-markets theory, which says financial prices efficiently incorporate all available information and are in that sense perfect." Shiller, Sharing Nobel Honors, and Agreeing to Disagree, N.Y. Times, at BU6, Oct. 27, 2013. As to his own views, Shiller wrote: "In contrast, I have argued that the theory makes little sense, except in fairly trivial ways. *Of course, prices reflect available information.* But they are far from perfect." *Ibid.* See also Shiller, Finance and the Good Society 186 (2012) ("But enough of the variability of individual stock prices, or other individual

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[16] The broad label ECMH is generally recognized as including three different hypotheses. The strong version holds that stock prices incorporate all information about a corporation, including confidential information. The semi-strong version holds that stock prices incorporate only public information. The weak version holds that stock prices reflect historical stock prices and related publicly available information. See *Schleicher v. Wendt*, 618 F.3d 679, 684-85 (7th Cir. 2010).

asset prices, *does* make sense that the market remains an extremely important source of information for directing resources.") (emphasis in original). While behavioral economists show that investors sometimes overreact and underreact to information, and that markets form bubbles and crash, they do not show that a company's stock price is unrelated to public information. It is consistent with their views that a disclosure of corporate fraud will cause the price of the stock to decline, harming investors, even if the stock or market as a whole is otherwise overvalued, undervalued, or volatile relative to some theoretical benchmark.[17]

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[17] Several of Halliburton's sources address fundamental rather than informational efficiency, and they also confirm that "bubbles" and market crashes are consistent with the premise that market prices react predictably to new information. See Lev & de Villiers, *supra*, at 21; Ayers, Back to Basics: Regulating How Corporations Speak to the Market, 77 Va. L. Rev. 945, 974-75 (1991); (Pet. Br. 16, 18). For example, Halliburton cites Professor Ayres' article for the proposition that Black Monday shows that the NYSE is not fundamentally efficient (Pet. Br. 18), but Ayres acknowledges in the very next paragraph that the market collapse of October 19, 1987 "does not refute the notion that the market is informationally efficient." Ayers, *supra*, at 974. See also Gilson & Kraakman, Market Efficiency After the Fall: Where Do We Stand After the Financial Crisis, in Research Handbook on the Economics of Corporate Law, 457, 465-73 (2012) (Hill & McDonnell, eds.); Fischel, Efficient Capital Markets, The Crash, and the Fraud on the Market Theory, 74 Cornell L. Rev. 907, 917 (1989). Put simply, "[t]hat the resulting price may be inaccurate does not detract from the fact that false statements affect it." *Schleicher*, 618 F.3d at 685 (Easterbrook, J.). Moreover, bubbles and crashes do not lead to windfall damages because

Many scholars have recognized that anomalies in the market are typically modest and, even when they lead to speculative bubbles and crashes, do not undermine *Basic*'s assumption that individual security prices incorporate information in a reasonably prompt way. See, *e.g.*, Malkiel, A Random Walk Down Wall Street 268-69 (10th ed. 2011) ("sometimes there is underreaction for a short period," but "by and large, prices reasonably reflect whatever public knowledge there is about each company"); Lucas, In Defense of the Dismal Science, The Economist, Aug. 6, 2009 (anomalies "are too small to matter"). Moreover, this Court recently recognized that "it is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 133 S. Ct. at 1192.

Although the work of behavioral economists has gained increased prominence in recent years, challenges to aspects of the ECMH existed long before *Basic*.[18] *Basic*

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plaintiffs must disaggregate the culpable from non-culpable factors that caused their stock price to drop as part of the requirement to demonstrate loss causation. See *infra* Part III.B (discussing disaggregation); see also *supra* Part I.B.1 (discussing 15 U.S.C. § 78u-4(e)).

[18] See, *e.g.*, LeRoy, Efficient Capital Markets and Martingales, 27 J. Econ. Lit. 1583 (1989) (citing numerous empirical studies from the 1970s and early 1980s); De Bondt & Thaler, Does the Stock Market Overreact?, 40 J. Fin. 793 (1985); Shiller, Stock Prices and Social Dynamics, 2 Brookings Papers on Econ. Activity 457 (1984); Shiller, The

referred to the ECMH approvingly in one sentence and an accompanying footnote, 485 U.S. at 246 & n.24, but only in the context of stating explicitly that it was unnecessary to "determine by adjudication what economists and social scientists have debated through the use of sophisticated analysis and the application of economic theory." *Id.* at 246 n.24. The Court therefore declined to "adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 248 n.28.[19]

Use of Volatility Measures in Assessing Market Efficiency, 36 J. Fin. 291 (1981); Ball, Anomalies In Relationships Between Securities Yield and Yield Surrogates, 6 J. Fin. Econ. 103 (1978); Basu, Investment Performance of Common Stocks in Relation to their Price-Earnings Ratios: A Test of the Efficient Market Hypothesis, 32 J. Fin. 663 (1977); Ball & Brown, An Empirical Evaluation of Accounting Income Numbers, 6 J. of Accounting Research 159, 173-74 (1968); see also Brief of American Corp. Counsel Ass'n as Amicus Curiae in Support of Petitioners, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (No. 86-279), 1987 WL 881069, at *7-10 ("The 'Fraud On The Market' Theory Conflicts With Modern Economic Principles").

[19] While *Basic* indicated at one point that well-developed markets incorporate "all publicly available information," 485 U.S. at 246, the Court clarified that it suffices if markets generally incorporate material information. See *id.* at 246 n.24 ("market professionals generally consider most publicly announced material statements"); *id.* at 247 ("most publicly available information is reflected in market price"); *id.* at 244 ("the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock"); see also *Amgen*, 133 S. Ct at 1192

The *Basic* Court certainly did not think markets always reacted rationally: Black Monday, October 19, 1987, when the NYSE plummeted 22% on a single day, took place *two weeks* before oral argument in *Basic*. (Pet. Br. 18). Nor did the Court assert, or even imply, that investors are always rational (an assumption not required by ECMH), or that stock prices reflect the fundamental value of corporations.[20] Rather, irrespective of other forces that may move the markets at times, the Court simply concluded that "most publicly available information is reflected in market price." *Basic*, 485 U.S. at 247.

As Professor Langevoort correctly recognizes, citing footnote 24 of *Basic*, "the majority was not insisting on anything approaching perfect efficiency," and that it is a mistake to "obsess[ ] on high levels of efficiency to justify the presumption of reliance." Langevoort, Judgment Day, *supra*, at 18 n.66. "The key question in assessing the presumption of reliance is whether the market segment in which the securities are traded is such that it has *sufficient* efficiency properties to make us reasonably confident that

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(presumption applies if, *inter alia*, "market is generally efficient").

[20] See Goshen & Parchomovsky, The Essential Role of Securities Litigation, 55 Duke L. J. 711, 769-70 & n.221 (2006). While the Court in *Basic* said that the market tells investors, "given all the information available to it, the value of the stock is worth the market price," 485 U.S. at 244, that only means that investors are entitled to the "supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price." *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975).

misinformation is likely to distort the stock price. Most well-organized markets meet this condition." *Id.* at 19.

Several articles cited by Halliburton, including Professor Langevoort's, acknowledge that the fraud-on-the-market presumption does not rise or fall with the ECMH. See, *e.g.*, Black, Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets, 44 Loy. U. Chi. L.J. 1493, 1502 (2013); Bebchuk & Ferrell, Rethinking *Basic*, Discussion Paper No. 756, Harvard Olin Ctr. For Law, Bus. & Econ., at 2.[21] (Pet. Br. 21-22, 39, 43).

Nor is there merit to Halliburton's assertion that *Basic* relied on a now-rejected "binary" notion that markets are either efficient or inefficient. (*Id.* at 20-21). That is merely a restatement of Halliburton's flawed claim that *Basic* depends on the ECMH, when in fact this Court simply recognized the uncontroversial proposition that developed markets generally respond to material information. Just as important, there is nothing binary about *Basic*, which is entirely case-specific: it recognizes a rebuttable presumption, which itself applies only with sufficient proof about the efficiency of the market for the specific security at issue. Defendants are free at class certification to introduce any evidence they wish to show that the stock prices of the defendant corporation do not react to new information, including to particular types of information. If the plaintiff fails to demonstrate that the market is efficient, that the misstatements are not public, or that the plaintiff did not trade between the time of the misstatement and the corrective disclosure, the presumption does not apply in the first place. And once the presumption attaches, defendants are free at

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[21] http://ssrn.com/abstract=2371304 (Jan. 2013).

summary judgment or trial to rebut the presumption in the manner set forth in *Basic*.

It is instead Halliburton's argument that suffers from the supposed flaw it identifies, because Halliburton would have this Court enact a categorical rule that all markets are inefficient and do not incorporate material information. In this very case, Halliburton has never argued that the market for its shares was inefficient for processing certain types of information, and there is no evidence that the market was inefficient in digesting any information at issue here. Yet Halliburton would reject the fraud-on-the-market presumption in this case.

C. *Basic* Is Administrable In Practice

Halliburton also contends that *Basic* is unworkable, because courts cannot consistently and reliably determine market efficiency. That argument has no bearing on this case because Halliburton conceded that the market for its stock is efficient. J.A. 753; Resp. App. 10a-15a, 18a-19a n.8; see *Amgen*, 133 S. Ct. at 1197 n.6 (declining to consider similar argument where market efficiency conceded). But in any event, Halliburton ignores the uniform case law applying *Basic* and relies almost exclusively on snippets from law review articles. Although the *Basic* decision did not establish a test for determining whether a market is "well-developed," courts in all circuits (except the D.C. Circuit, which has not addressed the issue) look to the factors enumerated in *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989): 1) average weekly trading volume; 2) number of analysts following the stock; 3) number of market makers and arbitrageurs; 4) eligibility to file a Form S-3 registration statement; and 5) cause-and-effect relationship

between corporate events/financial releases and stock price.[22] The courts have identified the fifth *Cammer* factor as "the most important." *Teamsters*, 546 F.3d at 207. Commentators agree. "The last factor, usually measured by reference to speed of adjustment, is the standard test for informational efficiency, and *would seem to be sufficient to address the issue.*" Langevoort, *Basic* at Twenty, *supra*, at 167. *Krogman v. Sterritt*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001), added three factors: 1) company's market capitalization; 2) bid-ask spread; and 3) percentage of the stock not held by insiders (the "float").

Halliburton cites a Third Circuit opinion stating "there has been some confusion and contradiction in court rulings." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (2011), abrogated in part, *Amgen*, 133 S. Ct. at 1991; (Pet. Br. 23). But the two areas of confusion referenced were resolved by *Halliburton* and *Amgen*. See *DVI*, 639 F.3d at

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[22] See, *e.g.*, *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 4-5 (1st Cir. 2005); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 n.16 (3d Cir. 2011); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990); *In re Northfield Laboratories, Inc. Sec. Litig.*, 267 F.R.D. 536, 545-47 (N.D. Ill. 2010); *In re Retek Inc. Sec. Litig.*, 236 F.R.D. 431, 436-37 (D. Minn. 2006); *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999); *In re Nature's Sunshine Product's Inc. Sec. Litig.*, 251 F.R.D. 656, 662 (D. Utah 2008); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 632 (N.D. Ala. 2009).

636-38. Tellingly, the Third Circuit did not question the methodology for determining market efficiency. See *id.* at 634-36 & n.16. The only other case Halliburton cites, *Unger*, 401 F.3d at 324-325, criticized the lower court for its lack of rigor in applying the *Cammer/Krogman* factors. Thus, Halliburton does not provide any meaningful support for its contention that the courts have reached inconsistent results on similar facts in applying the *Cammer/Krogman* factors. To the contrary, the case law indicates that the courts are applying an established methodology, as reflected by their universal embrace of a common framework, and are applying that framework in consistent and workable fashion, as evidenced by the lack of any circuit split on its application.

D. *Basic* Is Consistent With This Court's Recent Class-Certification Jurisprudence

A securities-fraud plaintiff relying on *Basic* in seeking class certification must establish not only the efficiency of the market, but also the timing of the class members' trades and that the defendant's misstatements were made publicly. *Amgen*, 133 S. Ct. at 1192-93, 1198. Though the plaintiff ultimately must prove the materiality of the misstatements, materiality need not be established at class certification because, in the absence of materiality, the claims of the entire class will fail on the merits; materiality thus does not go to the issue at class certification: whether common questions predominate over individual questions for purposes of Rule 23(b)(3). *Id.* at 1196, 1198-99.

That approach is consistent with this Court's Rule 23 jurisprudence, including *Wal-Mart*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). Far from criticizing *Basic*, this

Court in *Wal-Mart* approvingly discussed the fraud-on-the-market presumption without suggesting that it was somehow inconsistent with its holding that Rule 23 compliance must be "affirmatively demonstrate[d]." 131 S. Ct. at 2552 & n.6.

Contrary to Halliburton's argument, *Basic* does not embrace an assumption of commonality. Rather, plaintiffs must demonstrate commonality by satisfying the prerequisites of market efficiency, timing, and publicity. See *Amgen*, 133 S. Ct. at 1192-93, 1198-99. The class is certified only if the court determines, after considering the evidence and argument presented by both sides, that plaintiffs have satisfied that substantial burden. Such a case is perfectly suited to recognizing "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551.[23]

In *Comcast*, the plaintiffs sought class certification on the basis that damages from the defendant's allegedly anticompetitive conduct could be calculated on a class-wide basis. But the plaintiffs' proof of the existence of common damages relied on theories of antitrust liability that the district court had already rejected. This Court held that the class was not properly certified. It rejected the court of appeals' view that it was improper to consider the validity of the antitrust theories at the preliminary class-certification stage. See *Comcast*, 133 S. Ct. at 1432-35.

The Court's decision in *Comcast* does not inform the correctness of *Basic*. In a securities-fraud action, the

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[23] Halliburton's contrary argument seemingly depends on its incorrect assumption (see *Amgen*, 133 S. Ct. at 1191) that plaintiffs must "guarantee" that material information affects the stock's price. (Pet. Br. 38).

plaintiff's proof of the market's efficiency does not rely on an invalid theory of securities liability. And the Court's decisions in *Halliburton* and *Amgen* refuse to interject a free-flowing inquiry into the merits of the plaintiff's suit at the class-certification stage.

E. Defendants' Assorted Policy Arguments Are Exaggerated And Misleading

Halliburton complains that class certification forces large settlement without regard to the merits. (Pet. Br. 40-41). Again, this is precisely the type of empirical question that Congress is institutionally suited to evaluate. Further, the data show that Halliburton's claims are wrong. Defendants are often successful in dismissing weak cases, just as the PSLRA intended. For cases filed in 2000 and later, a motion to dismiss was filed in 95% of all cases; 48% of the motions were granted, 25% were granted in part and denied in part, and 8% were voluntarily dismissed by plaintiffs. Comolli & Starykh, Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review 18 (2014).[24] From 2000 to 2012, only 31% of the cases continued, at least in part, past the pleading stage. Comolli et al., Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review 16 (2013).[25] And dismissal rates "have been on a rising trend since 2000." Comolli & Starykh, *supra*, at 24.

In total, 73% of cases were resolved, through dismissal or settlement, *before* a motion for class

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[24] http://www.nera.com/nera-files/PUB_2013_Year_End_Trends_1.2014.pdf.

[25] http://www.nera.com/nera-files/PUB_Year_End_Trends_01.2013.pdf.

certification was *ever* filed and another 12% were resolved before a ruling on the class-certification motion. *Id.* at 19. Thus, the vast majority of cases, fully 85%, were resolved *before* a ruling on a class-certification motion. As of the end of 2012, motions for summary judgment were filed in 9% of the cases, a significant number considering how many cases are settled or dismissed. Defendants are frequently successful at summary judgment, fully prevailing 37% of the time and partially prevailing another 25% of the time. Comolli et al, *supra*, at 22.

Halliburton points to the aggregate $73 billion in class settlements since the PSLRA, and implies that companies are paying billions to settle meritless litigation. (Pet. Br. 40-41). That is wrong. First, most cases settle only after surviving a motion to dismiss, see Comolli et al., *supra*, at 16, including the PSLRA's heightened pleading requirement for *scienter*, which screens out many meritless cases. Second, the ten largest cases alone count for $29.7 billion in settlements, Comolli & Starykh, *supra*, at 30, and there can be no serious question that executives at most if not all of those companies, which include Enron, WorldCom, and Tyco, committed significant securities fraud. Third, given the evidence that defendants in securities-fraud cases have prevailed in summary judgment, at trial, and on appeal, see *id.* at 36; Comolli et al, *supra*, at 22, 39, it is implausible that sophisticated defense counsel advised their clients to pay tens or hundreds of millions of dollars to settle meritless cases. Tellingly, Halliburton does not provide a single example of such a case.

The $73 billion figure is also misleading. Not only do the ten largest settlements alone account for approximately $29 billion, but, from 2003-12, the number of settlements in excess of $100 million annually accounted for

5-16% of all settled cases, yet 40-95% of all settlement money. Ryan & Simmons, Securities Class Action Settlements: 2012 Review and Analysis 4 (2013).[26] Furthermore, the $73 billion figure includes settlements in Sections 11 and 12 cases (which have no reliance requirement) and cases involving secondary actors who would likely no longer be liable following *Stoneridge* and *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). See *id.* at 11, 13; Comolli & Starykh, *supra*, at 13. And the figure pales in comparison to the $2 trillion in investor losses suffered since only 2005. Comolli & Starykh, *supra*, at 8.

Halliburton also points to the number of filings and attorneys' fees, but disregards that, "[i]n 2012, securities class action filings were at their lowest levels since 2007," Comolli et al., *supra*, at 3, though they did rise in 2013, Comolli & Starykh, *supra*, at 2, and that, "[o]ver the period of 2010-2012, [attorneys'] fees have declined markedly compared to 1996-2009," Comolli et al., *supra* at 34.

Halliburton further overlooks the fact that "settlement amounts come largely from external sources," such as insurance companies and accounting firms, and therefore "securities class actions do not simply shift money from one set of investors to another * * *." Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497, 512-13 (1997). Insurers alone are estimated to pay more than half of all settlements. See Coffee, Reforming the Securities Class Action, *supra*, at 1550-51 & nn.61-62. And accounting firms often contribute as well. See Harwood et al., What Makes Securities Class Actions with Accounting Allegations

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[26] http://www.cornerstone.com/files/upload/Cornerstone_Research_2012_Settlements.pdf.

Different?, at 1 (Am. Bar Ass'n, 2011) ("from 2005 through 2010, 19 of the 20 largest settlements of securities class actions were all accounting cases").[27]

F. State Courts Do Not Refuse To Follow *Basic*

Halliburton argues that state courts refuse to follow *Basic*. (Pet. Br. 24-25). The straightforward answer is that the federal securities laws are distinct statutes. But in any event, Halliburton is incorrect. Several states *have* applied *Basic*. See, *e.g.*, *State v. Marsh & McLennan Companies, Inc.*, 292 P.3d 525, 532-37 (Or. 2012); *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 821-22 (Col. 2009); *Allyn v. Wortman*, 725 So. 2d 94, 101 & n.3 (Miss. 1998). Moreover, the decisions which Halliburton cites merely declined to extend *Basic* to common-law fraud, and did so in part because *Basic*'s presumption remained available under federal (and, in one instance, state) law. See, *e.g.*, *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1192, 1201 (N.J. 2000) ("plaintiff already had an adequate remedy under federal securities law"); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1090, 1101 (Cal. 1993) ("Plaintiffs already have remedies under the federal and state securities laws"); see also *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998) ("defer[ring] to the panoply of federal protections"). And *Mirkin* explicitly approved of *Basic*'s premise that "stock prices adjust in response to the dissemination of material information." 5 Cal. 4th at 1101.

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[27] http://www.cornerstone.com/getattachment/c6b4254e-5ea4-4f02-8949-beeb7d304ae2/What-Makes-Securities-Class-Actions-with-Accountin.aspx.

G. The Presumption Recognized in *Basic* is Rebuttable

Contrary to Halliburton's submission, the fraud-on-the-market presumption is genuinely rebuttable, and defendants can seek to do so in an early motion for summary judgment. While *amici* (Former SEC Comm'rs Br. 24-25) and Professor Grundfest profess that they can identify only a handful of successful rebuttal cases, they disregard numerous cases in which defendants rebutted the presumption at summary judgment by establishing that the misrepresentation at issue could not have affected the market because the market was already aware of the truth. See, *e.g.*, *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1262-63 (4th Cir. 1993); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113-16 (9th Cir. 1989); *In re Boston Scientific Corp. Sec. Litig.*, 708 F. Supp. 2d 110, 128-29 (D. Mass. 2010). Such a "truth-on-the-market" defense is a well-established method of rebuttal. See *Amgen*, 133 S. Ct. at 1203; *Basic*, 485 U.S. at 248-49.

They also omit rebuttals—decided before *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483-86 & n.9 (2d Cir. 2008) was abrogated by *Amgen*, 133 S. Ct. at 1203-04—that were based on a lack of price impact. See, *e.g.*, *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 492-93 (S.D.N.Y. 2011); *In re Am. Int'l Group, Inc. Sec. Litig.*, 265 F.R.D. 157, 186-88 (S.D.N.Y. 2010), vacated on other grounds, 689 F.3d 229 (2d Cir. 2012); *In re Credit Suisse First Boston Corp. (Latronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 142-49 & n.11 (S.D.N.Y. 2008); see also *In re*

Zonagen, Inc. Sec. Litig., 322 F. Supp. 2d 764, 780-81 (S.D. Tex. 2003) (rebuttal at summary judgment).[28]

In analogous cases brought under Section 11, defendants have negated causation on a class-wide basis at summary judgment and trial by showing a lack of price impact. See, *e.g.*, *Akerman*, 810 F.2d at 340-43; *Collins v. Signetics Corp.*, 605 F.2d 110, 114-16 (3d Cir. 1979), abrogated in part on other grounds, *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628 (3d Cir. 1989). And defendants have likewise successfully rebutted the analogous *Affiliated Ute* presumption of reliance. See, *e.g.*, *Smith v. Ayers*, 845 F.2d 1360, 1364 (5th Cir. 1998); *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 788-90 (9th Cir. 1980).

Finally, courts frequently grant motions to dismiss on loss causation or materiality grounds for failure to plead price impact, where it is clear from the face of the complaint (and judicially-noticed securities prices) that the stock price did not drop or did not drop as a result of a corrective disclosure—obviating the need for rebuttal. See, *e.g.*, *Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013); *Ind. State Dist. Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944-45 (6th Cir. 2009); *Oran v. Stafford*, 226 F.3d 275, 282-83 (3d Cir. 2000) (Alito, J.); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.).

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[28] Defendants can rebut the presumption at trial, *GAMCO Investors, Inc. v. Vivendi S.A.*, 927 F. Supp. 2d 88 (S.D.N.Y. 2013), and in post-trial claims proceedings.

III. THIS COURT SHOULD REJECT HALLIBURTON'S ARGUMENTS FOR SUBSTANTIALLY MODIFYING *BASIC*

Halliburton's argument that Plaintiffs should be required to prove price impact at class certification—or that defendants should be able to rebut the presumption by showing a lack of price impact at class certification—is directly contrary to this Court's precedent and to Rule 23.[29]

There is no need for this Court to radically alter federal-securities jurisprudence just to permit defendants a fact-based, merits challenge at the class-certification stage. Rule 56 of the Federal Rules of Civil Procedure already provides an appropriate vehicle to accomplish their stated goal. If a defendant believes that there is no evidence of price impact, and that such absence would dispose of all class claims, it can seek leave to move for summary judgment as to reliance or loss causation or materiality (which Halliburton did not do), without prejudice to the right to move for summary judgment later on *other* issues if the motion is unsuccessful. Cf. Fed. R. Civ. P. 56(a) & 2010 comm. notes (clarifying that partial summary-judgment motions are permissible). That motion can even be filed and decided prior to class certification. 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1798 (3d ed. 2005). If plaintiffs believe they "cannot present facts essential to justify [their] opposition," they can seek additional discovery under Rule 56(d). This well-established procedure allows defendants to mount an early, fact-based challenge to any meritless cases that advance beyond the

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[29] The former argument is also directly contrary to Halliburton's concession in the first appeal before this Court. See *Halliburton*, 131 S. Ct. at 2187 n.*.

pleading stage, and confines merits issues not tied to Rule 23 to the summary judgment and trial stages where they belong, under the proper standard of proof.

A. Adjudicating Price Impact At Class Certification Is Contrary to *Amgen* And *Halliburton* Because It Is a Merits Issue, Not Tethered to Rule 23

In *Amgen*, this Court held that plaintiffs need not prove materiality at class certification for two reasons. First, "because the question of materiality is an objective one," materiality "can be proved through evidence common to the class." *Amgen*, 133 S. Ct. at 1195. "Second, there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating," because "the failure of proof" on materiality "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196.

Amgen's analysis applies equally to price impact. The fact that materiality is an element of the claim, while price impact is technically not, is a distinction without a difference. Like materiality, price impact is an objective inquiry that turns on common evidence. And, absent price impact, all members of the proposed class will lose because no one will be able to demonstrate loss causation. Halliburton itself defines loss causation as "price impact *plus* a subsequent loss caused by the fraud" (Pet. Br. 7), and this Court has said that "[l]oss causation * * * requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Halliburton*, 131 S. Ct. at 2186. Thus, absent price impact, there can be no loss causation. And, without price impact,

there cannot be damages either. Thus, all plaintiffs would suffer from "a fatal similarity," *Amgen*, 133 S. Ct. at 1197, actually multiple fatal similarities, and individual questions could not possibly predominate. By contrast, plaintiffs who cannot show publicity or market efficiency cannot invoke the fraud-on-the-market presumption, but can proceed under a "traditional" showing of reliance. *Id.* at 1199.

Halliburton argues that "price impact is essential to loss causation only in fraud-on-the-market cases," (Pet. Br. 51) (emphasis omitted), and it points to atypical cases where individual plaintiffs brought claims involving non-publicly-traded securities or non-public misrepresentations. (*Id.* at 52). That argument proves nothing, since it is the typical fraud-on-the-market cases that are the ones currently before this Court. In any event, even in fraud-on-the-market cases, plaintiffs can establish loss causation without a public corrective disclosure.[30]

Halliburton argues that "price impact is indistinguishable from publicity," (*id.* at 51), which must be established at class certification to trigger the *Basic* presumption. The analogy does not hold. Publicity is a predicate for showing individual questions will not

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[30] Under a realization-of-the-risk model, see *Lentell v. Merill Lynch & Co.*, 396 F.3d 161, 173-74 (2d Cir. 2005), it is the realization of a risk concealed by the misrepresentation that causes the loss. See *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352 (S.D.N.Y. 2009) (downgrades of a company's credit ratings sufficed to establish prima facie claim as to loss causation); *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 306-07 (S.D.N.Y. 2005) (company's inability to meet its debt and Italian regulators' suspension of the trading of its stock stated a claim as to loss causation).

predominate over common ones for purposes of demonstrating reliance, but price impact is not. Moreover, fraud-on-the-market cases require a public misrepresentation to show that the information was transmitted to the market, but the question of publicity (unlike price impact) is not inextricably tied to elements of a Section 10(b) claim; nor is it common to all plaintiffs. Even absent a public statement, any individual plaintiff who heard the misrepresentation may be able to sue, as Halliburton concedes. (*Id.* at 52).

Requiring plaintiffs to establish price impact at the time of the misrepresentation, which necessarily establishes materiality, is directly contrary to *Amgen*'s holding that plaintiffs do not have to establish materiality at class certification. 133 S. Ct. at 1191. And requiring plaintiffs to establish price impact at the time of the corrective disclosure, which necessarily establishes loss causation, is directly contrary to *Halliburton*'s holding that plaintiffs do not have to establish loss causation at class certification. 131 S. Ct. at 2183.

In short, unlike market efficiency and publicity, which are entirely collateral to the merits of the claim, price impact goes to the heart of a Rule 10b-5 claim. See *Schleicher*, 618 F.3d at 683 (proving price impact at class certification would effectively require "plaintiffs [to] prove everything (except falsity) required to win on the merits"). And, because compliance with Rule 23 must be shown by a preponderance of the evidence, see *Teamsters*, 546 F.3d at 202, requiring proof of price impact at class certification would require plaintiffs to meet a higher burden than required to defeat a summary-judgment motion. Such a requirement would not only impose a new and entirely improper merits test, it would allow defendants to

circumvent Rule 56 and impinge on plaintiffs' right to a jury trial. Cf. *Tellabs*, 551 U.S. at 326-28.

The same analysis precludes price-impact rebuttal evidence at class certification because, absent price impact, all plaintiffs will lose on the merits. See *Amgen*, 133 S. Ct. at 1203-04.[31] While Halliburton contends that permitting price-impact rebuttal at class certification is consistent with *Basic* (Pet. Br. 49), that is not right. Rather, *Basic* indicated such rebuttal "is a matter for trial," 485 U.S. at 249 n.29, and as this Court recently clarified, for summary judgment as well, *Amgen*, 133 S. Ct. at 1204. Tellingly, the Court in *Basic* affirmed the grant of class certification, rather than vacating and remanding for possible rebuttal. 485 U.S. at 249-50; see *Amgen*, 133 S. Ct. at 1202-03.

Of course, under the current legal regime, defendants can introduce evidence at class certification of lack of price impact as some evidence that the market is not efficient. But in analyzing whether a market is efficient, courts do not limit their analysis to the specific statements that are alleged by the plaintiff to be fraudulent. See, *e.g.*, *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 513 (1st Cir. 2005).

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[31] Nor is the *Affiliated Ute* presumption rebuttable at class certification. (See Wash. Legal Found. Br. 14). The cases upon which *amici* rely found the presumption did not apply because defendant did not owe a duty to plaintiffs, as *Basic*'s presumption does not apply absent proof of market efficiency.

B. Adjudicating Price Impact At Class Certification Is Inappropriate Because It Often Requires Merits Discovery

Adjudicating price impact at class certification, rather than at summary judgment or trial, would also be inefficient and premature because merits discovery is often required. See *Amgen*, 133 S. Ct. at 1201 (proof of materiality would "necessitate a mini-trial"); Fed. R. Civ. P. 23(c)(1)(A) (class-certification order should issue at "an early practicable time").

For example, where the stock price declines following a "corrective" disclosure, discovery will often be necessary to determine whether that disclosure did in fact correct an earlier misrepresentation. See, *e.g.*, *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009) (expert did not show disclosure "relate[d] back to the misrepresentation"). Likewise, discovery will often be necessary to determine whether an event preceding a decline in stock price was the foreseeable materialization of a risk that was fraudulently concealed. See, *e.g.*, *In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 546 (N.D. Ill. 2007) (plaintiffs did not show that "aspects of the still-concealed fraud in fact provided the catalyst for an anticipated failure to meet earnings forecasts"), abrogated in part on other grounds, *Merck*, 130 S. Ct. 1784.

Fact discovery will also often be necessary to support expert testimony establishing that culpable, rather than non-culpable, factors were responsible for impacting the stock price. See, *e.g.*, *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (insufficient evidence that drop in stock price was due to culpable conduct). The need for such discovery is particularly compelling in this case

because Fifth Circuit law requires Plaintiffs to prove that "it is more probable than not" that culpable, rather than non-culpable, factors caused the decline in stock price. *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 666 (5th Cir. 2004). Other circuits require plaintiffs to demonstrate only that the culpable conduct was a substantial cause of plaintiffs' loss. *E.g.*, *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.*, 730 F.3d 1111, 1123 (9th Cir. 2013); *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 239 (1st Cir. 2013); *Meyer*, 710 F.3d at 1196; *Gould v. Winstar Comm'n., Inc.*, 692 F.3d 148, 161 (2d Cir. 2012).

Finally, if price impact were adjudicated at class certification without fact discovery, defendants could immunize themselves by artfully drafting corrective disclosures, disguising the true cause of price drops, and strategically timing releases to coincide with unrelated negative, but non-culpable, news. See, *e.g.*, *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009).

C. To Rebut the Presumption, Halliburton Bears The Burden Of Persuasion To Prove No Price Impact By A Preponderance Of The Evidence

To rebut the presumption, a defendant must make an actual "showing that *severs* the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." *Basic*, 485 U.S. at 248. Defendants thus bear the burden of persuasion. They must make such a showing, under the appropriate standard of proof, at summary judgment or trial, and assuming *arguendo* that price-impact rebuttal were permissible at class certification (which it should not be, other than to the extent it is relevant for

determining market efficiency), they must make such a showing at class certification as well.

In *Affiliated Ute*, this Court established a presumption of reliance in Rule 10b-5 cases primarily involving material omissions. 406 U.S. at 153-54. Rebutting that presumption requires defendants to prove by a preponderance of the evidence that the plaintiff's transaction decision would not have been affected had the omission been disclosed. See *DuPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (citing cases). Defendants' burden to rebut the *Basic* presumption should be the same. The two presumptions derive from the Exchange Act, fulfill the same function, and are frequently analyzed together, including by this Court. *E.g.*, *Stoneridge*, 552 U.S. at 159; *Basic*, 485 U.S. at 234, 243, 245. Thus, there is no basis for treating them differently.

Halliburton contends that the presumption established in *Basic* is governed by Fed. R. Evid. 301, which imposes only a burden of production. But that Rule applies to presumptions "unless a federal statute * * * provide[s] otherwise," Fed. R. Evid. 301, and the Exchange Act "provides otherwise," as recognized in *Basic*. Indeed, the *Affiliated Ute* presumption upon which *Basic* relied was established nearly three years *before* Rule 301 was adopted, and so cannot be governed by Rule 301. And, while *Basic* included a single, "see also" reference to Rule 301 in generally describing the utility of presumptions, 485 U.S. at 245, nowhere did this Court indicate that fraud-on-the-market defendants would bear only a burden of production. By contrast, where this Court has invoked Rule 301 to impose a burden of production, it has done so expressly. See, *e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 253-55 & n.8.

Finally, imposing only a burden of production on defendants would render the *Basic* presumption toothless. According to Halliburton, defendants in every case could satisfy their burden simply by "put[ting] an expert on the stand" and having the expert "say there was no price impact." Transcript of Oral Argument at 39, *Halliburton*, 131 S. Ct. 2179 (No. 09-1403).[32] That would effectively require plaintiffs to prove price impact, eviscerating the presumption and requiring proof of materiality and a "mini" trial on the merits in derogation of *Amgen*. It would also undermine *Halliburton* because, in price-maintenance cases such as this one (and many—perhaps the vast majority—of fraud-on-the-market cases involve price maintenance), proof of price impact is indistinguishable from proof of loss causation.

IV. CONCLUSION

For the foregoing reasons, this Court should reaffirm *Basic* and affirm the decision below.

Respectfully submitted,

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[32] http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1403.pdf.

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APPENDIX

APPENDIX — STATUTORY PROVISIONS

STATUTORY APPENDIX
TABLE OF CONTENTS

The Securities Act of 1933:

Section 11(a), (e), codified at 15 U.S.C. § 77k(a), (e) . . 2a-3a

Section 12, codified at 15 U.S.C. § 77l. 5a

The Securities Exchange Act of 1934:

Section 9(a)-(c), (f), codified at
15 U.S.C. § 78i(a)-(c), (f) 7a

Section 10(b), codified at 15 U.S.C. § 78j(b) 12a

Section 14(a)(1), codified at 15 U.S.C. § 78n(a)(1) . . .13a

Section 18(a), codified at 15 U.S.C. § 78r(a) 14a

Private Securities Litigation Reform Act of 1995:

15 U.S.C. § 78u-4 (scattered sections) 15a

15 U.S.C. § 78u-5(a)-(c) 26a

SEC Rule 10b-5, codified at 17 C.F.R. § 240.10b-5 . . .32a

Federal Rule of Civil Procedure 23(a)-(c)(1) 33a

Federal Rule of Civil Procedure 56. . . . . .35a

Federal Rule of Evidence 301 . . . . . .39a

Federal Rule of Evidence 702 . . . . . .39a

APPENDIX

Section 11 of the Securities Act, codified at 15 U.S.C. § 77k

Civil Liabilities on Account of False Registration Statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any

person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and

(1) the value thereof as of the time such suit was brought, or

(2) the price at which such security shall have been disposed of in the market before suit, or

(3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the

public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Section 12 of the Securities Act, codified at 15 U.S.C. § 77l

Civil Liabilities Arising in Connection with Prospectuses and Communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation

> or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Appendix

Section 9 of the Securities Exchange Act, codified at 15 U.S.C. § 78i

Manipulation of Security Prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security,

(A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or

(B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or

(C) to enter any order or orders for the sale of any such security with the knowledge that an

order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security- based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles, options, futures, or security-based swaps

It shall be unlawful for any person to effect, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires—

(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

(B) any security futures product on the security; or

(C) any security-based swap involving the security or the issuer of the security;

(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product; or

(C) such security-based swap; or

(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product with relation to such security; or

(C) any security-based swap involving such security or the issuer of such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(f) Persons liable; suits at law or in equity

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 10 of the Securities Exchange Act, codified at 15 U.S.C. § 78j

Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 14(a) of the Securities Exchange Act, codified at 15 U.S.C. § 78n(a)

Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

Appendix

Section 18 of the Securities Exchange Act, codified at 15 U.S.C. § 78r

Liability for Misleading Statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) ofsection 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Appendix

15 U.S.C. § 78u-4

Private Securities Litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general Not later than 90 days after the date on which a notice is published under subparagraph

(A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination equired by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this paragraph.

(iii) Rebuttable presumption

(I) In general Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

* * *

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

* * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

* * *

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) Stay of discovery

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

* * *

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

* * *

(e) Limitation on damages

(1) In general

Except as provided in paragraph (2), in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

(2) Exception

In any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, if the plaintiff sells or repurchases the subject security prior to the expiration

of the 90-day period described in paragraph (1), the plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security.

(3) "Mean trading price" defined

For purposes of this subsection, the "mean trading price" of a security shall be an average of the daily trading price of that security, determined as of the close of the market each day during the 90-day period referred to in paragraph (1).

15 U.S.C. § 78u-5

Application of Safe Harbor for Forward-Looking Statements

(a) Applicability

This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by such issuer.

(b) Exclusions

Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 78o (b)(4)(B) of this title; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m (d) of this title.

(c) Safe harbor

(1) In general

Except as provided in subsection (b) of this section, in any private action arising under this chapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity; [1] was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) Oral forward-looking statements

In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1) (A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results might differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) Availability

Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) Effect on other safe harbors

The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g) of this section.

SEC Rule 10b-5, codified at 17 C.F.R. § 240.10b-5

Employment of Manipulative and Deceptive Practices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Appendix

Federal Rule of Civil Procedure 23

Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

Federal Rule of Civil Procedure 56

Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Appendix

Federal Rule of Evidence 301

Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Federal Rule of Evidence 702

Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

REPLY BRIEF

RECORD
AND
BRIEF

No. 13-317

SUPREME COURT, U.S.
FILED
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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
I. The Fund's Defense Of *Basic* Ignores Law, Economics, And Experience	1
A. The Fund fails to show that *Basic* is entitled to *stare decisis* protection	1
B. The Fund mistakenly treats congressional silence as an endorsement of the Fund's views	6
C. The Fund wrongly asserts that Section 9 best informs the 10b-5 reliance element	7
D. The Fund fails to respond to *Basic*'s anomalous Rule 23 consequences	12
E. The Fund's faulty economic analysis cannot preserve *Basic*	13
II. The Fund Cannot Show Why Plaintiffs Should Be Exempt From Establishing Price Impact	16
III. The Fund's Arguments Against Price-Impact Rebuttal Contravene *Basic*'s Own Guarantee	19

TABLE OF AUTHORITIES

Page

CASES

Affiliated Ute Citizens of Utah v. *United States*,
406 U.S. 128 (1972) 10, 23

Am. Express v. *Italian Colors Rest.*,
133 S. Ct. 2304 (2013) 12, 13

Amgen, Inc. v. *Conn. Ret. Plans & Trust Funds*,
133 S. Ct. 1184 (2013) ..... *passim*

Basic Inc. v. *Levinson*,
485 U.S. 224 (1988) ..... *passim*

Blonder-Tongue Labs., Inc. v. *Univ. of Ill. Found.*,
402 U.S. 313 (1971) 3

Bob Jones Univ. v. *United States*,
461 U.S. 574 (1983) 7

Boys Markets, Inc. v. *Retail Clerk's Union, Local 770*,
398 U.S. 235 (1970) 2

Citizens United v. *FEC*,
558 U.S. 310 (2010) 8, 9

Cammer v. *Bloom*,
711 F. Supp. 1264 (D.N.J. 1989) 18

Comcast Corp. v. *Behrend*,
133 S. Ct. 1426 (2013) 13, 18, 22

Dura Pharms., Inc. v. *Broudo*,
544 U.S. 336 (2005) 7

Erica P. John Fund, Inc. v. *Halliburton Co.*,
131 S. Ct. 2179 (2011) 16, 17, 22

TABLE OF AUTHORITIES—Continued

Page

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 7

Girouard v. *United States*, 328 U.S. 61 (1946) 3

Helvering v. *Hallock*, 309 U.S. 106 (1940) 3

In re Fine Host Corp. Sec. Litig., 25 F. Supp. 2d 61 (D. Conn. 1998) 12

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J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 4

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 2, 8, 9

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Payne v. *Tennessee*, 501 U.S. 808 (1991) 4

Regents of Univ. of Cal. v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007) 10

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TABLE OF AUTHORITIES—Continued

Page

Smilovitz v. *First Solar, Inc.*, __ F.R.D. __, No. CV12-00555-PHX-DGC, 2013 WL 5551096 (D. Ariz. Oct. 8, 2013) 18

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United States v. *Gaudin*, 515 U.S. 506 (1995) 4

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011) 13, 17, 18, 19, 22

STATUTES

Securities Exchange Act of 1934

Section 9, 15 U.S.C. § 78i 6, 7, 8, 9, 10

Section 10, 15 U.S.C. § 78j ..... *passim*

Section 14, 15 U.S.C. § 78n 6

Section 18, 15 U.S.C. § 78r 6, 7, 8, 9, 10

Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) 5, 6, 7, 11

RULES

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Evid. 301 23

TABLE OF AUTHORITIES—Continued

Page

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MISCELLANEOUS

Advisory Comm. Note on Fed. R. Civ. P. 23(b)(3) (1966 amends.), 39 F.R.D. 69, 103 (1966) 13

Advisory Comm. Notes on Fed. R. Civ. P. 23 (2003 amends.), 28 U.S.C. App., p. 144 (2006 ed.) 22

Restatement (Second) of Agency (1958) 12

IN THE

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---

REPLY FOR PETITIONERS

I. THE FUND'S DEFENSE OF *BASIC* IGNORES LAW, ECONOMICS, AND EXPERIENCE

A. The Fund fails to show that *Basic* is entitled to *stare decisis* protection

1. Implicitly agreeing that "*stare decisis* is the last hope for salvaging *Basic*," Pet. Br. 29, the Fund tellingly leads with *stare decisis*, see Fund Br. 11-19, 24-29, rather than by defending the law or economics underlying *Basic*. But the Fund's bold declaration that "[p]rinciples of *stare decisis* apply with full force to *Basic*" depends on the false premise that *Basic* "is a quintessential statutory interpretation case that this Court should not overrule." Fund Br. 12.

Basic is doubly removed from the paradigmatic statu-

tory-construction case. *Basic* layered a judicially created presumption onto the 10b-5 action, itself a "judicial construct that *Congress did not enact* * * *." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (emphasis added). "The text of § 10(b) does not provide for private claims. Such claims are of judicial creation * * *. [W]e have made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 358-359 (1991) (footnote and citations omitted). The *Basic* Court acknowledged acting on its own, claiming only that "[t]he presumption of reliance employed in this case is *consistent with, and*, by facilitating Rule 10b-5 litigation, *supports*, the congressional policy embodied in the 1934 Act." 485 U.S. at 245 (emphasis added). This "helping hand" approach fundamentally differs from—and warrants far less precedential respect than—decisions interpreting a statute's language and meaning.

2. Even in the most straightforward statutory context, where *stare decisis* has the greatest traction, the Court "ha[s] never applied *stare decisis* mechanically to prohibit overruling [its] earlier decisions determining the meaning of statutes." *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658, 695 (1978). There is thus no truth to the Fund's assertion that a decision overruling *Basic* would be practically unprecedented. See Fund Br. 12. The Court in fact has overruled "statutory" precedents in multiple areas:

- **Labor relations.** In *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 & n.5, 241 (1970), the court authorized anti-strike injunctions by overruling *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). It did so despite recognizing that Congress declined an opportunity to abrogate *Sinclair*. *Boys Markets*, 398 U.S. at 241-242.

- **Patent law.** In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, the Court overruled a 35-year-old decision that required mutuality of estoppel in patent cases. 402 U.S. 313, 349-350 (1971) (overruling *Triplett* v. *Lowell*, 297 U.S. 638 (1936)). It did so despite codification of the Patent Act in its current form between *Triplett* and *Blonder-Tongue*, and despite the failure of legislation that would have overruled *Triplett*. *Id.* at 327 n.17.
- **Tax law.** "[W]ant of specific Congressional repudiations of the *St. Louis Trust* cases [does not] serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with [an intervening] case, make for dissonance of doctrine." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940).
- **Immigration law.** The Court should not "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U.S. 61, 70 (1946) (overruling Naturalization Act precedent).

The Fund observes that the Court's greater readiness to revisit its antitrust precedents is not perfectly analogous to securities law. Fund Br. 18-19 (citing *Stoneridge*, 552 U.S. at 163). *Stoneridge* rightly distinguished securities law from antitrust law because judicial elaboration is constrained in the 10b-5 context *where Congress has expressly resolved the question at issue*. 552 U.S. at 163. Unsurprisingly, nothing in *Stoneridge* or elsewhere suggests that, if Congress remains silent on a 10b-5 question previously addressed by this Court, later Courts are powerless to reverse course.

3. Contrary to the Fund's argument, *Basic*'s judicially inspired litigation presumption does not implicate reli-

ance interests that traditionally animate *stare decisis*. It neither "serve[s] as a guide to lawful behavior," *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995), nor alters anyone's rights or duties, see *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). If *Basic* is overruled, fraudulent statements remain just as illegal under Section 10(b).[1]

The Fund states that investors have relied on the deterrent effect of private securities actions. Fund Br. 25. That effect is questionable at best. See Pet. Br. 43-44; Chamber of Commerce Br. 24-26; Comm. on Capital Mkts. Reg. Br. 14-17. Moreover, any conceivable deterrence wrought by private actions predated *Basic*. See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964) (calling private actions an "effective weapon in the enforcement" of securities laws). Nor does that effect depend on *Basic*'s continued validity, because speakers remain civilly liable to anyone who relies on their misstatements and remain subject to governmental enforcement without any reliance showing at all.

Congress has no separate "reliance" interest in retaining *Basic* because it has not legislated with "specific reference to" *Basic*. Cf. *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (Congress "indicated without ambiguity" its reliance on specific cases in enacting the McCarran-Ferguson Act). Cf. *infra* Part I.B

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[1] The Fund often repeats *Amgen*'s *dictum* that *Basic* created a "substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b-5 plaintiff," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Whatever the "substantive" overtones, the doctrine is fundamentally "procedural" for *stare decisis* purposes. *Basic*'s presumption—like purely procedural rules—applies only in court. It neither prohibits nor permits primary conduct, while most statutory precedents delimit lawful behavior. *Basic*'s presumption simply "facilitat[es] Rule 10b-5 litigation" by reducing plaintiffs' burden to prove reliance. 485 U.S. at 245.

(noting that the PSLRA does not depend on *Basic*'s presumption and is wholly silent about reliance).

The SEC likewise has no cognizable reliance interest in retaining *Basic*. The Fund and various *amici* raise the concern that overruling *Basic* would somehow affect the validity of SEC regulations or enforcement actions predicated on the notion that new, material information usually affects markets.[2] That is a *non sequitur*; the SEC need not establish reliance in its enforcement actions, and whatever its regulations and actions assume about the behavior of capital markets, they in no way involve reliance in private 10b-5 actions.

In the end, the only parties that "rely" on *Basic* are those within the class-action industry, especially lawyers. That is not the sort of reliance that *stare decisis* protects.

4. The Fund and various *amici* ask the Court to adopt an insular, one-way "ratchet" approach to *stare decisis*, under which any majority could fashion its own rules, even those that may be patently erroneous, and force all future courts to accept them on the theory that Congress could sweep up the mess if it chose. See, *e.g.*, *Stare Decisis* Scholars Br. 5 ("judicial interpretation * * * does operate on a ratchet"). Perhaps the *Basic* Court should not have decided *Basic* as it did, *amici* acknowledge; but it did, so the Court must forever leave *Basic* undisturbed, heedless of errors, costs, or consequences. *Id.* at 16-17. That is a dangerous distortion of *stare decisis* that takes direct aim at the separation of powers.

Strikingly, all parties appear to agree that the substantive question of reliance is one that Congress best

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[2] See, *e.g.*, Fund Br. 27-29; Former SEC Chairmen Br. 11-22; *Stare Decisis* Scholars Br. 18-19.

can decide. See, *e.g.*, *id.* at 14-15. That is precisely Halliburton's point. Congress requires actual reliance in the most analogous aftermarket-trading context. See *infra* Part I.C. Overruling *Basic* would not limit Congress, but would squarely remove the question from the realm of judicial tinkering and allow Congress to make further policy refinements if it wishes.

B. The Fund mistakenly treats congressional silence as an endorsement of the Fund's views

The Fund characterizes the PSLRA as evidence that Congress has ratified wide-ranging class actions that depend on *Basic*. Fund Br. 13-17. But nothing in the PSLRA references or depends upon *Basic*'s conception of reliance. The PSLRA applies to individual suits, class actions alleging non-10b-5 violations (such as under Sections 9, 14, or 18 of the Exchange Act), and 10b-5 class actions where all members can otherwise establish common reliance. No party has identified any PSLRA provision that would be inoperable without *Basic*.

The Fund points to failed legislative proposals that would have overturned *Basic*. Fund Br. 13; U.S. Br. 22. But it neglects to acknowledge that legislative proposals *embracing* the *Basic* presumption equally failed in both Houses. See Br. for Members of Congress Supporting Neither Party 7-8, 10, 11-14, 17-18. Together they signify nothing. Congress as a body took no position on *Basic*'s continued viability. See *id.* at 7-9, 17-18. The Fund and its *amici* undertake to write on this decidedly clean slate by selectively citing legislative history that supports their view.

Moreover, the vast majority of the Fund's congres-

sional *amici* voted *against* the PSLRA.[3] It is never helpful to misconstrue a major bipartisan piece of legislation by turning to those who refused to participate in the compromise. Nor do the Fund's congressional *amici* better their position by incorrectly asserting that "when Congress takes action in [an area where the law is settled] but does not overturn that settled legal position, it is deliberately preserving that position." Br. 2. That assertion flatly conflates inaction and acquiescence—two concepts that this Court has been careful to distinguish.[4] Confusing the two is particularly improper here, because Congress *codified* judicially-defined elements it wished to endorse in the PSLRA, but not *Basic*'s presumption of reliance. See, *e.g.*, *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (recognizing PSLRA's codification of judicially generated loss-causation element).

C. The Fund wrongly asserts that Section 9 best informs the 10b-5 reliance element

The Fund and various *amici* defend *Basic*'s lax approach to reliance by asserting that Section 9(a), which does not require reliance at all, and not Section 18(a), is the 10b-5 action's closest analogue. For multiple reasons, this argument must fail.

1. *Basic* itself defeats the Fund's contention. The majority expressly noted the argument that "the analo-

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[3] See https://www.govtrack.us/congress/votes/104-1995/h216 (House vote); https://www.govtrack.us/congress/votes/104-1995/s295 (Senate vote).

[4] Various briefs cite *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), and *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), but those cases involved extraordinary and undisputable evidence that Congress had considered and embraced the *status quo*. See Br. for Members of Congress Supporting Neither Party 20. No such evidence exists here.

gous express right of action includes a reliance requirement, see, *e.g.*, § 18(a) of the 1934 Act." 485 U.S. at 243. It effectively adopted that argument by immediately "*agree[ing]* that reliance is an element of a Rule 10b-5 cause of action." *Ibid.* (emphasis added). But the majority then fatefully departed from Section 18(a)'s text when deciding what *type* of reliance was required. Ignoring the text's actual-reliance requirement, see 15 U.S.C. § 78r(a), the majority created the presumption of reliance based on its view of sound policy—exactly the methodology that this Court has rejected. See Pet. Br. 29.

Basic presumably regarded Section 9 as irrelevant because it lacks a reliance element. See 15 U.S.C. § 78i(f). If it were the proper analogue, then *Basic* could have avoided the need for a presumption of reliance altogether, and the opinion's logic would have been entirely different. But *no* Justice from *Basic* onward has challenged reliance as an element of 10b-5 claims. And outside of *Basic*'s enclave, reliance in this Court's 10b-5 cases increasingly follows the traditional understanding of *actual* reliance.[5] Section 9(a) thus has no relevance to reliance in 10b-5 cases, and the Fund's contrary assertion defends *Basic* on a ground that *Basic* itself rejected.[6] Cf. *Citi-*

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[5] For instance, because the plaintiff "did not *in fact* rely upon [defendants'] own deceptive conduct," *Stoneridge* rejected 10b-5 actions against customers and suppliers who allegedly enabled an issuer to make fraudulent financial statements. 552 U.S. at 160 (emphasis added). The dissent asserted that insistence on Section 18(a)-like actual reliance was "contrary to * * * our holding in *Basic*," *id.* at 168 (Stevens, J., dissenting); see *id.* at 170-171.

[6] Section 9 may be relevant to *other* aspects of 10b-5 litigation, but despite the Fund's strenuous arguments, Fund Br. 31-32, *Lampf*—a statute-of-limitations case—did not endorse Section 9 as the universal analogue for all 10b-5 issues. Both Sections 9 and 18 had the same limitations periods, so the Court was not choosing between

zens United v. *FEC*, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.").

2. Even if the most analogous provision were an open question, the Fund does not dispute that Section 18(a) is more like 10b-5 claims in this crucial respect: Unlike Section 9(a), Section 18(a) permits *aftermarket* purchasers to sue issuers and their officers for damages caused by material misstatements. In exchange for not requiring reliance for Section 9(a) claims, Congress severely limited Section 9(a) by imposing a privity requirement for misstatement-based claims.[7] See 15 U.S.C. § 78i(a)(4); see U.S. Br. 16 n.3 (conceding that only buyers or sellers can be liable for misstatements under Section 9(a)(4)). The vast bulk of 10b-5 claims, including the Fund's, could not be brought under Section 9(a), because most 10b-5 suits involve aftermarket claims where the plaintiff did not buy from or sell to the company or officer making the misstatement.

By contrast, when Congress wanted to permit private

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them. It had to select *either* the one-and-three-year periods in those (and other) original 1934 Act sections *or* the five-year period in a newer section. Footnote 9, upon which the Fund relies, noted slight differences "in terminology"—limitations were triggered in Section 9 by a "violation," and in Section 18 by "accrual." In *dicta*, the Court concluded that "[t]o the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e)," 501 U.S. at 364 n.9. The Court did not base this unexplained selection on a determination that Section 9 is inherently more analogous than Section 18. Much less did the Court foreclose using Section 18 in cases like this one, where it is decidedly more analogous in every relevant respect.

[7] The remainder of Section 9(a) contains no privity limitation, but it is limited to specified forms of manipulation, not misrepresentations.

aftermarket liability in Section 18(a), it *expressly included actual reliance*. See Former SEC Commissioners Supporting Petitioner Br. 20-22 (noting that draft bill omitting an actual-reliance requirement was universally deemed inadequate). Put another way, the Fund *could not* have sued Halliburton under Section 9(a) for any alleged misrepresentation, but it *could* have brought a Section 18(a) suit. The Fund may dislike an actual-reliance requirement for aftermarket claims, but that principle comes directly from Congress.[8]

3. Various *amici* supporting the Fund resist the relevance of Section 18(a) by observing that it is considerably narrower than Section 10(b); the former requires that actionable statements be in SEC filings, while the latter is a "catch-all." But it hardly follows, as they contend, that the *broader* 10b-5 action should have a *looser* reliance requirement. See, *e.g.*, Securities Law Scholars Br. 28-30.

Neither the Fund nor any *amicus* adequately explains why a demanding actual-reliance requirement makes sense for liability associated with statements in SEC filings (Section 18(a)), while liability for other misrepresentations can be based on a loose presumption of reliance

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[8] The Fund relies heavily on *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972). But that case does not help the Fund and need not be affected by *Basic*'s overruling. *Affiliated Ute*, wholly unlike this case, granted a presumption of reliance on material *omissions* in a non-class action involving *both* privity *and* a duty to disclose. See *id.* at 144-145, 151-154. Its presumption rests not on the fraud-on-the-market theory, but on the view that, "*[u]nder the circumstances of this case*," the party bearing the duty to disclose must disprove reliance. *Id.* at 153-154 (emphasis added). After all, "it is fair to force one who breached his duty to prove that the plaintiff did not so rely." *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 385 (5th Cir. 2007).

(Section 10(b)). Representations in SEC filings are the very sort of public statement that, the Fund argues, ordinary investors need not personally read because such public information is quickly incorporated into share prices. See, *e.g.*, Fund Br. 19-23; U.S. Br. 14-21 (arguing that Congress believed that information would affect the price). Yet, on the Fund's reasoning, Congress required actual reliance where one would *least* expect it.

4. The Fund and the Government each seek an escape hatch from the foregoing analysis. The Fund contends that, because of the PSLRA, the historical-reconstruction approach of turning to the most analogous express cause of action is obsolete. Fund Br. 30. Post-PSLRA cases like *Stoneridge* and *Morrison* v. *National Australia Bank Ltd.*, it observes, did not employ it. *Ibid.* But that was because the technique was wholly unnecessary to resolve the questions presented. In *Stoneridge*, statutory text authorized an aiding-and-abetting cause of action, but *only* for the SEC. 552 U.S. at 158. And in *Morrison*, no statutory text rebutted the presumption against extraterritoriality. 130 S. Ct. 2869, 2881 (2010). By contrast, there is *no textual basis* in Section 10(b) or the PSLRA for deriving any congressional view of reliance in 10b-5 claims. Far from heralding the historical-reconstruction approach's obsolescence, *Morrison* affirms that it remains binding when the text does not resolve a question. *Id.* at 2881 n.5.

The Government likewise seeks to evade traditional analysis by imputing the theories animating *Basic* to the 1934 Congress. It supports this historical revisionism with citations to various pre-1934 cases, see U.S. Br. 17-18; Fund Br. 22, none of which remotely supports the proposition that Congress contemplated wide-ranging private actions based on a fraud-on-the-market theory of reliance. Some were *prosecutions* not requiring proof of reliance; one case denied recovery to a stock-tip-news-

letter under an illegal contract to influence his subscribers with biased information. The rest were civil actions in which private plaintiffs *actually relied* on schemes to defraud the public. None of those cases suggests that Congress intended to allow presumed reliance when it enacted analogous provisions of the 1934 Act (much less when it enacted Section 10).[9]

D. The Fund fails to respond to *Basic*'s anomalous Rule 23 consequences

The Fund and the Government dismiss the serious tension between *Basic* and this Court's Rule 23 jurisprudence. Securities class actions are an important supplement to public enforcement, they say, and overruling *Basic* would often "preclude certification," leaving many "defrauded investors" without private "legal recourse." Fund Br. 24; see U.S. Br. 28.

But those are just the arguments this Court found unpersuasive when the Government pressed them in its *amicus* brief (*e.g.*, at 1, 33) in *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Here, neither the Fund nor the Government—nor *any* of its *amici*—cite, let alone distinguish, *American Express*, a case which Halliburton had emphasized. See Pet. Br. 48. The alleged importance of private enforcement and infeasibility of individual claims do not justify bending the

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[9] The Government also asserts that, if traditional reliance were restored, then investors who "purchase stock based on" a broker's recommendation "would be left without a remedy" even if the broker "was misled by the company's misrepresentations * * *." U.S. Br. 13 n.2. But even without *Basic*, investors *could* still sue a company if their brokers were their agents and relied on a misrepresentation because, "[u]nder well-settled principles of agency law, one who defrauds an agent is liable to the principal." *In re Fine Host Corp. Sec. Litig.*, 25 F. Supp. 2d 61, 71 (D. Conn. 1998) (citing Restatement (Second) of Agency § 315 (1958)).

law to allow class actions. *Am. Express*, 133 S. Ct at 2309, 2311.

The Fund's cursory discussion of *Wal-Mart* and *Comcast* (Br. 41-43) elides the inherent conflict between Rule 23 and fraud actions where individualized reliance questions necessarily predominate. The drafters of modern Rule 23 recognized that tension, emphasizing that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Advisory Comm. Note on Fed. R. Civ. P. 23(b)(3) (1966 amends.), 39 F.R.D. 69, 103 (1966).

A group of civil-procedure scholars supporting the Fund acknowledge that Note, but assure the Court that "this was understood to mean that common issues might not predominate where the defendant's oral communications varied significantly from one class member to the next." Br. 14 n.12. That might explain the *first* part of the Advisory Committee's explanation ("material variation in the representations made"), but it does not address the *second* part ("material variation * * * in the kinds or degrees of reliance" by plaintiffs). By presuming away that latter "variation," *Basic* engendered serious tension with Rule 23.

E. The Fund's faulty economic analysis cannot preserve *Basic*

The Fund and its *amici* expend considerable energy throughout their briefs defending a straw man that Halliburton never attacked—that market prices generally respond to new, material information. Likewise, despite their substantial effort defending "event studies," Halliburton has never contested that event studies are valuable in establishing elements of securities fraud. Indeed, event studies are central to why price impact can (and, if

Basic survives, should) be considered at certification, rather than relying on the imperfect proxy of market efficiency. See *infra* Part II.

Halliburton makes two primary economic contentions that justify overruling *Basic* as a legal matter. First, because markets do not consistently and efficiently respond to new information, a judicially crafted "rebuttable presumption" that is virtually irrebuttable in practice (especially at the class-certification stage) is inappropriate. See, *e.g.*, Former SEC Commissioners Supporting Petitioners Br. 22-26. Second, market realities now show that investors do not simply invest "in reliance on the integrity of [the market] price," *Basic*, 485 U.S. at 247, making the presumption of common reliance wholly fictional. Halliburton demonstrated that price integrity (much less information conveyed by price) often is marginal or irrelevant to investors' trading decisions; indeed, some investors are indifferent to prices or their fluctuations because their investment strategies do not depend on those features. See Pet. Br. 15-20. The Fund makes no effort to dispute this point. Logically, investors with such substantially varying motivations cannot be *presumed* to have *common reliance* guiding their every transaction.

The Fund and the Government seek to distract the Court from this fundamental truism (which neither actually denies). The Fund portrays a market at odds with reality, depicting most investors as *Basic* apparently envisioned them—a Norman Rockwell image of newspaper stock-quote pages spread across the kitchen table. Such investors no doubt exist, although likely far fewer today. Certainly, they do not come close to comprising the entire market, and indeed they are net *losers* in the *Basic*-generated litigation bonanza. Pet. Br. 41-43; Chamber of Commerce Br. 24-28. The Fund is long on rhetoric about protecting such long-term small investors, but short on

showing that they and all others in a class rely in common on price integrity.

The Government asserts that because new information generally affects prices, and because investors "reasonably may rely on the integrity of the market prices," U.S. Br. 9 (comma omitted), then the courts should *treat* all of them as so relying, *id.* at 9-10. And it says that *Basic*'s factual economic premises were actually "*conclusions of law* to which the current economic debate regarding the efficient-market hypothesis is altogether irrelevant." *Id.* at 26. This merely restates (without attribution) Professor Langevoort's theory of "juristic grace," a *post hoc* rationalization of *Basic*. See Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 161, 198. Although counterfactual, it would, on policy grounds, treat all transactions *as if* they relied on market-price integrity. "The most straight-forward way of articulating this" approach, Professor Langevoort explains, "is to jettison reliance entirely"—which is what the Fund and the Government, though less candidly, would do.[10] If we presume common reliance as a matter of law when we know investors do *not* rely even on price integrity (much less misrepresentations) as a matter of fact, then there is indeed no point in having a reliance element.

In any event, *even if* well-developed markets efficiently incorporated material information to the degree presumed by *Basic*, and *even if* investors actually purchased in reliance on market-price integrity, *Basic* would still represent an unjustified departure from the 1934 Act's

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[10] Langevoort, Judgment Day for Fraud-on-the-Market?: Reflections on *Amgen* and the Second Coming of *Halliburton*, Georgetown Public Law and Legal Theory Research Paper No. 13-058, at 15 (Nov. 16, 2013).

text. That the central economic premises of *Basic*'s reasoning are now hotly disputed only confirms the wisdom of Justice White's warning against elevating a "mere babe" of economic theory into law. 485 U.S. at 250.

II. THE FUND CANNOT SHOW WHY PLAINTIFFS SHOULD BE EXEMPT FROM ESTABLISHING PRICE IMPACT

The "fundamental premise" of *Basic*'s presumption remains "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Neither the Fund nor the Government cites or acknowledges that principle, and neither shows why, even if the Court declines to require actual reliance, it should not at least require plaintiffs to establish price impact to invoke the presumption.

1. The Fund accepts its certification-stage burden to prove market efficiency. But generalized efficiency is at best an imperfect proxy for an alleged misrepresentation's price impact. Indeed, in defending *Basic*'s "modest" economic underpinnings, the Fund and the Government repeatedly emphasize that efficient-market theory means only that misrepresentations *typically* affect prices. *E.g.*, Fund Br. 8, 9, 25; U.S. Br. 6, 8-9, 33-34. Likewise, the binary market-efficiency test is often satisfied even when it is doubtful that misrepresentations distorted the market price; rigorous efficiency analysis is commonly skipped altogether for widely-traded companies. *E.g.*, *In re Nature's Sunshine Prods. Inc. Sec. Litig.*, 251 F.R.D. 656, 664 (D. Utah 2008) (finding efficiency where prices reacted to unexpected news less than 25% of the time); Chamber of Commerce Br. 19. Price impact is far more precise and relevant to certification than its flawed proxy, generic market efficiency.

Ironically, the Fund and its *amici* laud event studies for their ability to establish a given market's efficiency.

They do not contest that the same event studies can be used to establish the narrower and more salient question of whether alleged misrepresentations—as opposed to other information—distorted the market price. Br. for Law Professors Supporting Petitioners 24-32 (explaining how event studies make this pinpoint determination more easily than overall-market determinations). Indeed, the Fund itself used the *same* event study to establish market efficiency *and* to support its claim that Halliburton's stock price dropped in response to corrective disclosures. See J.A. 579-580.

2. Neither Rule 23 nor *Amgen* constrain this Court from modifying its own precedent to clarify plaintiffs' burden to prove price impact. Cf. U.S. Br. 27-28. *Basic* openly recognized that a straightforward application of Rule 23 to securities-fraud lawsuits would mean that individual questions predominate. 485 U.S. at 242. But "[t]he Court in *Basic* sought to alleviate [that] concer[n] by permitting plaintiffs to invoke a rebuttable presumption of reliance."[11] *EPJ Fund*, 131 S. Ct. at 2185. Without overruling *Basic*, the Court can recalibrate the balance between Section 10(b) and Rule 23 to "alleviate * * * concerns" that the presumption is being applied to certify classes where its "fundamental premise" is lacking.

Moreover, this Court's non-securities Rule 23 caselaw now demands that plaintiffs bear the burden of establishing the "glue" binding class claims together. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 (2011). Under *Basic*, the glue for common reliance is price impact. Thus, plaintiffs should be required to "prove * * * *in fact*" that alleged misrepresentations distorted the market price, *id.* at 2551, rather than relying upon market effi-

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[11] The Government thus incorrectly suggests (Br. 10-11 n.1) that easing class certification did not motivate the *Basic* majority.

ciency—the very sort of imperfect proxy and flawed classwide methodology this Court rejected in *Wal-Mart* and *Comcast*. Pet. Br. 26-27.

3. It is fundamentally anomalous to presume that the putative class relied in common on Halliburton's alleged misrepresentations when both lower courts found no evidence that those statements distorted the market price. Considering price impact as one non-determinative factor in a binary market-efficiency test (Fund Br. 53; U.S. Br. 26)[12] is as backwards as treating a census as a non-determinative factor to assess a statistical sample. Efficiency at most shows whether price impact is likely, but price impact itself is what matters. See Br. for Law Professors Supporting Petitioners 6-9. Indeed, *Amgen* explained that market efficiency is a predicate of price impact, not vice versa. 133 S. Ct. at 1199 (explaining that without efficiency "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price"). Thus, the focus (and the plaintiff's burden) should be on whether common questions of reliance actually exist—whether the misrepresentations distorted the market price—not on irrelevant evaluation of whether the market is *generically* efficient in processing information.

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[12] The Fund mistakenly claims that the widespread *Cammer* test is not "binary" because one factor considers whether stock prices react to unexpected news, and it faults Halliburton for not pressing such a challenge below. But that is just one of five factors that courts consider in declaring a market binarily efficient or not efficient. *E.g.*, *Smilovitz* v. *First Solar, Inc.*, __ F.R.D. __, No. CV12-00555-PHX-DGC, 2013 WL 5551096, at *13 (D. Ariz. Oct. 8, 2013) (finding efficiency under other factors despite evidence of inefficiency on cause-and-effect factor).

III. THE FUND'S ARGUMENTS AGAINST PRICE-IMPACT REBUTTAL CONTRAVENE *BASIC*'S OWN GUARANTEE

1. The Fund and the Government acknowledge that market efficiency and publicity are fit subjects for class-certification inquiries. Their argument that certification-stage price-impact consideration is *not* appropriate, however, is that it "can be proved through evidence common to the class." U.S. Br. 31, 33 (quoting *Amgen*, 133 S. Ct. at 1195). But efficiency and publicity are also "classwide" questions that must be addressed at certification. *Amgen*, 133 S. Ct. at 1199.

The Fund and the Government next assert that the absence of price impact makes it impossible for any individual class member to prove loss causation in a fraud-on-the-market case. But they never answer Halliburton's showing (Pet. Br. 51-53) that this rationale would equally prohibit certification-stage consideration of market efficiency and publicity. Without them, no plaintiff can prove loss causation in a fraud-on-the-market case because there would be no basis to believe that the misrepresentation affected the market price. Neither the Fund nor the Government identifies any scenario in which a class failing to prove price impact is differently situated vis-à-vis loss causation than a class that cannot prove market efficiency or publicity.[13] That should end the matter.

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[13] The Fund argues that efficiency and publicity "are entirely collateral to the merits," while "price impact goes to the heart of a Rule 10b-5 claim." Fund Br. 52. Not so: Market efficiency is "[p]erhaps the most common example of considering a merits question at the Rule 23 stage." *Wal-Mart*, 131 S. Ct. at 2552 n.6. After proving it then, plaintiffs "will surely have to prove [it] again at trial in order to make our their case on the merits." *Ibid.*

2. Moreover, the Fund and the Government are wrong that the absence of price impact necessarily prevents all class members from showing loss causation. The Government correctly notes that "the relevant 'price' for this purpose is the *market* price of a publicly-traded security." U.S. Br. 31. Halliburton identified three published appellate opinions in which individual plaintiffs prevailed on loss causation *without* showing that the "market price" was affected because they purchased in off-exchange transactions and thus were not bound to prove loss by reference to the market price.[14] Pet. Br. 52. The Government dismisses cases involving "non-market (rather than open-market) transactions, where the fraud-on-the-market presumption does not apply." U.S. Br. 32 n.8. But that misses the point, as *Amgen* asks precisely whether individual plaintiffs could prevail *even though* they "cannot invoke the fraud-on-the-market presumption." 133 S. Ct. at 1199.

Nor is the Government correct (Br. 32) that non-exchange transactions in publicly listed stocks are "far more imaginative than real." *Amgen*, 133 S. Ct. at 1197. Fully *40%* of stock transactions now take place in "private trading venues, mostly operated by big banks," rather than NYSE or NASDAQ. See Editorial, Trading in the Dark, N.Y. Times, SR10 (April 7, 2013).[15] These private transactions often occur at non-exchange prices. *Ibid.* Thus, even if defendants showed that misrepresen-

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[14] Statements by Halliburton and this Court that loss causation means "price impact *plus* a subsequent loss caused by the fraud" (see Fund Br. 50) are accurate in the fraud-on-the-market context in which they were made. They are not applicable in non-fraud-on-the-market cases, as explained above.

[15] http://www.nytimes.com/2013/04/07/opinion/sunday/trading-in-the-dark.html?_r=0.

tations did not distort the NYSE price of Halliburton's stock, thereby defeating the presumption of reliance, a class member who purchased in a non-exchange transaction could still prove actual reliance, as well as loss causation by reference to the non-exchange price *at which he purchased*.

It matters not that this scenario is allegedly "atypical." Fund Br. 51. *Amgen* refused consideration of materiality at certification because the absence of that "indispensable elemen[t]" doomed "all" individual claims "as a matter of law." 133 S. Ct. at 1199. By contrast, because price impact is not a 10b-5 element, the real possibility that non-exchange purchasers have viable claims causes individualized questions of reliance to predominate.

3. Despite the concession that price-impact evidence *is* relevant to efficiency, see *supra* p. 18, the Government contends that price-impact rebuttal should not be considered because in an "efficient market" the lack of price impact could mean that the misstatement was not material, and materiality need not be proved at certification. U.S. Br. 32; Fund Br. 52. This again confuses cause and effect. No matter what *caused* price impact to be absent—whether lack of materiality, efficiency, publicity, or something else (see Pet. Br. 20-22 for examples)—price impact remains the "fundamental premise" justifying class certification.

Neither *Amgen* nor *Basic* reserves price-impact rebuttal for summary judgment or trial. See Fund Br. 53. *Amgen* repeatedly emphasized that its reference to later-stage proof applied only to rebuttal of "materiality," which was barred at certification for the same reason that plaintiffs need not establish materiality to begin with. 133 S. Ct. at 1203-1204. Tellingly, the Fund cites no case in which a rebuttable presumption could be invoked at one stage of litigation, but could not be rebutted until a later stage.

4. The Fund proffers several meritless arguments not joined by the Government.

Loss Causation: The Fund mistakenly asserts (Br. 52) that "requiring plaintiffs to establish price impact at the time of the corrective disclosure, which necessarily establishes loss causation, is directly contrary to *Halliburton*'s holding that plaintiffs do not have to establish loss causation at class certification." But price impact only requires distortion at the time of the misrepresentation. *EPJ Fund*, 131 S. Ct. at 2186-2187. That a plaintiff may seek to reverse-engineer that showing by asserting price declines following corrective disclosures does not convert *Basic*'s "fundamental premise" of price impact into the "distinct concept" of loss causation. *Ibid.*

Discovery: The fact that discovery and expert testimony may be necessary to establish price impact is irrelevant to whether it should be considered at class certification. See Advisory Comm. Notes on Fed. R. Civ. P. 23 (2003 amends.), 28 U.S.C. App., p. 144 (2006 ed.) ("it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis"). Indeed, *Comcast* and *Wal-Mart* teach that such measures are frequently necessary for a plaintiff to satisfy Rule 23. And courts within the Second Circuit have been deciding price impact at class certification for five years, often by relying on event studies, without noted difficulty. See Chamber of Commerce Br. Supporting Cert. 23.

Summary Judgment: Moving for summary judgment on price impact *before* class certification is not a realistic option, and the Fund cites no securities case where this was done. As a practical matter, such an early summary-judgment disposition would bind only named plaintiffs, with no preclusive effect against putative class members. Rubenstein, Newberg on Class Actions 7:10 (5th ed. 2013). And price impact is relevant to Rule 23's predom-

inance requirement and thus must be proved at the class-certification stage by a preponderance of the evidence; it need not be confined to summary judgment.

Rule 301: Halliburton does not bear the burden of persuasion to rebut the reliance presumption because Rule 301, which *Basic* cited, governs all presumptions "unless a federal statute * * * provide[s] otherwise." The 1934 Act, which lacks a private action, hardly "provide[s] otherwise." Lower courts' application of *Affiliated Ute* does not aid the Fund. *Affiliated Ute* was decided before Rule 301's adoption, as the Fund observes, and this Court first referred to *Affiliated Ute* as providing a "presumption of reliance" in *Stoneridge*, 552 U.S. at 159. Thus, there may be good reason to treat *Affiliated Ute*'s rebuttal burden differently than *Basic*'s. See also *supra* n.8.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
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In the Supreme Court of the United States

HALLIBURTON CO., ET AL., PETITIONERS

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court should overrule the holding of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), that a plaintiff in a private action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, may invoke a rebuttable presumption of reliance based on the fraud-on-the-market theory.

2. Whether, in such a case, a plaintiff that invokes the fraud-on-the-market presumption of reliance must prove that the alleged misrepresentation distorted the market price of the security in order for the suit to be maintained as a class action, and whether the district court must allow the defendant at class certification to present evidence of no such price impact.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
I. The fraud-on-the-market presumption is an appropriate way for a plaintiff in a private securities-fraud action to demonstrate reliance 7
A. The *Basic* Court properly recognized that a private securities-fraud plaintiff may invoke the fraud-on-the-market presumption to establish reliance 7
B. The fraud-on-the-market presumption is consistent with congressional intent and common-law fraud principles 14
C. Congress has acquiesced in the fraud-on-the-market presumption 21
D. Academic debate about the efficient-market hypothesis has not undercut the fraud-on-the-market presumption 23
E. Stare decisis principles counsel strongly in favor of reaffirming *Basic*'s fraud-on-the-market holding 26
II. When plaintiffs in a private securities-fraud action invoke the fraud-on-the-market presumption, they need not prove, and defendants may not rebut, price impact at the class-certification stage 29
Conclusion 35
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 12

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 29

Amgen Inc. v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) ..... *passim*

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) ..... *passim*

Bedford v. *Bagshaw*, (1859) 157 Eng. Rep. 951 (Exch. Div.) 17

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 2, 8

Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) 2, 10

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) 33

Erica P. John Fund, Inc. v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) 3, 4, 5, 13, 30

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 20

Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 19

Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008) 29

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In the Supreme Court of the United States

No. 13-317

HALLIBURTON CO., ET AL., PETITIONERS

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. The Court's disposition of this case will have a substantial impact on the ability of private plaintiffs to obtain relief for violations of those laws. In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), the case in which this Court first approved use of the fraud-on-the-market presumption of reliance in a private securities-fraud action, the SEC, represented by the Solicitor General, filed a brief as amicus curiae advocating that result. Because meritorious private securities-fraud actions, including class actions, are an essential supplement to criminal prosecutions and civil enforcement actions

brought by the Department of Justice and the SEC, the United States has a substantial interest in this case.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. 15 U.S.C. 78j(b). Under SEC Rule 10b-5, which implements Section 10(b), it is unlawful for any person, in connection with the purchase or sale of a security, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b). This Court has recognized a private right of action to enforce those provisions, see, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975), and Congress has "ratified th[at] implied right of action," *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

In order to recover in a private suit under Section 10(b) and Rule 10b-5(b), a plaintiff must prove: (1) a material misrepresentation or omission by the defendant; (2) that the defendant acted with scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) the plaintiff's reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

Proof of reliance establishes the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). The "traditional (and most direct) way a plaintiff can demonstrate reliance" on a misrepresentation is to show that he was aware of the false statement and purchased stock "based on that specific misrepresentation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). In *Basic*, however, this Court recognized an alternative approach, known as the "fraud-on-the-market" presumption, to proving the reliance element of a private Section 10(b) claim. 485 U.S. at 241-247.

That presumption rests on the understanding that "the market price of shares traded on well-developed markets reflects all publicly available information," including "any material misrepresentations." *Basic*, 485 U.S. at 246. Because the market "transmits information to the investor in the processed form of a market price," a court may presume that an investor relies on the public misstatements when he "buys or sells stock at the price set by the market." *Erica P. John Fund*, 131 S. Ct. at 2185 (quoting *Basic*, 485 U.S. at 244, 247). A defendant may rebut the presumption through "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248.

The fraud-on-the-market presumption is "a substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b-5 plaintiff." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). The presumption has "particular significance" for class plaintiffs, *ibid.*, however,

because it allows the reliance element of a Section 10(b) suit to be proved through evidence common to all class members, which increases the likelihood that "questions of law or fact common to class members [will] predominate" in the suit as a whole. Fed. R. Civ. P. 23(b)(3); see *Erica P. John Fund*, 131 S. Ct. at 2184.

2. Respondent is the lead plaintiff in a securities-fraud class action against Halliburton Co. and one of its officers (petitioners in this Court). Pet. App. 2a-3a. Respondent alleges that petitioners attempted to inflate Halliburton's stock price by downplaying the company's estimated asbestos liabilities, overstating the revenue in its engineering and construction business, and overstating the benefits of a merger. *Id.* at 3a, 33a. Respondent further alleges that, after it purchased stock in Halliburton, petitioners made corrective disclosures about these matters that caused Halliburton's stock price to decline. *Ibid.* Respondent sought to certify a class of all persons who had purchased Halliburton common stock within a specified time period. *Id.* at 2a-3a.

The district court initially denied the class-certification motion. Pet. App. 54a-99a. The court explained that petitioner had failed to prove loss causation, and that circuit precedent required a plaintiff to prove that element in order to invoke the fraud-on-the-market presumption. *Id.* at 57a, 98a (citing *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007)). The court of appeals affirmed, holding that proof of loss causation is necessary to certify a class relying on the fraud-on-the-market presumption. *Id.* at 32a-53a.

This Court reversed. See *Erica P. John Fund*, *supra*. The Court held that a class-action plaintiff who invokes the fraud-on-the-market presumption need not prove loss causation to obtain class certification because that element is not relevant to whether "reliance was capable of resolution on a common, classwide basis." 131 S. Ct. at 2183-2184.

3. On remand, the district court certified the class. Pet. App. 26a-31a. The court rejected petitioners' argument that respondent must show price impact to obtain class certification in a fraud-on-the-market case. *Id.* at 30a.

Petitioners appealed. While their appeal was pending, this Court held in *Amgen* that a plaintiff relying on the fraud-on-the-market presumption need not prove materiality in order to obtain class certification. See 133 S. Ct. at 1193, 1195, 1197. The Court explained that "materiality can be proved through evidence common to the class," and that a failure to prove materiality will "end the case for one and for all," not leave a case in which individual questions of law and fact predominate over common ones. *Id.* at 1195-1196.

4. The court of appeals affirmed. Pet. App. 1a-22a. Relying on *Amgen*, the court explained that price impact—the "measure of the effect of a misrepresentation on a security's price"—is "an objective inquiry" that relies upon evidence "common to the class." *Id.* at 16a. The court further explained that there is no "risk that a later failure of proof on the common question of price impact will result in individual questions predominating" over common ones, because if class members cannot establish price impact, they cannot

prove loss causation and damages, essential elements of a securities-fraud claim. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

I. More than 25 years ago, this Court held in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), that a plaintiff in a private securities-fraud action may rely on the fraud-on-the-market presumption to establish reliance. That presumption rests on the common-sense premise that public, material information about a publicly-traded company affects the price of the company's stock. The presumption also reflects the view that investors, in deciding whether to buy publicly-traded securities, may reasonably assume that the market price has not been tainted by material misinformation. Congress had precisely that understanding when it enacted the Securities Exchange Act of 1934. Congress has ratified the private securities-fraud cause of action, and it has consistently declined to disturb the fraud-on-the-market presumption.

Petitioners identify no good reason to overrule *Basic*'s fraud-on-the-market holding. The fraud-on-the-market presumption has proved workable, and its essential premises remain sound. Academic debate about the efficient-market hypothesis has not undermined the presumption. Congress has declined to disturb the presumption but instead has taken it as given while enacting measures designed to curb potential abuses in private securities-fraud suits. The Court therefore should reject petitioners' request to upset this settled and sensible presumption.

II. If the plaintiff in a securities-fraud suit establishes that the defendant's alleged misstatements were disseminated to the public, and that the relevant stock was traded on an efficient market, he need not

additionally prove price impact in order to obtain class certification. The question whether particular statements affected the market price of a publicly-traded stock will have the same answer for every class member. And if class members establish public dissemination and the efficiency of the market, but are ultimately unable to prove price impact, their claims will fail together because they will not be able to prove loss causation. Petitioners' arguments are virtually indistinguishable from those that the Court rejected in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). The judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE FRAUD-ON-THE-MARKET PRESUMPTION IS AN APPROPRIATE WAY FOR A PLAINTIFF IN A PRIVATE SECURITIES-FRAUD ACTION TO DEMONSTRATE RELIANCE

A. The *Basic* Court Properly Recognized That A Private Securities-Fraud Plaintiff May Invoke The Fraud-On-The-Market Presumption To Establish Reliance

1. In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), the Court explained that the reliance element of a private Section 10(b) suit establishes "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243. The Court further observed that there is "more than one way to demonstrate the causal connection." *Ibid.* The Court explained that "[t]he modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass those

differences." *Id.* at 243-244 (footnote omitted); see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 744-745 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable.").

The plaintiffs in *Basic* alleged that the defendants had made public misstatements about a stock traded on a large, well-developed market. The Court held that, in such a suit, a plaintiff who did not personally read or hear the alleged misstatements may prove the reliance element of a Section 10(b) suit by showing that the market processed the misstatements into the market price at which he purchased the security. 485 U.S. at 243, 247. The Court explained that, when an investor buys stock on a well-developed market, "the market is interposed between seller and buyer" and the market performs "the valuation process" for the investor. *Id.* at 244 (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)). The Court held that, because material information about a security is accounted for in a market price, and because "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," courts may presume that an investor who buys stock on a well-developed market indirectly relies on public, material misstatements made about that stock. *Id.* at 244, 247.

2. The fraud-on-the-market presumption reflects two sound (and related) overarching premises about the operation of developed securities markets. The first is that material, publicly-disseminated information about stock traded on such a market generally

influences the stock's price. See *Basic*, 485 U.S. at 246 (stating that "[r]ecent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations"). When information about a company is released publicly, market professionals assess that information to determine whether and how it should influence their trading decisions. *Id.* at 244, 248. Thus, even when a stock purchaser is unaware of a particular public statement that is relevant to the stock's value, that statement may appropriately be viewed as a legal cause of the market price the buyer pays to acquire the stock.

Second, the decision in *Basic* reflects the additional premise that investors typically do, and reasonably may, rely on the integrity of the market price, even when they lack the time or expertise to scrutinize the raw materials that inform the judgments of market professionals. The *Basic* Court observed that requiring proof of individualized reliance "would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market." 485 U.S. at 245. An important (though largely implicit) premise of the *Basic* opinion is that an investor who buys stock in reliance on the integrity of the market price, without reading all material public statements about the company, is behaving reasonably and in a manner consistent with congressional intent. The Court viewed the fraud-on-the-market presumption as furthering Congress's policies in enacting the 1934 Act, because "Congress expressly relied on the premise that securities markets are affected by information" when it "enacted legislation to facilitate an

investor's reliance on the integrity of those markets." *Id.* at 245-246. The Court further explained that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Id.* at 246-247 (quoting *Schlanger* v. *Four-Phase Sys. Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).

That concept of reasonable reliance is particularly sound because the scienter element of a Section 10(b) action significantly limits the circumstances under which investors may recover for market losses. A person who invests in the stock market assumes the risk that his trades may be unsuccessful for any number of reasons. The investor does not, however, assume the risk that the market price at which he bought or sold a security was tainted by fraud. See *Basic*, 485 U.S. at 246-247; cf. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (explaining that federal securities laws make private suits available, "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause"). To put it another way: by treating as reasonable the ordinary investor's reliance on the integrity of the market price, the Court in *Basic* determined that such investors are fit subjects of the law's protections, even if they have not personally read or heard the misrepresentations that caused that price to be distorted.[1]

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[1] Petitioners suggest (Br. 27) that the Court in *Basic* adopted the fraud-on-the-market presumption *in order to* cause common issues to predominate and thereby facilitate class actions. That suggestion is unfounded. The *Basic* Court was reviewing the class-certification decisions of the courts below, see 485 U.S. at 230, and it accordingly discussed the relationship between various

3. The *Basic* Court adopted a legal presumption, not a particular economic theory. The Court relied on the premises (described above) that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations," and that an investor who buys or sells stock generally "rel[ies] on the integrity of [the market] price." 485 U.S. at 246, 247. But the Court did not purport to determine how quickly or how accurately markets process information. Instead, the Court recognized the existence of ongoing academic debate over such matters, but concluded that the debate did not call into question the two fundamental premises underlying the presumption. *Id.* at 246-247 & n.24, 248 n.28; see pp. 24-25, *infra*. The Court also made clear that the defendant may rebut the presumption of reliance by showing that either or both of those premises are untrue in a particular case. 485 U.S. at 248-249. The mode of proof approved in *Basic* simply reflects the *presump-*

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methods of proving reliance and the requirements of Rule 23, see *id.* at 242. The Court's rationales for adopting the fraud-on-the-market presumption, however, contain no reference to the desirability of encouraging class actions. See *id.* at 243-249. Petitioners rely primarily (Br. 27) on language in the *Basic* opinion that described the district court's class-certification analysis. See 485 U.S. at 242. But while the district court in *Basic* observed that the fraud-on-the-market presumption would have the practical effect of facilitating class actions, it agreed with a prior court that the "[j]ustification for the use of a presumption in open market transactions need not, and indeed should not, be premised on the bringing of the 10b-5 suit as a class action." 86-279 Pet. App. at 129a (quoting *Tucker* v. *Arthur Andersen & Co.*, 67 F.R.D. 468, 480 (S.D.N.Y. 1975)).

tive view that information affects market prices and that investors reasonably rely on those prices.

The reliance element of a private Section 10(b) claim serves to establish "the causal connection" between the defendant's misstatements and the plaintiff's injury. *Basic*, 485 U.S. at 243. That explanation accords with longstanding common-law principles. In tort actions generally, the plaintiff must prove a "causal connection between the wrongful conduct and the resulting damage." William L. Prosser, *Handbook of the Law of Torts* 714 (4th ed. 1971). In cases involving fraudulent misrepresentations, that causal connection is established by showing that the misrepresentation "induce[d] * * * the plaintiff to act." *Ibid.*; accord 3 Restatement (Second) of Torts § 546, cmt. a, at 102 (1979).

Given the natural and well-recognized tendency of public material misrepresentations to affect the price of stocks traded on a developed market, the Court appropriately determined that either direct or indirect reliance could establish the requisite causal link. *Basic*, 485 U.S. at 243; see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 154 (1972) (considering whether there was a sufficient connection to "establish the requisite element of causation in fact"). The Court's authority to define reliance in that way was particularly clear because, until the decision in *Basic*, the Court had not determined whether a private securities-fraud plaintiff must prove reliance at all. See *Basic*, 485 U.S. at 243 (resolving that uncertainty); cf. Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 157 (explaining that the Court in *Basic* could have reached the same result by holding "that causation

was the only requirement, with reliance as one (but not necessarily the only) way of demonstrating a causal link between the lie and harm to the plaintiff").[2]

The fraud-on-the-market presumption does not apply to every private Section 10(b) suit, but only when the defendant is alleged to have "made public, material misrepresentations" about stock sold "in an impersonal, efficient market." *Basic*, 485 U.S. at 248 (quoting court of appeals' decision); see *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (explaining that plaintiff seeking to invoke the presumption must establish an efficient market and public statements). And even when those prerequisites are initially satisfied, defendants may disprove the asserted causal link between the alleged misrepresentations and any asserted injury to the plaintiff by showing (for example) that the stock's price was not affected by the defendant's statement or that the plaintiff "would have traded despite his knowing the statement was false." *Basic*, 485 U.S. at 248; see *id.* at 248-249 (providing other examples). The *Basic* presumption therefore sensibly reflects the realities of modern securities markets.

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[2] Indirect reliance is not limited to the cases identified in *Basic*. See 485 U.S. at 243. An individual may purchase stock based on the recommendation of his broker or a stock-tip newsletter. Under petitioners' view, if the broker who made the recommendation was misled by the company's misrepresentations, but the investor who bought the stock was unaware of those specific statements, the investor would be left without a remedy, even though he relied on the statements through the broker. Yet the common law has long recognized such concepts of indirect reliance. See 3 Restatement (Second) of Torts §§ 533, 534, at 72, 76.

B. The Fraud-On-The-Market Presumption Is Consistent With Congressional Intent And Common-Law Fraud Principles

1. The Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*), reflects Congress's understanding that information affects stock prices in well-developed markets and that investors rely on the integrity of market prices. In the decades preceding the Act, false statements disseminated to the securities markets had undermined the integrity of prices and eroded investor confidence. See S. Rep. No. 1455, 73d Cong., 2d Sess. 30-45 (1934) (*Second Senate Report*); see also, *e.g.*, Christopher Branda, Jr., Note, *Manipulation of the Stock Markets Under the Securities Laws*, 99 U. Pa. L. Rev. 651, 665 (1951).

A particular focus of Congress's concern was the widespread manipulation of securities prices by groups of investors known as "pools." *Second Senate Report* 30-31. Pool members engaged in concerted activity to raise the price of a stock, drum up interest in the company, then sell their stock at a profit. *Id.* at 31; see Charles Amos Dice, *The Stock Market* 428-432 (1928). To achieve their objectives, pools utilized an array of manipulative and deceptive devices, including disseminating false, positive information about the stock in order to entice buyers. *Second Senate Report* 32, 41; S. Rep. No. 792, 73d Cong., 2d Sess. 8 (1934) (*First Senate Report*); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10-11 (1934) (*House Report*). The pools were able to profit at the expense of unwitting investors because the markets processed the false or misleading statements into (inflated) stock prices. See *First Senate Report* 8; Twentieth Century Fund, Inc., *Stock Market Control* 118 (Evans Clark et al. eds., 1934).

Once the pool operators stopped manipulating the stock price, the price would drop, and "[t]he public [was] the loser." Twentieth Century Fund, Inc., *The Security Markets* 502-503 (Alfred L. Bernheim & Margaret Grant Schneider eds., 1935).

2. Congress enacted the 1934 Act to stop those manipulative practices, ensure price integrity, and restore the public's faith in the Nation's capital markets. See *House Report* 10-11. In particular, Congress sought to ensure that prices reflect the "free and honest balancing of investment demand with investment supply" rather than false information. *Id.* at 10; see *Second Senate Report* 30 ("The true function of an exchange is to maintain an open market for securities, where supply and demand may freely meet at prices uninfluenced by manipulation and control.").

In describing the need for regulation, the 1934 Act observed that "the prices of securities" on the national exchanges and markets had been "susceptible to manipulation and control," harming the national economy. § 2(2)-(3), 48 Stat. 882 (15 U.S.C. 78b(2)-(3)). Two provisions of the Act focused on preventing that manipulation: Section 9, which prohibited certain categories of manipulative practices, and Section 10(b), which prohibited the use, in connection with the purchase or sale of a security, of any other "manipulative or deceptive device or contrivance" made unlawful by SEC rules and regulations. §§ 9, 10(b), 48 Stat. 889-891 (15 U.S.C. 78i, 78j(b)); see Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 430 (1990).

Section 9 prohibited a buyer or seller from making "false or misleading" statements to induce the purchase or sale of a security, and it provided a right of

action to persons who "purchase[d] or s[old] a[] security at a price which was affected by such act or transaction," Act § 9(a)(4) and (e), 48 Stat. 890 (now codified at 15 U.S.C. 78i(a)(4) and (f)).[3] Those provisions reflected the same premises that underlie the fraud-on-the-market presumption. Congress recognized in 1934 that markets process information into a price, and that false information undermines the integrity of that price, to the detriment of investors who trade on the understanding that market prices reflect the free interplay of supply and demand. *House Report* 10-11.[4] And in Section 9(e), Congress created a private right of action through which investors who purchase stock at a price affected by a false statement may recover for that fraud.[5]

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[3] The prohibition imposed by Section 9(a)(4) applies only to persons who buy or sell (or offer to buy or sell) securities. See 15 U.S.C. 78i(a)(4). By contrast, Section 10(b) and Rule 10b-5 prohibit *all* material misstatements made in connection with the purchase or sale of securities, see 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5(b), including misstatements made by persons who are neither purchasers nor sellers.

[4] Section 9(a)(4) appeared alongside other provisions that prohibited transactions designed to give a false appearance of active trading, see, *e.g.*, 15 U.S.C. 78i(a)(1)-(2), reflecting Congress's understanding that false statements affect prices through the market mechanism in the same way that fictitious trades affect prices.

[5] Congress also relied on the premise that markets process information into the price in Section 11 of the Securities Act of 1933, which permits any person who has acquired a security to sue for misrepresentations in a registration statement, see ch. 38, § 11, 48 Stat. 82 (15 U.S.C. 77k), because even though these statements "may never actually have been seen by the prospective purchaser," they "determine the market price of the security" on account of "their wide dissemination." H.R. Rep. No. 85, 73d Cong. 1st Sess.

3. These principles reflected in the 1934 Act had their origins in the common law. In an early fraud case involving market-traded securities, an English court held that false rumors of Napoleon's death—circulated by those seeking to raise the price of securities issued by the British government—constituted "a fraud levelled against all the public" because the rumors affected market prices, harming those who purchased at a distorted price. *Rex* v. *DeBerenger*, (1814) 105 Eng. Rep. 536 (K.B.) 537-538. Other English courts similarly found defendants liable for damages after they disseminated false information to the market in order to "induce the public to purchase their shares at a price which they were not justified to ask." *Stainbank* v. *Fernley*, (1939) 59 Eng. Rep. 473 (Ch.) 476-477; see *Bedford* v. *Bagshaw*, (1859) 157 Eng. Rep. 951 (Exch. Div.) 956.

By the time of the 1934 Act, American courts and scholars had accepted these concepts. One contemporary scholar explained that, "where the effect of [a] statement was to create a false valuation or appraisal by the entire market, and the buyer relied upon the state of the market, he had, at second hand as it were, relied on the statement itself." A.A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 269-270 (1931) (citing *Ottinger* v. *Bennett*, 96 N.E. 1123 (N.Y. 1911) (per curiam), and *Ridgley* v. *Keane*, 119 N.Y. Supp. 451 (N.Y. App. Div. 1909)); see James Wm. Moore & Frank M. Wiseman, *Market*

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10 (1933); see William O. Douglas & George E. Bates, *The Securities Act of 1933*, 43 Yale. L.J. 171, 176 (1933) (plaintiff who "buys in the open market * * * may be as much affected by the concealed untruths or the omissions as if he had read and understood the registration statement").

Manipulation and the Exchange Act, 2 U. Chi. L. Rev. 46, 65-77 (1934) (citing cases); see also William O. Douglas, *Protecting the Investor*, 23 Yale Rev. 522, 524 (1934) (explaining, in the context of registration statements, that "[t]he judgment of [market] experts will be reflected in the market price"). As one court held the year before the 1934 Act was enacted, "[w]hen an outsider, a member of the public, reads the price quotations of a stock listed on an exchange, he is justified in supposing that the quoted price is an appraisal of the value of that stock due to a series of actual sales between various persons dealing at arm's length in a free and open market." *United States* v. *Brown*, 5 F. Supp. 81, 85 (S.D.N.Y. 1933), aff'd, 79 F.2d 321 (2d Cir.), cert. denied, 296 U.S. 650 (1935). The court further explained that, if the market is manipulated to raise the price of a stock, "an outsider [who] buys in that market * * * obviously pays more * * * than he would have paid in a free and open market, and hence is a victim of unfair dealing by the insiders." *Ibid.*

When Congress enacted the 1934 Act, courts accepted that "[a] statement made in a public marketplace, though not directed to a specific buyer, nevertheless could reasonably be assumed to affect buyers" because "the market mechanism transmits representations widely" to investors through the price. A.A Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 394 (1938); see S.S. Huebner, *The Stock Market* 38 (rev. ed. 1934). It thus was well-recognized that "securities markets are affected by information" (*Basic*, 485 U.S. at 246), and that spreading false information about a publicly-traded stock could seriously harm even those investors who were unaware of the

specific statements used to manipulate markets. And while pre-1934 investors harmed by such misstatements could not necessarily recover through private suits, the 1934 Act was enacted to "rectify perceived deficiencies in the available common-law protections." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983).

4. Petitioners contend (Br. 12-14) that, to ensure that the implied private right of action under Section 10(b) furthers the purposes of the 1934 Congress, the Court should look to the express private right of action created by Section 18(a) of the Exchange Act. Under Section 18(a), a person who makes a false or misleading statement in "any application, report, or document" filed under the Act or an SEC rule or regulation is liable for damages caused to a person "who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement." 15 U.S.C. 78r(a). Petitioners state (Br. 13) that Section 18(a) "expressly requires actual reliance," and that the indirect reliance discussed in *Basic* therefore should be deemed insufficient in a Section 10(b) suit.

Petitioners' reliance on Section 18(a) is misplaced. Although Section 18(a) limits recovery to plaintiffs who buy or sell stock "in reliance upon" the defendant's false or misleading statement, it does not specify the type of reliance required or state whether indirect reliance through the market price will suffice. 15 U.S.C. 78r(a). The same argument that petitioners now put forward was advanced by the dissenting Justices in *Basic*, see 485 U.S. at 257-258 (White, J., concurring in part and dissenting in part), and it did not persuade the Court then.

In any event, Section 9 of the 1934 Act provides a closer analogue to Section 10(b) than does Section 18(a). Sections 9 and 10 were both designed to address the manipulation of securities prices. Section 9 prohibited certain categories of manipulative practices, and Section 10(b) was a "catch-all" that authorized the SEC to prohibit any other manipulative or deceptive practices. *Hearing on H.R. 7852 and H.R. 8720 before the House Comm. on Interstate & Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas Corcoran); see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976) (describing Section 10(b) "as a 'catchall' clause"). Congress thus ensured that "[t]he resourceful and unscrupulous traders who think up schemes not specifically condemned by section 9" would "find themselves at best only one jump ahead of the Commission." John Hanna, *The Securities Exchange Act of 1934*, 23 Cal. L. Rev. 1, 17 (1934). Consistent with that understanding, this Court has interpreted Section 10(b) by reference to Section 9. See *Ernst & Ernst*, 425 U.S. at 201-206, 209 n.28.

Section 9(a)(4) prohibited a buyer or seller from making "false or misleading" statements to induce the purchase or sale of a security, 15 U.S.C. 78i(a)(4), and Section 9(e) authorized "any person" who bought or sold stock "at a price which was affected by" a manipulative practice prohibited by Section 9 to sue for "damages sustained as a result." 15 U.S.C. 78i(f). An investor's right to sue under Section 9(e) was not made contingent on proof that the investor subjectively relied upon, or even was aware of, the defendant's false or misleading statements. That provision is instructive here for two related reasons. First, Section 9 reflects Congress's understanding that material

misstatements about a company, by affecting the market price at which the company's stock is sold, may injure even investors who were unaware of those misstatements. See pp. 15-16, *supra*. Second, Congress viewed that causal chain between prohibited manipulation and ultimate economic loss as sufficient to justify liability in a private damages action, without requiring proof of direct reliance. The fraud-on-the-market presumption rests on the same principles.

C. Congress Has Acquiesced In The Fraud-On-The-Market Presumption

In the 25 years since *Basic*, Congress has repeatedly acted to refine the Section 10(b) private right of action. The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, imposed a variety of procedural and substantive limitations on securities-fraud litigation, including class actions. Congress "recognized that although private securities-fraud litigation furthers important public-policy interests," such as "deterring wrongdoing and providing restitution to defrauded investors," private lawsuits had "also been subject to abuse." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1184, 1200 (2013) (citing H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31-32 (1995)). Congress added a variety of new requirements for private actions, including heightened pleading requirements, 15 U.S.C. 78u-4(b)(1)-(2); automatic stays of discovery pending resolution of motions to dismiss, 15 U.S.C. 78u-4(b)(3)(B); safe harbors for forward-looking statements, 15 U.S.C. 78u-5; and mandatory sanctions for abusive litigation, 15 U.S.C. 78u-4(c). Congress subsequently "fortified the PSLRA" (*Amgen*, 133 S. Ct. at 1200) in the Securities Litigation Uniform

Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (SLUSA), which prevents private securities-fraud plaintiffs from avoiding the PSLRA's requirements by proceeding under state law. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81-83 (2006).

In both the PSLRA and SLUSA, Congress refined the contours of the private right of action without modifying, curtailing, or eliminating the fraud-on-the-market presumption. Indeed, Congress specifically "rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen*, 133 S. Ct. at 1201. An early version of the legislation that became the PSLRA included a provision that would have overturned *Basic*'s fraud-on-the-market presumption by requiring a plaintiff to prove that he "had actual knowledge of and actually relied on" a false or misleading statement. H.R. 10, § 204, 104th Cong., 1st Sess. (1995). Hearings were held on the bill, and multiple witnesses testified in support of eliminating the fraud-on-the-market presumption. See *Common Sense Legal Reform Act: Hearings before the Subcomm. on Telecommunications & Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess., 92, 236-237, 251-252, 272 (1995). Rather than overturn the fraud-on-the-market presumption, however, Congress placed other, more narrowly-tailored limitations on the private cause of action to target specific abuses that it had observed post-*Basic*.

"It is appropriate for [the Court] to assume that when [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge Inv. Part-*

ners, LLC v. *Scientific-Atlanta*, 552 U.S. 148, 165-166 (2008). Overruling *Basic* now would upset the careful balance Congress struck in the PSLRA and SLUSA, and it would radically alter the way in which private Section 10(b) suits are litigated. Meritorious private securities-fraud actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the Department of Justice and the SEC. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). And while petitioners do not ask this Court to abrogate the private right of action altogether, a requirement that every private Section 10(b) plaintiff must prove direct, individualized reliance would substantially diminish the compensatory and deterrent effect of the private remedy. If that step is to be taken at all, it should be taken by Congress.

D. Academic Debate About The Efficient-Market Hypothesis Has Not Undercut The Fraud-On-The-Market Presumption

1. Petitioners' primary contention (Br. 14-22) is that the Court should abandon the fraud-on-the-market presumption because of academic debate regarding the efficient-market hypothesis. That argument is mistaken.

Both the fraud-on-the-market presumption and the efficient-market hypothesis rest on the uncontroversial premise that markets process publicly available information about a company into the company's stock price. Compare *Basic*, 485 U.S. at 241-242, with, *e.g.*, Bradford Cornell, *Corporate Valuation: Tools for Effective Appraisal and Decision Making* 38-39 (1993). The Court in *Basic* used that understanding as part of the rationale for a legal presumption, which plaintiffs must support with case-specific evidence,

and which defendants may rebut. 485 U.S. at 242. Under the rubric of the efficient-market hypothesis, economists have treated that general understanding as a jumping-off point for academic debate about precisely how quickly markets process information into a price that accurately reflects the value of the security.

Economists debate these questions in order to determine when investors can take advantage of arbitrage opportunities. The "weak" version of the efficient-market hypothesis is that "prices incorporate information in a way that prevents the historical pattern of prices from being used to predict changes in price," so that "only someone with new information can make a trading profit." *Schleicher* v. *Wendt*, 618 F.3d 679, 684-685 (7th Cir. 2010) (Easterbrook, J.). The "semi-strong" version adds that "the value of new information is itself reflected in prices quickly after release, so that only the *first* recipient of this information (or someone with inside information) makes a profit." *Id.* at 685. And the "strong" version adds that prices reflect private as well as public information, so that even an inside trader cannot outperform other investors, *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 10 n.16 (1st Cir. 2005), and "that the price set in this way is *right*," in that it "accurately reflects the firm's value." *Schleicher*, 618 F.3d at 685.

The *Basic* Court recognized that "economists and social scientists," using "sophisticated statistical analysis" and "economic theory," had debated the precise scope and contours of the efficient-market hypothesis. 485 U.S. at 246-247 n.24, 248 n.28. The Court concluded, however, that it was not necessary to resolve that debate in order to approve the fraud-on-the-market

presumption. *Ibid.* Rather, the Court found it sufficient that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Ibid.* The Court accordingly made clear that it was not "adopt[ing] any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 248 n.28.

2. The soundness of the fraud-on-the-market presumption does not depend on whether, when prices react to information, they reach a "correct" value such that no trading strategy can beat the market. Barbara Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1502-1504 (2013); see *Schleicher*, 618 F.3d at 685. Whatever the state of academic debate on that particular question, there is widespread agreement on the basic point that public disclosure of material information generally affects the prices of securities traded on efficient markets. See *Schleicher*, 618 F.3d at 685; see also Langevoort, 2009 Wis. L. Rev. at 161-162. Even the most vocal critics of the efficient-market hypothesis do not dispute that markets generally process information into the stock's price, and any challenge to that understanding would call into question the integrity of the entire market. *E.g.*, Robert J. Shiller, *We'll Share the Honors, and Agree to Disagree*, N.Y. Times, at BU6 (Oct. 27, 2013) ("Of course, prices reflect available information.").

To be sure, the fraud-on-the-market presumption depends not only on the generally accepted empirical proposition that public material information affects prices, but also on the *Basic* Court's further determination that this causal link is sufficient to justify a

damages recovery in a private lawsuit. That determination in turn rested partly on the *Basic* Court's view of proximate causation, and partly on its view that investors may reasonably rely on the integrity of the market price. Those aspects of the *Basic* Court's analysis, however, clearly are *conclusions of law*, to which the current economic debate regarding the efficient-market hypothesis is altogether irrelevant.

3. The *Basic* framework is flexible enough to accommodate criticisms of the presumption and to allow defendants to present evidence that markets may not process specific information for specific securities or at specific times. See Pet. Br. 16-22. No one believes that markets perfectly process information: if markets instantaneously processed all public information into a price, no investor would have an incentive to analyze that information. See Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393, 404-405 (1980). Nothing in *Basic* prevents a defendant from presenting evidence—at the class-certification or merits stage—that the market for a particular security did not adequately perform its information processing function at a particular time or for particular news. But petitioners declined to make such a challenge here. See J.A. 753.

E. Stare Decisis Principles Counsel Strongly In Favor Of Reaffirming *Basic*'s Fraud-On-The-Market Holding

Under the doctrine of stare decisis, the Court generally does not overrule one of its prior decisions absent a special justification. See, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). In the area of statutory interpretation, where the "legislative power is implicated," *Patterson* v. *McLean Credit Union*, 491

U.S. 164, 172-173 (1989), stare decisis "has special force, for Congress remains free to alter what [the Court has] done." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (internal quotation marks and citation omitted). And when such a precedent has stood for several decades, it "enhance[s] even the usual precedential force" that the Court accords to its prior interpretation of statutes. *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007) (citation omitted).

Principles of stare decisis apply with special force here. *Basic* has been the law for more than 25 years. During that period, Congress has ratified the implied cause of action recognized by this Court, while adjusting the contours of that cause of action to reflect particular concerns raised in fraud-on-the-market cases. Congress considered the option of overriding the presumption, and it declined to take that step.

Petitioners contend (Br. 25-27) that *Basic* has been undermined by recent decisions of this Court construing the requirements for class certification under Federal Rule of Civil Procedure 23. That is incorrect. "[F]raud on the market is a substantive doctrine of federal securities-fraud law that can be invoked by" both individual and class plaintiffs. *Amgen*, 133 S. Ct. at 1193. Contrary to petitioners' contention (Br. 25), nothing in *Basic* suggests that the court in a private Section 10(b) suit may presume that the requirements for class certification have been met. Rather, in determining whether "questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3), the court must consider what forms of proof will be sufficient to establish liability under the appli-

cable substantive law. The fraud-on-the-market presumption increases the likelihood that common issues will predominate, but it does not relieve the plaintiff of the burden of establishing the prerequisites to class certification. Cf. note 1, *supra*.[6]

The foundations of the fraud-on-the-market presumption are as solid today as they were in 1985, and, for that matter, in 1934. And it remains true that without the fraud-on-the-market presumption, private plaintiffs who trade on large, impersonal markets would face "unnecessarily unrealistic evidentiary burden[s]" that ignore market realities. *Basic*, 485 U.S. at 245. Petitioners therefore have not articulated the special justification that this Court requires before it will depart from a longstanding statutory-interpretation precedent. Overruling *Basic* would substantially diminish the compensatory and deterrent effect of the private Section 10(b) right of action, and it could have a more general destabilizing effect as well, since "[t]o overturn a decision settling one * * * matter simply because [the Court] might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others." *John R. Sand & Gravel*, 552 U.S. at 139.

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[6] By way of analogy, a plaintiff who seeks a preliminary injunction must demonstrate his entitlement to that relief. See, *e.g.*, *Winter* v. *NRDC*, 555 U.S. 7, 20 (2008). In determining whether the plaintiff has established the requisite likelihood of success on the merits (see *ibid.*), however, a court must take into account the relevant substantive law, including any applicable presumptions. A court that found that the plaintiff was likely to prevail on the merits, based in part on the availability of a presumption useful to the plaintiff's case, would not impermissibly "presume" the plaintiff's entitlement to injunctive relief.

II. WHEN PLAINTIFFS IN A PRIVATE SECURITIES-FRAUD ACTION INVOKE THE FRAUD-ON-THE-MARKET PRESUMPTION, THEY NEED NOT PROVE, AND DEFENDANTS MAY NOT REBUT, PRICE IMPACT AT THE CLASS-CERTIFICATION STAGE

A. Under Federal Rule of Civil Procedure 23(a), the named plaintiff must show the familiar requirements of numerosity, commonality, typicality, and adequacy of representation. The party seeking certification also must establish that the proposed class fits into one of the categories described in Rule 23(b). See *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011).

In this case, respondent has argued that class certification is appropriate under Rule 23(b)(3) because the suit is one in which "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); see Pet. App. 5a-6a. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). To satisfy Rule 23(b)(3), a plaintiff must establish that the elements of the cause of action are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-312 (3d Cir. 2008).

B. It is "common ground" that, to obtain class certification based on the fraud-on-the-market presumption, the plaintiff in a securities-fraud class action must prove (1) "that the alleged misstatements were publicly known"; (2) that "the stock traded in an efficient market"; and (3) that the class members' trans-

actions "took place between the time the misrepresentations were made and the time the truth was revealed." *Erica P. John Fund*, 131 S. Ct. at 2185 (internal quotation marks and citation omitted); see *Basic*, 485 U.S. at 241-242.[7] If the plaintiff establishes those facts, the element of reliance will be subject to common proof, whether or not the plaintiffs ultimately succeed on that or any other element of their claim.

In this case, petitioners conceded that the market for Halliburton stock is efficient, Pet. App. 55a-56a, and they do not dispute that the alleged misstatements were made publicly and that class members purchased Halliburton stock during the relevant interval. Instead, they contend (Br. 49-53) that respondent must prove price impact at class certification in order to show that common issues predominate. Petitioners are mistaken.

"'Price impact' simply refers to the effect of a misrepresentation on a stock price," *i.e.*, that a false or misleading statement has caused the stock price to be higher or lower than it would have been if the truth had been known. *Erica P. John Fund*, 131 S. Ct. at 2187. A material misrepresentation may "propel the stock's price upward" or simply "slow the rate of fall." *Schleicher*, 618 F.3d at 683-684. Although price impact is not a freestanding element of a private securities-fraud claim, see, *e.g.*, *Amgen*, 133 S. Ct. at 1191-1192, it is integrally related to the element of loss causation. Unless the alleged misstatements impacted

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[7] As the Court explained in *Amgen*, the last of those requirements "relates primarily to the Rule 23(a)(3) and (a)(4) inquiries into typicality and adequacy of representation," rather than to the question of predominance under Rule 23(b)(3). 133 S. Ct. at 1198-1199.

the stock price, the plaintiff will be unable to show that he relied on a distorted price and suffered losses when the truth came to light. See Pet. App. 13a-14a.

For two reasons, however, proof of price impact is not a prerequisite to class certification. First, price impact "can be proved through evidence common to the class." *Amgen*, 133 S. Ct. at 1195. Because the relevant "price" for this purpose is the *market* price of a publicly-traded security, the question whether any price impact occurred (and, if so, how great that impact was) will necessarily have the same answer for all class members. Pet. App. 16a. Second, there is no risk that a failure to prove price impact "will result in individual questions predominating." *Amgen*, 133 S. Ct. at 1196. If a class is certified and the factfinder ultimately concludes that petitioners' alleged misrepresentations did not affect the price of Halliburton stock, all plaintiffs will lose on the merits because they will be unable to prove (at least) the element of loss causation. Thus, although price impact is not a free-standing element of a private Section 10(b) claim (Pet. Br. 51), a failure of proof on price impact will have the practical effect of "end[ing] the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class." *Amgen*, 133 S. Ct. at 1196.

Petitioners contend (Br. 51-52) that, although an eventual failure of proof on price impact would render the fraud-on-the-market presumption unavailable, individual plaintiffs might still retain viable claims. If that were so, certification of a class without a finding on price impact would create a risk that individual issues would later come to predominate. Petitioners do not explain, however, how a plaintiff who has

proved publicity and an efficient market (fraud-on-the-market predicates that must be established at class certification and have been established in this case), but who is ultimately unable to prove price impact, could have any viable securities-fraud claim remaining.[8] That is especially true because, when a plaintiff has established an efficient market but cannot establish price impact, a likely inference is that the alleged misstatements are not material, see Pet. App. 18a n.10, and materiality need not be proved at class certification. *Amgen*, 133 S. Ct. at 1196.

Accordingly, the individualized issues that "hypothetically might arise" if respondent cannot ultimately prove impact "are far more imaginative than real." *Amgen*, 133 S. Ct. at 1197. If the defendant in a particular Section 10(b) suit identifies a plausible case-specific reason to view this chain of events as a reasonable possibility, the district court can take that danger into account in determining whether common issues predominate. But the bare possibility that such a case might someday arise does not justify a severely disproportionate requirement that plaintiffs in every securities-fraud class action must establish price impact at class certification. Petitioners "have approached this case as if class certification is proper only when the class is sure to prevail on the merits," but Rule 23 does not require that showing; instead, it requires plaintiffs to establish that common issues predominate over individual ones. *Schleicher*, 618 F.3d at 685.

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[8] The cases petitioners cite (Br. 52) address the entirely different situation of non-market (rather than open-market) transactions, where the fraud-on-the-market presumption does not apply.

At bottom, petitioners' argument on price impact is not meaningfully distinguishable from the arguments this Court rejected in *Amgen*. Price impact, like materiality, is an objective inquiry that "can be proved through evidence common to the class." 133 S. Ct. at 1195-1196. And failure of proof of price impact, like failure to prove materiality, "would end the case for one and for all," rather than leaving claims "in which individual reliance issues could potentially predominate." *Id.* at 1196.

C. Just as a plaintiff in a private securities-fraud suit is not required to prove price impact at class certification, a defendant in such an action may not rebut price impact at the class-certification stage. The appropriate inquiry at class certification is whether the plaintiff has met the requirements of Rule 23, and a district court may "inquir[e] into the merits of a suit" only to the extent necessary "to determine the propriety of certification." *Wal-Mart*, 131 S. Ct. at 2552 n.6 (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). Proof that particular statements had no effect on the market price of Halliburton stock would not suggest that individualized issues will predominate over common ones. Instead, if a plaintiff has established market efficiency and publicity but cannot show price impact, all class members' claims will fail.

Petitioners contend (Br. 53-55) that they should be permitted to disprove price impact at class certification because such rebuttal evidence, if credited, would "erase[] any possibility that there could be classwide reliance via reliance on a distorted market price." The Court in *Amgen* rejected a closely analogous argument. The defendants there argued that, even if a

plaintiff proceeding under the fraud-on-the-market presumption was not required to prove materiality to certify a class, the defendants should be allowed to present rebuttal evidence on that issue. 133 S. Ct. at 1203. The Court responded that, "just as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." *Id.* at 1204. So too here, proof that the alleged misrepresentations did not impact the stock price would not cause "individual reliance questions to overwhelm questions common to the class" because all class members' claims would "fail[] on their merits, thus bringing the litigation to a close." *Id.* at 1196, 1203-1204.

In this case, as in *Amgen*, petitioners' efforts to adjudicate the merits of respondent's claim are "properly addressed at trial or in a ruling on a summary-judgment motion." *Amgen*, 133 S. Ct. at 1197. And petitioners' various policy arguments (Br. 39-49) about the burdens imposed by class actions should be directed to Congress, because the federal courts "have no warrant to encumber securities-fraud litigation" by adding to the requirements imposed by Rule 23. *Amgen*, 133 S. Ct. at 1201-1202.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 78j provides, in pertinent part:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * * *

2. 17 C.F.R. 240.10b-5 provides, in pertinent part:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

* * * * *

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[1] So in original. Probably should be followed by a comma.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading * * * .

* * * * *

3. Federal Rule of Civil Procedure 23 provides, in pertinent part:

Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of

conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and con-

cisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses***. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * * * *

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 13-317

IN THE SUPREME COURT OF THE UNITED STATES

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,
v.
ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF AARP AND NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE FRAUD-ON-THE-MARKET PRESUMPTION MAKES 10b-5 PRIVATE SECURITIES FRAUD CLASS ACTIONS A VIABLE REMEDY FOR DEFRAUDED INVESTORS 5

II. PRIVATE SECURITIES LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD 7

A. Defrauded Investors Have Recovered Their Losses as a Result of This Court's Emphasis on the Importance of Private Securities Litigation in Maintaining the Integrity of the Markets and Deterring and Redressing Securities Fraud 10

B. Congress Has Also Expressed Its Continued Support for the Important Role Private Securities Litigation Plays in Deterring Fraud, Compensating Victims, and Promoting Market Integrity 17

III. RULE 10b-5 REPRESENTS INVESTORS' ONLY SOURCE OF REDRESS BECAUSE OF FEDERAL LIMITATIONS ON SECURITIES FRAUD CLAIMS BASED ON STATE LAW 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Allyn v. Dually,
725 So. 2d 94 (Miss. 1998) 23

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133 S.Ct. 1184 (2013) 6, 19

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485 U.S. 224 (1988) ..... *passim*

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472 U.S. 299 (1985) 10

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421 U.S. 723 (1975) 10, 22

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369 F.3d 421 (4th Cir. 2004) 23

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292 P.3d 525 (Or. 2012)..... 23

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INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people and disrupt their retirement security. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

A significant percentage of the investing public in the United States' markets is comprised of members of the age fifty and older population. Older persons are frequent targets of financial fraud because they often have significant assets and they look for investment opportunities that will supplement Social Security and other sources of retirement income. As a result, AARP has elevated the importance of combating securities fraud and given this issue a high priority by commenting on

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

legislative and regulatory proposals that address investment fraud, filing *amicus* briefs in cases involving the securities laws, and supporting efforts to enhance the remedies of defrauded investors.

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has sixty-seven (67) members, including the securities regulators in all fifty (50) states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's members are responsible for regulating securities transactions under state law, and their principal activities include registering local securities offerings, licensing the brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to address fraud and other misconduct. NASAA's members are intimately familiar with the investment offerings and sales abuses confronting their state residents on a daily basis.

NASAA supports all of its members' activities and it appears as *amicus curiae* in important cases involving securities regulation and investor protection. Recognizing that private actions are an essential complement to governmental enforcement of the securities laws, NASAA and its members also support the rights of investors to seek redress in court for investment-related fraud and abuse. NASAA and its members have an interest in this appeal because it will profoundly affect the ability of

investors to seek redress in cases where unscrupulous companies and individuals seek to cloak their fraudulent acts.

The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets. This is of particular concern at this time, to both AARP and NASAA, given the entry of many first-time investors into the market and the responsibility for retirement investing that retirees and employees have had to assume as a result of the shift in the retirement plan paradigm from defined benefit pension plans (under which employers bear the risk of loss) to defined contribution pension plans (under which plan participants bear the risk of loss).

SUMMARY OF ARGUMENT

Private securities fraud litigation initiated under Rule 10b-5 is essential to protect the integrity of the securities markets for investors, maintain investor confidence in the markets, and compensate investors who have been victims of fraud. Overturning or substantially modifying the Court's holding in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), would contravene Congress' and the Court's continually expressed support for such litigation by significantly undermining innocent investors' ability to recover their losses, resulting in a loss of confidence in the U.S. markets.

Basic serves to aid plaintiffs in securities fraud cases seeking class certification under Rule 23 by providing them the fraud-on-the-market presumption to demonstrate reliance as a class and satisfy Rule 23's predominance requirement. Overturning or substantially modifying *Basic*'s

presumption would abandon more than 25 years of the Court's precedent and erect a substantial hurdle to certification that would essentially foreclose securities fraud plaintiffs' use of the class action vehicle.

Given federal limitations on state law-based securities fraud claims, Rule 10b-5 class actions that utilize *Basic*'s presumption remain one of the few viable means by which victims of securities fraud can hope to gain significant recovery. Moreover, Congress, in its attempts to address perceived abuses in securities fraud litigation with the adoption of the PSLRA and SLUSA, continued to recognize the importance of Rule 10b-5 class actions and determined that the provisions of the PSLRA and the SLUSA struck the proper balance between perceived vexatious litigation and the important role played by securities fraud class actions, leaving *Basic*'s presumption intact. Overruling or significantly modifying *Basic* would disrupt the delicate balance these statutes created and would implement a hurdle that Congress chose not to enact.

Therefore, as a result of the important role played by Rule 10b-5 in protecting investors and ensuring confidence and integrity in the markets, the unavailability of alternative remedies under state law, and Congress's determination to address vexatious litigation without dismantling the fraud-on-the-market presumption, the Court should not abandon its ruling in *Basic*.

ARGUMENT

Overturning the Court's ruling in *Basic* will create an insurmountable hurdle to the private securities actions that Congress and the Court have embraced under Section 10(b), and that the SEC implemented through Rule 10b-5, which have proven to be powerful tools in deterring securities fraud and compensating securities fraud victims.

I. THE FRAUD-ON-THE-MARKET PRESUMPTION MAKES 10b-5 PRIVATE SECURITIES FRAUD CLASS ACTIONS A VIABLE REMEDY FOR DEFRAUDED INVESTORS.

Basic's fraud-on-the-market presumption makes private enforcement of the securities laws possible by making class action litigation feasible. Rule 10b-5 prohibits issuers from making material misrepresentations in connection with the sale or purchase of securities. *See* 17 C.F.R. § 240.10b-5(b) (2013). To enforce this rule, an individual defrauded investor first must establish that he or she relied on the issuer's misrepresentation. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). To enforce this rule as a class, however, a putative class of defrauded investors must first meet the requirements of Federal Rule of Civil Procedure 23(b)(3) by establishing that common questions of law or fact predominate over any questions affecting only individuals. *See* Fed. R. Civ. P. 23(b)(3). Unlike any of the other factors in a Rule 10b-5 claim, reliance is usually specific to each member of the class, and requiring an individual showing of reliance for each plaintiff makes class certification impossible. Recognizing the importance of the class action vehicle in private enforcement of Rule 10b-5, the Court in *Basic* established the fraud-on-the-

market presumption. The presumption relieves plaintiffs from the necessity of proving reliance individually and permits plaintiffs to establish reliance as a group, provided they establish certain predicate facts, thereby establishing that common questions predominate as required by Rule 23(b)(3). *Basic*, 485 U.S. at 241.

Without *Basic*'s fraud-on-the-market presumption, private securities class actions will not be a viable remedy for victims of fraud in cases alleging affirmative misrepresentations because individual issues would always predominate over common issues due to the individualized nature of Rule 10b-5's reliance component. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." (citing *Basic*, 485 U.S. at 242)); *see also* Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton 27 (Geo. Pub. L. & Legal Theory Research Paper No. 13-058, 2013), *available at* http://scholarship.law.georgetown.edu/facpub/1226 [hereinafter *Judgment Day*] ("[W]ithout class certification there will be no practicable mechanism to address demonstrable harm from securities fraud."). However, the class action mechanism is essential for most investors to vindicate their rights—without it, recovery for Rule 10b-5 fraud would be impossible as a practical matter. Most investors' individual losses are often minimal compared to the total harm to all investors from one fraud. As a result, defrauded investors face a collective action

problem–although each individual would benefit from litigation to hold the violator accountable for shareholder losses, few have the incentive to investigate and bring an individual claim because the costs would dwarf the expected return to the individual investor. *See* Lisa L. Casey, *Class Action Criminality*, 34 Iowa J. Corp. L. 153, 163 (2008). The class action device solves this problem by permitting groups of investors to share litigation costs on a large scale. The class action device also provides incentive to plaintiffs' attorneys to prosecute cases of fraud, and lends feasibility to the handling of such cases. Attorneys must devote significant time, "financial resources and human capital" to the development of complex securities cases. *Id.* at 164. Class actions permit claims aggregation to the point that the class and potential investor return are "large enough to attract experienced plaintiffs' attorneys willing to represent injured shareholders on a contingent fee basis." *Id.* at 163. Without this incentive, defrauded investors would not be able to afford representation and would not be able to take action to recover losses.

II. PRIVATE SECURITIES LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD.

Private securities fraud class action lawsuits are an essential means of protecting the integrity of the securities markets for investors, maintaining investor confidence in the markets, and compensating investors that have been victims of fraud. As a federal agency dependent on the annual appropriations cycle, the SEC must fulfill its broad mandate with limited resources that are "not sufficient to permit the SEC to examine regulated

entities and enforce compliance with the securities laws in a way that investors deserve and expect." *Testimony Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 113th Cong. 5 (2013) (statement of Mary Jo White, Chair, U.S. SEC). Most recently, the SEC was allocated $324 million less than it requested in 2014. *See* Bruce Carton, *SEC to Receive 2% Budget Increase in FY 2014, Far Below 26% Requested Increase*, Compliance Week (Jan. 14, 2014), http://www.complianceweek.com/sec-to-receive-2-budget-increase-in-fy-2014-far-below-26-requested-increase/article/329305/. According to the SEC, its budget does not enable it to adequately enforce the federal securities laws:

> This proposed level falls short of what we need to fulfill our responsibilities to investors and our markets . . . It will limit our ability to bolster our enforcement and examinations programs, implement our new duties regarding derivatives, private fund advisers and municipal advisers, and invest in critical technology for market oversight and law enforcement. It is particularly frustrating considering that funding for the SEC does not contribute to the federal deficit.

Paul Davidson, *Budget Deal Puts Squeeze on Financial Regulators*, USA Today, Jan. 15, 2014, http://www.usatoday.com/story/money/business/2014/01/14/spending-bill-financial-regulators/4480599/ (quoting SEC spokesman).

The Commission selectively employs its limited resources by necessity, and does not have the resources to fully meet any of its goals without

private investor vigilance. *See* Elisse B. Walter, Commissioner, U.S. SEC, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program (Nov. 8, 2011) [hereinafter Walter Remarks]. In fact, private litigation fills an enforcement void created by the SEC's limitations, and there is very little overlap between private and public enforcement actions. James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 777 (2003) [hereinafter *Enforcement Heuristics*] (finding only 15% of settled class actions have parallel SEC action). This is particularly true as to restitution because the SEC rarely prioritizes making securities fraud victims whole. Walter Remarks, *supra* (SEC cannot choose targets by magnitude of investor losses); *Enforcement Heuristics*, *supra*, at 778 (statistical analysis shows investors' provable losses unrelated to SEC choice of enforcement targets; instead agency focuses resources on small capitalization firms in financial distress).

The Commission therefore recognizes that private securities litigation is an "essential supplement" to SEC enforcement actions. Brief of the United States as Amicus Curiae Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) (No. 08-905) (recognizing the importance of private securities litigation as a supplement to criminal and civil enforcement actions); *see also* Walter Remarks, *supra* (it is "critical to investors, our securities markets, and our economy overall that these laws remain fully enforceable [by the public]"). The courts have likewise recognized the importance of private litigation, *see infra* Section II.A, and Congress has

relied on private litigation to help ensure robust anti-fraud enforcement, *see infra* Section II.B.

Consequently, the resolution of the issues presented in this case will have immediate and potentially serious repercussions for the civil enforcement of securities law violations in this country, especially as they relate to Rule 10b-5. As financial crimes abound and alternative forums for aggrieved investors remain limited, it is especially important that the federal courts remain open to victims of fraud and serve as a viable forum where fraud victims can seek meaningful remedies. Overturning or substantially modifying the fraud-on-the-market presumption in *Basic* would essentially close the courthouse doors to victims of securities fraud by removing victims' ability to enforce the securities laws through private litigation.

A. Defrauded Investors Have Recovered Their Losses as a Result of This Court's Emphasis on the Importance of Private Securities Litigation in Maintaining the Integrity of the Markets and Deterring and Redressing Securities Fraud.

The Court has long recognized the vital importance of legitimate private securities litigation to the federal enforcement regime for securities fraud. *See, e.g., Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (observing that "implied private actions provide 'a most effective weapon in the enforcement' of the securities laws"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (stating that "private enforcement" of Rule 10b-5 is "a necessary supplement to Commission action"). The Court has described private securities fraud actions as "a prominent

feature of federal securities regulation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). The Court noted the importance of private securities fraud actions in *Basic* itself: "[j]udicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic*, 485 U.S. at 230-31. Since the Court's decision to implement the fraud-on-the-market presumption in *Basic*, the Court has been unwavering in its support for and recognition of the important role played by private securities fraud litigation in maintaining the integrity of the markets, deterring securities fraud, and compensating victims of fraud. *See* Barbara Black, *Eliminating Securities Fraud Class Actions Under The Radar*, 2009 Colum. Bus. L. Rev. 802, 808 (2009).

The Court specifically recognized that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006). Investor confidence in the integrity of the securities markets is crucial to the capital formation system of our economy. *See Basic*, 485 U.S. at 235 n.12. Investor confidence requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay." Luis A. Aguilar, Commissioner, U.S. SEC, Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation (Apr. 4, 2011) [hereinafter Aguilar Remarks]. Private securities litigation performs a significant role in maintaining investor confidence in

the integrity of our markets by enforcing the mandatory disclosure required by the securities laws, a role that is particularly important in light of the recent financial crisis. *See Dabit*, 547 U.S. at 78 (noting the importance of Rule 10b-5). If the Court stymies investors' efforts to hold corporate actors accountable for their frauds, investor confidence in the integrity of our markets will suffer, and investors will likely be far less willing to participate in our securities markets. *See* Aguilar Remarks, *supra* (discussing empirical evidence that disclosure benefits companies and the "economy as a whole").

The Court has also recognized the important role of private securities fraud actions in deterring fraud, another fundamental goal of the securities laws, by supplementing criminal and civil actions brought by the various government entities. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."). Many instances of securities fraud go unpunished because "the volume of violations is too great for the SEC to detect and investigate all possible wrongdoing." *Enforcement Heuristics*, *supra*, at 762. As former Commissioner Elisse B. Walter has remarked, "even with ideal resource availability, the Commission cannot bring every case." Walter Remarks, *supra*. However, the "frequency and magnitude of sanctions are important in the deterrence of deceptive financial reporting." James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the*

Enforcement of the U.S. Securities Law, 6 European Company & Fin. L. Rev. 164, 173 (2010).

Private securities actions are therefore essential deterrents to securities law violations because they increase the frequency of sanctions and the financial penalties paid by companies that break the law. Additionally, government agencies are generally strangers to the transactions that give rise to allegations of private securities fraud. Private participants in allegedly fraudulent transactions thus have an informational advantage over government agencies and are significantly more likely to detect and blow the whistle on fraud than the Commission. *Id.* at 198 (SEC is first to detect only 6% of revealed corporate frauds). Private investors, of course, also have stronger incentives to prosecute certain alleged frauds because they stand to profit from any recovery.

Finally, private securities class actions are the defrauded investor's primary mechanism for compensation. Statistics show that "private enforcement . . . dwarf[s] public enforcement," and thus private litigants are much more successful in terms of recovery than the Commission. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1542-43 tbls. 2 & 3 (2006). In fact, "even in major scandals where the [Commission] has brought its own action, the damages paid in securities class actions are usually (but not always) a multiple of those paid to the [Commission]." *Id.* at 1543.

Unfortunately, the SEC is ineffective at making defrauded investors whole because of its institutional shortcomings and because of the nature

of financial fraud. First, the SEC must carefully prioritize enforcement actions because it faces chronic resource constraints, and the Commission typically does not choose enforcement targets based on the magnitude of individual losses. *See supra* Section II; Walter Remarks, *supra*. Furthermore, the Congressional mandate and funding for the Commission allows it to prosecute only the most flagrant abuses of securities laws and limits available monetary remedies. The SEC can order violators of securities laws to disgorge ill-gotten profits and can levy fines, but it cannot seek damages; thus, "while the agency can require wrongdoers to give up the benefits they have received from violations, it cannot necessarily make the victims whole." Walter Remarks, *supra*. In fact, "it is the nature of financial fraud violations that the harm caused as a consequence of misrepresenting the firm's performance or financial position is often greater than any profit violators take home." *Enforcement Heuristics*, *supra*, at 756.

Therefore, although the SEC is authorized to return disgorged funds and some fines to investors, and although these funds may be substantial in some cases, the amounts collected to be returned to investors "can pale when compared to the harm proximately caused by the defendants' violation." *Id.* Thus, while the Commission may seek monetary relief, its remedies are designed primarily to deter violations by making them unprofitable, rather than to make investors whole. And with good reason: the damages in major securities fraud cases can and often do run into the billions of dollars. *See, e.g.*, *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004); *see also* Coffee,

supra, at 1555 (cataloguing settlement amounts in major securities fraud cases). Accordingly, the primary means of compensating injured investors remains the private cause of action under Rule 10b-5.

Though the Court has relied on the deterrence effect of private securities fraud class actions more than it has cited its compensation component, *see* Black, *supra*, at 814-15, the importance of class litigation to investor compensation has not been lost on the lower courts. In fact, without private litigation investors would have recovered little, even in the wake of some of the most significant financial frauds of our time. For instance, when Global Crossing filed for bankruptcy in 2002, the company "wiped out $2.5 trillion in market value." Julie Creswell & Nomi Prins, *The Emperor of Greed*, Fortune, June 24, 2002. Global Crossing chair Gary Winnick treated the company as his personal "cash cow" and "cashed in $735 million of stock over four years–including $135 million Global Crossing issued to his private company–while receiving $10 million in salary and bonuses and other payments to the holding company." *Id.* Investors in Global Crossing claimed to have lost over $35.5 billion as a result of the company's fraud. In the subsequent SEC enforcement action, a handful of company executives were fined $100,000 each, while Global Crossing and Gary Winnick paid absolutely nothing. *3 Ex-Officials of Global Crossing are Fined in SEC Settlement*, N.Y. Times (Apr. 13, 2005), http://www.nytimes.com/2005/04/12/business/worldbusiness/12iht-global.html. As a result of a class action lawsuit, however, investors recovered a $245 million settlement, including $30 million from Winnick personally. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 447. While the recovery

through the private lawsuit was small in comparison to investors' losses, it was vastly more than what the SEC recovered.

More recently, WorldCom shareholders lost an estimated $200 billion as a result of "perhaps the largest accounting fraud in history, with the company's income overstated by an estimated $11 billion [and] its balance sheet overstated by more than $75 billion." *SEC v. WorldCom, Inc.*, 273 F. Supp. 2d 431, 431 (S.D.N.Y. 2003). The SEC recovered $750 million in its enforcement action, some of which was ultimately distributed to defrauded investors. *Id.* at 435. The penalty recovered by the SEC was only a small fraction of investor losses resulting from the fraud: the *WorldCom* district court recognized that compensation of victims is "a 'distinctly secondary goal' of S.E.C. actions" and the SEC could not determine the size of the penalty based on the shareholder losses to be compensated. *Id.* at 434 (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). However, through class litigation, investors ultimately recovered $6.133 *billion*. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 322 (S.D.N.Y. 2005). The *WorldCom* settlements represent the second-largest class action settlement of all time. NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* 30 (Jan. 21, 2014). Investor recoveries varied under the settlement, which went "a long way toward making bondholders whole." *In re WorldCom*, 388 F. Supp. 2d at 339. Stockholders recovered $0.56 per share. *Id.* at 340. Both categories of defrauded WorldCom investors would have recovered little, if anything, without access to investor class actions.

B. Congress Has Also Expressed Its Continued Support for the Important Role Private Securities Litigation Plays in Deterring Fraud, Compensating Victims, and Promoting Market Integrity.

Since the Court's decision in *Basic*, Congress has taken steps to cure what it viewed as abuses in private securities class actions by enacting the PSLRA, 15 U.S.C. § 78u-4 (2012), and the SLUSA, 15 U.S.C. §§ 77p(b), 78bb(f) (2012). Even while restricting private securities class actions to correct perceived abuses, Congress made clear that it recognized the important role played by private securities litigation in deterring fraud and compensating victims: "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 104-98, at 8 (1995). Congress also recognized the important role such actions play in maintaining investor confidence in our markets and ensuring market integrity:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government actions. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). The Court itself has also recognized that even in light of the limitations placed on private securities fraud actions in the PSLRA, Congress has continually embraced class actions as an effective tool to ensure a robust regime of securities regulation. *See Tellabs*, 551 U.S. at 321 n.4 ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." (*quoting Dabit*, 547 U.S. at 81)).

There is no doubt that the PSLRA and SLUSA greatly limited fraud victims' ability to maintain private class actions. *See infra* Section III. Nevertheless, even during the height of private securities litigation reform when Congress took up the issue of alleged vexatious litigation, Congress did not limit or eradicate *Basic*'s fraud-on-the-market presumption, though some argued doing so would have solved the problems that Congress hoped to address with the adoption of the PSLRA and SLUSA.

Defendants in private securities class actions have argued that the PSLRA has "frozen the outer limits of fraud-on-the-market class actions," *Judgment Day*, *supra*, at 5, which they contend prevents courts from expanding such actions because such expansion is for Congress to decide. This line of reasoning is a two way street, however. *Id.* If the PSLRA prevents the Court from expanding private securities fraud class actions, the PSLRA should also prevent the Court from constricting private securities class actions by overturning doctrines—such as the fraud-on-the-market-presumption—that

were staples of law left unchanged by Congress. *See id.* As the Court has noted, "[i]t is appropriate for us to assume that when § 78u-4 [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action *as then defined* but chose to extend it no further." *Stoneridge*, 552 U.S. at 166 (emphasis added). In 1995 when Congress adopted the PSLRA, the fraud-on-the-market presumption was an accepted part of the private cause of action under § 10(b). Initial versions of the PSLRA even included provisions that would have abandoned the fraud-on-the-market presumption. Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 204(c) (1995); *see also* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 153 (2009). However, Congress "rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen*, 133 S.Ct. at 1201.

Had Congress wanted to jettison the fraud-on-the-market presumption, it could have acted directly, as the PSLRA was "*about* fraud-on-the-market litigation." *Judgment Day*, *supra*, at 6 n.17. Instead, Congress chose to accept the presumption as part of the § 10(b) and Rule 10b-5 private right of action "as then defined." *Stoneridge*, 552 U.S. at 166. It follows that Congress, not the Court, should determine the presumption's continued viability, as Professor Langevoort convincingly argues:

> Indeed, the structure of the PSLRA makes no sense except when read as a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs to bring, plead and prove a successful claim through a variety of reforms. So it occupies

> the field, in a way that disappointed both the most insistent champions and the most strident critics of private securities litigation. When this happens, the natural conservative judicial move is to defer.

Judgment Day, *supra*, at 6; *see also* Black, *supra*, at 805 ("Radical change of an important investor protection mechanism, however, is such an important policy matter affecting our securities markets that the debate should take place in the national spotlight."); *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (Easterbrook, J.) (indicating that it is up to Congress to further define the limits of private securities actions).

Some former members of Congress argue in this case that the Court should not weigh heavily the fact that Congress rejected a provision that would have overturned the *Basic* presumption. *See* Brief for Former Members of Congress, Senior SEC Officials, and Congressional Counsel as Amici Curiae Supporting Neither Party at 2-3. These *amici* also, however, note that Congress was presented with provisions that would have codified the *Basic* presumption—provisions that were also left on the drafting room floor. Congress left the fraud-on-the-market presumption undisturbed, and this Court should defer to that judgment.

III. RULE 10b-5 REPRESENTS INVESTORS' ONLY SOURCE OF REDRESS BECAUSE OF FEDERAL LIMITATIONS ON SECURITIES FRAUD CLAIMS BASED ON STATE LAW.

Congressional limitations on private securities class actions in the PSLRA and particularly in SLUSA have effectively limited the forums in which aggrieved investors can seek relief. In adopting the PSLRA, Congress sought to prevent the filing of "frivolous 'strike' suits alleging violations of the Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation." S. Rep. No. 104-98, at 4 (1995). To address this primary concern, Congress, in the PSLRA, significantly limited private securities litigation by "creat[ing] a carefully tailored safe harbor for forward-looking statements," changing the way in which lead plaintiffs are chosen, and devising stricter pleading standards, among other things. *See id.* at 5-7.

Following the adoption of the PSLRA, Congress enacted SLUSA in an attempt to close a perceived loophole in the PSLRA that increased the number of private securities class actions being filed in state court, *see* S. Rep. No. 105-182, at 3-4 (1998)—specifically, to address the concern that "securities class action lawsuits [had] shifted from Federal to state courts" as a means of circumventing the PSLRA. *See* 15 U.S.C. §§ 77p(b), 78bb(f) (findings set forth in Pub. L. 105-353, 112 Stat. 3227, § 2). With certain exceptions, SLUSA provides that no class action based upon state law may be maintained in any state court on behalf of more than fifty class members. *See id.* §§ 77p(b), 78bb(f). With the enactment of SLUSA, Congress effectively closed the state courthouse doors to private securities fraud

class actions. *See* John M. Wunderlich, *"Uniform" Standards for Securities Class Actions*, 80 Tenn. L. Rev. 167, 168-69 (2012).

The need to ensure that investors have meaningful remedies in federal court is all the more important when state law does not provide an alternative remedy. This is especially true for securities fraud cases in light of the fact that "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Dabit*, 547 U.S. at 88. Furthermore, the Court has observed that the disadvantages posed by a restrictive interpretation of federal securities law can be "attenuated" where adequate remedies are available under state law. *See Blue Chip Stamps*, 421 U.S. at 738 n.9 (weighing fact that class action in state court was an alternative remedy); *see also Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977) (state cause of action under corporate law was a factor in determining whether to recognize federal cause of action); *J.I. Case Co. v. Borak*, 377 U.S. 426, 429 (1964) (noting that if federal jurisdiction is limited and state law affords no relief, then the "whole purpose" of the statutory provision might be frustrated). Conversely, where state law does not offer a significant alternative forum for plaintiffs' claims—as is the case after the enactment of SLUSA—there is a correspondingly greater justification and need for the federal courts to afford relief for victims of securities fraud.

In this case, Petitioners contend that state courts have "roundly rejected" the fraud-on-the-market theory. *See* Pet'rs' Br. 11. Petitioners go on: "State courts, of course, are not bound by *Basic*, and thus it is a marked critique that they have overwhelmingly refused to adopt its fraud-on-the-

market approach." *Id.* at 24. While most states have not adopted the fraud-on-the-market presumption, their failure to do so is not a "marked critique" of the theory. Many states have not embraced *Basic*'s presumption because there is no need—reliance is not an element of most state law securities fraud claims. *See* Unif. Sec. Act § 410(a)(2) (1956); Unif. Sec. Act § 509(b) (2002); *see also* Unif. Sec. Act. § 509 cmt. 4 (2002) ("Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b)."); *Dunn v. Borta*, 369 F.3d 421, 432 (4th Cir. 2004) ("The 'by means of' clause . . . is not intended as a requirement that the buyer [of a security] prove *reliance* on the untrue statement or the omission." (quoting Louis Loss, *Commentary on the Uniform Securities Act* 148 (1976))). Additionally, private state law securities fraud claims generally require some form of privity between the buyer and seller of the securities at issue. See Unif. Sec. Act § 509 cmt. 3 (2002). The existence of any such privity requirement would negate the need for a state to adopt the fraud-on-the-market-theory as the action would be between the buyer and a direct seller—a transaction in which the market plays no direct role.

In states where the fraud-on-the-market theory could be applicable under state law, some state courts have embraced it. *See State v. Marsh & McLennan Cos., Inc.*, 292 P.3d 525, 532-37 (Or. 2012); *Allyn v. Dually*, 725 So. 2d 94, 101 & n.3 (Miss. 1998). And while some states have declined to extend *Basic* to common-law fraud, they did so in part because *Basic*'s presumption remained available under federal or state law. *See, e.g.*, *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1192 (N.J.

2000) ("plaintiff already had an adequate remedy under federal securities law"); *Mirkin v. Wasserman*, 858 P.2d 568, 572 (Cal. 1993) ("[p]laintiffs already have remedies under the federal and state securities laws").

Petitioners' attempt to undermine *Basic*'s fraud-on-the-market presumption by citing state courts' refusal to accept the doctrine is wholly unpersuasive given that (1) state securities fraud claims generally do not require plaintiffs to prove reliance; (2) a state law privity requirement renders the presumption inapt; and (3) where applicable, some state courts have adopted the fraud-on-the-market theory. The states' experience with *Basic*'s approach thus lends no support to Petitioners' arguments.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully submit that the Court should affirm the decision of the Fifth Circuit and deny Petitioners' call to overturn or substantially modify *Basic*.

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Dated: February 5, 2014

AMICUS CURIAE BRIEF

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE CIVIL PROCEDURE SCHOLARS SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Fraud-On-The-Market Presumption Is Consistent With Modern Class Action Jurisprudence. 5

A. The Presumption Arises From Substantive Securities Law. 5

B. The *Basic* Presumption Is Consistent With *Wal-Mart* and *Comcast*. 7

II. Rule 23 Was Adopted To Facilitate Securities-Law Class Actions. 11

III. Requiring Plaintiffs To Prove Price Impact At The Certification Stage Would Be Inappropriate. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 11

Amchem Prods. v. Windsor, 521 U.S. 591 (1997) 14, 15

Amen v. Black, 234 F.2d 12 (10th Cir. 1956) 12

Amgen Inc. v. Conn. Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013) 4, 6, 16, 17, 18

Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp., 315 F. Supp. 2d 666 (E.D. Pa. 2004) 7

Basic Inc. v. Levinson, 485 U.S. 224 (1988) .....*passim*

Black v. Finantra Capital, Inc., 418 F.3d 203 (2d Cir. 2005)..... 7

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) 6, 16, 17

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)..... 3, 5, 10

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940)..... 12

Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952)..... 11

Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) 15, 16

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 7, 10, 17, 19, 20

Erica P. John Fund v. Halliburton Co., 131 S. Ct. 2179 (2011) 4, 17, 18, 19

Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1964) 12

Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968) 16

Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966) 14

Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968) ... 16

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964) 13

Herman & MacLean v. Huddleston, 459 U.S. 375 (1982) 11

Hubbard v. BankAtlantic Bancorp, Inc., 688 F.3d 713 (11th Cir. 2012) 21

In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig, 281 F.R.D. 134 (S.D.N.Y. 2012) 20

In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) 18

In re Merrill Lynch & Co. Research Reports Sec. Litig., 568 F. Supp. 2d 349 (S.D.N.Y. 2008) 7

In re Motorola Sec. Litig., 505 F. Supp. 2d 501 (N.D. Ill. 2007) 21

Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) 11, 12

Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971) 14

Nelson v. Hodowal, 512 F.3d 347 (7th Cir. 2008) ... 18

Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) 15

Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944) 12

Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000) 18

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 6, 12, 15

Pennsylvania Co. for Ins. On Lives v. Deckert, 123 F. 2d 979 (3d Cir. 1941) 12

Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).. 15

Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010).. 18

Snyder v. Harris, 394 U.S. 332 (1969) 11

Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951) 12

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008) 17

Tucker v. Arthur Andersen & Co., 67 F.R.D. 468 (S.D.N.Y. 1975) 6

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Statutes:

Rules Enabling Act, 28 U.S.C. § 2072(b) 3, 5

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Plaintiffs' Omnibus Opposition To Defendants' Motions For Summary Judgment, *In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, No. 09 MD 2058 (PKC) (S.D.N.Y.) (filed June 29, 2012) 21

Sec. and Exchange Comm'n, Memorandum With Respect to Amendments to Rule 23 of the Federal Rules of Civil Procedure (May 7, 1965), *in* Records of the U.S. Judicial Conference, *microfilmed at* Cong. Inf. Serv., CI-7010-77 13

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Rules:

Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment, 39 F.R.D. 69 (1966) 14

S. Ct R. 37.6..... 1

BRIEF OF AMICI CURIAE CIVIL PROCEDURE SCHOLARS SUPPORTING RESPONDENT

INTEREST OF AMICI

Amici are law professors whose scholarship and teaching involve federal civil procedure and class actions:[1]

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School and the author of definitive works on federal court rulemaking, interjurisdictional preclusion, litigation sanctions, international civil litigation, and judicial independence and accountability. He is co-editor of JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (2002). He was appointed by the Speaker of the U.S. House of Representatives to the National Commission on Judicial Discipline and Removal and was a principal author of the Commission's 1993 report.

Robert H. Klonoff is the Dean & Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School. He is the co-author of a leading casebook on class actions, author of numerous articles on class actions, and associate reporter for the American Law Institute's project, Principles of the Law of

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[1] This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for amici affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

Aggregate Litigation. He has personally handled more than 100 class action cases as counsel, and he has frequently served as an expert witness in class action matters.

David Marcus is a Professor of Law at the University of Arizona. He has written numerous articles on class actions and other issues in federal civil procedure, including histories of Rule 23 covering the years spanning 1938 to 1980.

Arthur R. Miller is a University Professor at New York University who teaches at the NYU School of Law and is a coauthor of the multi-volume treatise FEDERAL PRACTICE AND PROCEDURE. He has served as Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, as well as Reporter to the American Law Institute's Complex Litigation Project, which preceded the ALI Project on Aggregate Litigation. Professor Miller is the author of more than 40 books and numerous articles.

Tobias Barrington Wolff is Professor of Law at the University of Pennsylvania Law School. He is the author of the leading work on the operation of preclusion doctrine in class action litigation, co-author of a Civil Procedure casebook, and author of numerous other works on procedure and class actions. Professor Wolff is a member of the American Law Institute and past chair of the AALS Section on Conflict of Laws.

SUMMARY OF ARGUMENT

This Court should continue to adhere to the fraud-on-the-market presumption adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Halliburton is

wrong in arguing that the presumption is inconsistent with modern class-action jurisprudence, such as *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Indeed, *Wal-Mart* discussed the presumption with approval. *See* 131 S. Ct. at 2552 n.6.

Moreover, under the Rules Enabling Act, 28 U.S.C. § 2072(b), it would be improper to use a procedural rule such as Rule 23 to abrogate or narrow the *Basic* presumption. The fraud-on-the-market presumption is a substantive doctrine of federal securities law, both derived from interpretation of the Securities Exchange Act of 1934 and supported by the federal Securities Act of 1933.

The *Basic* presumption is a way of *demonstrating* commonality and predominance – not of shirking those requirements. Thus, a securities fraud case where the plaintiffs have satisfied the preconditions for triggering the *Basic* presumption meets the *Wal-Mart* standard for proving commonality. Because prices in an open and developed market move in response to public information, all class members will be affected in the same way.

Securities fraud actions under *Basic* also follow the course charted by this Court in *Comcast*. Under *Basic*, plaintiffs use the presumption and economic evidence to prove the difference between (i) the actual market price, and (ii) the market price absent the securities law violation. This is exactly what the Court in *Comcast* instructed.

Halliburton's position is inconsistent with the settled practice of using the fraud-on-the-market

presumption to support class certification in securities fraud cases, as shown by the history of Rule 23.

This Court should reject Halliburton's proposals (i) that plaintiffs should be required to prove "price impact" at the certification stage – i.e., to show that the defendant's alleged misrepresentations affected the market price – or (ii) that a defendant should be able to rebut the presumption at certification by showing the absence of price impact. Both proposals conflict with the holdings in *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), and *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*Halliburton I*"), that materiality and loss causation, respectively, are merits issues rather than questions for the certification stage. The "price impact" showing that Halliburton demands falls into the category of materiality, loss causation, or both.

Halliburton's position also ignores the need for discovery, in many cases, to isolate the price impact attributable to the defendant's misrepresentations. Discovery is often needed to respond to defendants' assertions that factors apart from the alleged fraud, including market-wide factors and unrelated company-specific news, were the real reasons for the movement in the company's stock price. Requiring plaintiffs to prove price impact at certification would either force them to address an intensely factual issue prior to the completion of fact and expert

discovery or cause the court to delay the certification decision until that discovery had been completed.[2]

The judgment below should be affirmed.

ARGUMENT

I. The Fraud-On-The-Market Presumption Is Consistent With Modern Class Action Jurisprudence.

Halliburton argues that *Basic* is at odds with the Court's recent Rule 23 jurisprudence, such as *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because those cases require plaintiffs to "prove" predominance rather than to "presume" it. Pet. Br. 25-27. That argument is flawed for several reasons. In fact, it would be a radical expansion of *Wal-Mart* and *Comcast* to adopt Halliburton's arguments.

A. The Presumption Arises From Substantive Securities Law.

First, under the Rules Enabling Act, 28 U.S.C. § 2072(b), it would be improper to use a procedural rule such as Rule 23 to abrogate or narrow the *Basic* presumption. "The Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561

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[2] "[T]he more class certification procedure is assimilated to trial procedure, the more discovery courts will have to permit before ruling on certification." Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 668 (2012).

(quoting 28 U.S.C. § 2072(b)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same).

The *Basic* presumption is not a mere procedural device. Rather, "fraud on the market is a substantive doctrine of federal securities-fraud law." *Amgen*, 133 S. Ct. at 1193. The presumption is grounded in the federal Securities Act of 1933 and the Securities Exchange Act of 1934. In *Basic*, this Court explained that, in drafting the Exchange Act, "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." 485 U.S. at 246. The Court cited the legislative history of the Act, *id.*, and opined that "[t]he presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act." *Id.* at 245.

In fact, the Ninth Circuit (in a decision twice cited with approval by this Court) opined that the fraud-on-the-market presumption was consistent with the Rules Enabling Act precisely because it was derived from the federal securities laws. *See Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (cited in *Amgen*, 133 S. Ct. at 1193, and *Basic*, 485 U.S. at 245); *see also Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 480 (S.D.N.Y. 1975) (making the same point as to the Rules Enabling Act).

The substantive nature of the presumption is confirmed by the fact that it is not limited to class actions. It applies outside the Rule 23 context as

well, in individual actions under Rule 10b-5.[3] The presumption is not limited to the certification stage and applies throughout trial. *See Wal-Mart*, 131 S. Ct. at 2552 n.6.

Because the *Basic* presumption is substantive in nature, the Rules Enabling Act provides that Rule 23 cannot be used to modify or eliminate it.

B. The *Basic* Presumption Is Consistent With *Wal-Mart* and *Comcast*.

There is a further flaw in Halliburton's argument: The *Basic* presumption is not a way of *avoiding* a proof requirement. It is a way of *satisfying* the reliance element of the private right of action under Section 10(b) of the Securities Exchange Act of 1934. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

In *Basic*, this Court expressly rejected the argument that the presumption was improper because it avoided the need for a plaintiff to prove reliance. *See* 485 U.S. at 243 ("Petitioners and their

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[3] *See, e.g., Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005) (applying *Basic* presumption in suit brought by individual plaintiff); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 358-59 (S.D.N.Y. 2008) (same); *Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F. Supp. 2d 666, 676-77 (E.D. Pa. 2004) (same). *See also* Stephen B. Burbank, *The Costs of Complexity (Book Review)*, 85 MICH. L. REV. 1463, 1472 (1987) ("[In *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975)] we see a court use a presumption to reallocate burdens, thereby overcoming a major obstacle to class certification, and respond to a charge of overreaching by announcing that the presumption is available in individual actions.").

amici complain that the fraud-on-the-market theory effectively eliminates the requirement that a plaintiff asserting a claim under Rule 10b-5 prove reliance."). This Court explained that the presumption enables plaintiffs to "establish" the requisite "causal nexus" "indirectly." *Id.* at 245 (internal quotation marks and citation omitted).

Parties in many situations use presumptions and other legal rules to help them satisfy their burdens of proof. As the *Basic* Court explained, "[p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Id.* at 245.

On this basis, Justice White, joined in a dissenting opinion by Justice O'Connor, explained that "there are portions of the Court's fraud-on-the-market holding with which I am in agreement," including its decision not to dispense with "reliance" completely and its decision to make the presumption rebuttable. *Id.* at 251 (dissenting opinion).

Accordingly, the fraud-on-the-market presumption is perfectly consistent with *Wal-Mart*, *Comcast*, and other recent Rule 23 decisions. In fact, this Court in *Wal-Mart* endorsed *Basic* and explained that, without the presumption, "each of the individual investors would have to prove reliance on the alleged misrepresentation," a burden that "would often be an insuperable barrier to class certification." *Wal-Mart*, 131 S. Ct. at 2551 n.6. The Court added that the presumption is a solution to obstacles that plaintiffs would otherwise face at the certification stage:

> But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market . . . .

Id. In short, *Wal-Mart* saw no conflict between the fraud-on-the-market presumption and Rule 23 – quite the contrary.

Accordingly, the dictates of *Wal-Mart* are plainly met. *Wal-Mart* held that the particular evidence presented by members of a putative class did not actually show that the company operated under a general policy of discrimination. The commonality requirement could not be met, because there was no common question capable of class-wide resolution, for purposes of Title VII. 131 S. Ct. at 2553-56. As *Wal-Mart* explained, the "common contention" "must be of such a nature that it is capable of classwide resolution" – i.e., that the "theory can be proved on a classwide basis." *Id.* at 2551, 2555.[4]

A securities fraud case where the plaintiffs have satisfied the preconditions for triggering the *Basic*

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[4] For an argument that *Wal-Mart's* Rule 23(a)(2) holding is best viewed as specific to substantive Title VII law, see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028 (2013) ("the commonality holding in *Dukes* is at base a statement of Title VII policy").

presumption meets this standard. Because prices in an open and developed market move in response to public information, all class members will be affected in the same way. The common issue absent in *Wal-Mart* is thus present here.

The dictates of *Comcast* are also met. In *Comcast*, this Court held that a plaintiff's damages model in an antitrust case fell short of establishing that damages could be measured class-wide. In particular, the Court found that the model could not identify the differences between high prices in general and high prices attributable to the specific antitrust violation identified by plaintiffs (known as "overbuilder competition"). *See* 133 S. Ct. at 1433-35. "If the theory does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 1433. "Calculations need not be exact, but at the class certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case . . . .'" *Id.* (citation omitted).

Securities fraud actions under *Basic* follow precisely the course charted by this Court in *Comcast*. Under *Basic*, plaintiffs use the presumption and economic evidence to prove the difference between (i) the actual market price, and (ii) the market price absent the securities law violation. This is exactly what the Court in *Comcast* instructed. Indeed, under *Dura*, a plaintiff is not permitted to proceed merely under an "inflated purchase price" theory but rather is entitled to recover only "those economic losses that misrepresentations actually cause." 544 U.S. at 345.

Thus, neither *Wal-Mart* and *Comcast* supports Halliburton here.

II. Rule 23 Was Adopted To Facilitate Securities-Law Class Actions.

Halliburton's position is inconsistent with the settled practice of using the fraud-on-the-market ("FOTM") presumption to support class certification in securities fraud cases. As this Court noted, "nearly every court that ha[d] considered the proposition" prior to the decision in *Basic* had adopted the FOTM presumption. 485 U.S. at 247.

The history of Rule 23 shows that it was intended "to encourage more frequent use of class actions." *See* Charles Alan Wright, Arthur M. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1752 at 18 (3d ed. 2005) ("Wright & Miller"). Shortly after the original Rule 23's promulgation in 1938, influential commentators noted the potential for class actions under the securities laws. *See, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 984-87 (1941).[5]

The first recognition of a private right of action came in *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 n.10 (1982). Class actions soon followed. As an example, a securities

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[5] This article has had wide influence. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 n.12 (1974); *Snyder v. Harris*, 394 U.S. 332, 351 n.15 (1969); *Dickinson v. Burnham*, 197 F.2d 973, 981 n.4 (2d Cir. 1952) (Clark, J.)

fraud class action was certified in *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 833 (D. Del. 1951), in the wake of *Kardon*.

Throughout the period from 1938-1966, courts routinely approved the use of Rule 23 in cases grounded upon fraud or a common course of misrepresentation. For example, in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), this Court reversed the Third Circuit's holding that relief was limited to damages only, sustaining the district court's equitable "power to make effective the right of recovery" where "petitioners' bill states a cause of action tested by the customary rules governing suits of this character" and a defendant "is threatened with many law suits." *Id.* at 287-88. On remand, the Third Circuit opined that, "if a corporation engaged in the sale of stock by fraudulent means to a number of individuals, under rule 23(a)(2) they might join together as parties plaintiff in one action to avoid a multiplicity of suits." *Pennsylvania Co. for Ins. On Lives v. Deckert*, 123 F. 2d 979, 983 (3d Cir. 1941).[6]

"[M]odern class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1990). At the time of the Rule's 1966 revision, the importance of Rule 23 to the enforcement of the securities laws was already clear.

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[6] *See also Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1964); *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 49-50 (2d Cir. 1947); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *York v. Guar. Trust Co.*, 143 F.2d 503, 528 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

In 1964, one court of appeals expressed a widely shared view when it quoted Professor Loss's leading treatise on Securities Regulation: "'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device.'"[7]

Similarly, the U.S. Securities and Exchange Commission ("SEC") explained "[t]hat the availability of the representative suit for class actions on behalf of investors similarly situated . . . has contributed substantially to the feasibility of prosecution by investors of causes of actions based on violations of the federal securities laws."[8] The SEC urged courts not to interpret the revised Rule "to impose unwarranted obstacles" to securities class actions."[9]

Hence, the Advisory Committee drafted Rule 23(b)(3) with securities fraud cases firmly in mind. The Advisory Committee Note to the 1966 amendments cites "a fraud perpetrated on numerous persons by the use of similar misrepresentations" as "an appealing situation for a class action," even if the case includes individual issues with respect to injury

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[7] *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964) (quoting 3 Louis Loss, *Securities Regulation* 1819-20 (2d ed. 1961)).

[8] Memorandum of Securities and Exchange Commission With Respect to Amendments to Rule 23 of the Federal Rules of Civil Procedure, at 2, 4 (May 7, 1965), *in* Records of the U.S. Judicial Conference, *microfilmed at* Cong. Inf. Serv., CI-7010-77.

[9] *Id.*

and damages suffered.[10] The Advisory Committee Note referred to securities cases.[11] Citing the Note, this Court properly noted in *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997), that predominance "is a test readily met" in cases alleging securities fraud.[12] *See also* Wright & Miller, *supra*, § 1781 (noting securities fraud class actions).

In his widely cited article on the amended rule, Committee reporter Professor Benjamin Kaplan confirmed that "[t]he Advisory Committee forecast that cases of fraudulent misrepresentation or antitrust violations would be likely, although not by any means sure candidates for class treatment under

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[10] *See* Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment, 39 F.R.D. 69, 103 (1966).

[11] *Id.* (citing *Oppenheimer v. F.J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir.1944), and *Miller v. National City Bank of N.Y.*, 166 F.2d 723 (2d Cir.1948)).

[12] The Advisory Committee Note acknowledged that, "although having some common core, a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment, 39 F.R.D. 69, 103 (1966). At the time of the revision, this was understood to mean that common issues might not predominate where the defendant's oral communications varied significantly from one class member to the next. *E.g.*, *Morris v. Burchard*, 51 F.R.D. 530, 533-35 (S.D.N.Y. 1971); *but cf. Fischer v. Kletz*, 41 F.R.D. 377, 382-83 (S.D.N.Y. 1966) (certifying a securities fraud class under Rule 23(b)(3) even though the defendant made different statements at different times, and the class members made purchases based on different representations).

subdivision (b)(3)."[13] He cited *York v. Guaranty Trust Co. of N.Y.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945), as "illustrative" of the proper use of Rule 23(b)(3). There, the Second Circuit allowed class proceedings in a suit by noteholders, even though the plaintiffs could not rule out the possibility that evidence of causation might differ from one class member to another.[14]

In the wake of the 1966 revisions, the SEC took the position that private class actions were essential to the vindication of the securities laws. In one case, the SEC filed an amicus brief explaining that "the activities of the Securities and Exchange Commission do not eliminate the need for class-action procedure in private actions based on violations of the federal securities laws."[15] The SEC added that "[b]ecause of budgetary limitations and alternative demands on available manpower, the Commission cannot fully investigate or take action

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[13] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967). For examples of the Court's citations to Professor Kaplan's article, see *Ortiz*, U.S. at 833, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997), *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 & 813 n.4 (1985), and *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356 n.21 (1978).

[14] *York v. Guar. Trust Co.*, 143 F.2d 503, 528 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

[15] *Dolgow v. Anderson*, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1970) (quoting title).

in every case of possible violation."[16] The SEC concluded:

> Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fraudulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action appears to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such remedies may be vindicated.[17]

In addition, the federal courts largely followed the Advisory Committee's intentions and granted class certification in securities fraud cases. For example, in a 1968 securities action, the Tenth Circuit opined that "the new rule is designed to expand the situations in which a class action is appropriate" and to "favor . . . the maintenance of the class action."[18] As the Ninth Circuit opined in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) (cited in *Amgen*, 133 S. Ct. at 1193, and *Basic*, 485 U.S. at 245): "Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course

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[16] *Id.* at 483.

[17] *Id.* at 483-84.

[18] *Esplin v. Hirschi*, 402 F.2d 94, 99-100 (10th Cir. 1968); *see also Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968) (quoting *Esplin*).

of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions." 524 F.2d at 902.

Subsequently, of course, this Court has repeatedly approved the *Basic* presumption in the class action context. *See Amgen*, 133 S. Ct. at 1193; *Wal-Mart*, 131 S. Ct. at 2552 n.6; *Halliburton I*, 131 S. Ct. at 2186; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008); *Dura*, 544 U.S. at 342-43.

III. Requiring Plaintiffs To Prove Price Impact At The Certification Stage Would Be Inappropriate.

As a back-up position, Halliburton argues that this Court should require plaintiffs to prove "price impact" or "price distortion" at the certification stage – i.e., to show that the defendant's alleged misrepresentations affected the market price. Pet. Br. 37-39. Alternatively, Halliburton argues that a defendant should be able to rebut the presumption by showing the absence of price impact. *Id.* at 49-55; *see also* Amici Br. of Law Professors in Support of Petrs. at 24-34.

Both proposals conflict with the holdings in *Amgen*, 133 S. Ct. 1184 (2013), and *Halliburton I*, 131 S. Ct. 2179 (2011), that materiality and loss causation, respectively, are merits issues rather than questions for the certification stage. Price impact can generally be viewed as a subset either of materiality or loss causation.

Requiring plaintiffs to prove price distortion at the certification stage would effectively require them to prove materiality, in conflict with the holding in

Amgen. "In the context of an 'efficient' market, the concept of materiality translates into information that alters the price of the firm's stock," because whether information is viewed as "material" by a reasonable investor will depend on its impact on a company's stock price. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (per Alito, J.), for example, the court opined that where a "disclosure had no effect" on a company's stock price, "it follows that the information . . . was immaterial as a matter of law." *Id.*; *see also Nelson v. Hodowal*, 512 F.3d 347, 350 (7th Cir. 2008) ("information that, when revealed, has no effect on a stock's price is not 'material' to investors' decisions" (citing *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1130 (7th Cir. 1993)); *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) ("[T]he materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock.") (internal quotation marks and citation omitted).

Halliburton's proposal is also foreclosed by the holding in *Halliburton I* that loss causation need not be shown at the certification stage. Where a plaintiff alleges that false statements maintained, rather than artificially increased, a company's stock price, the most common way to establish price impact would be to show that the stock price suffered a significant decline in response to the corrective disclosures. *See, e.g.*, *Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010) (Easterbrook, J.). Such a showing is the same thing as loss causation. As explained by the Law Professor Amici supporting Halliburton, "cases in which no market movement can be discerned through current economic methods

would likely ultimately fail at the merits stage under *Dura* for lack of demonstrable damages." Amici Br. of Law Professors in Support of Petrs. at 31. *Dura* is a loss causation case, and under *Halliburton I*, plaintiffs are not required to show loss causation at the certification stage

Halliburton's proposals also ignore the need for discovery, in many cases, to show price impact attributable to a defendant's misrepresentations. Defendants frequently respond to 10b-5 actions by arguing that the company's stock price moved due to factors apart from the alleged fraud, such as market-wide factors and unrelated company-specific news. To disprove such defenses and show that the fraud led to the stock price reaction, plaintiffs are often required to develop facts that can be found only in defendants' internal documents or elicited at depositions of company officers or investor relations officials. (Public companies typically employ large investor relations departments that specifically track the movements in the company's stock price and often document the reasons for that movement in emails and internal reports.) Facts set forth in documents maintained by investor relations departments are often essential to disaggregating the reasons for a stock price's movement on a given day. Such documents (and related testimony) need to be analyzed by experts for each side, who in turn would have to be deposed. Given the fact-intensive nature of these issues, they can only be resolved on a fully developed record. Requiring plaintiffs to prove price impact at certification would either compel them to address an intensely factual question prior to the completion of discovery or cause the court to

postpone the certification decision until the completion of discovery.

A good example of the need for discovery is the securities litigation against Bank of America (BofA) stemming from its merger with Merrill Lynch (Merrill). *See In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig*, 281 F.R.D. 134 (S.D.N.Y. 2012) (certifying class). Plaintiffs alleged that BofA violated the securities laws by failing to disclose, prior to the shareholder vote on the merger, that Merrill was suffering catastrophic losses. Plaintiffs contended that a statistically significant stock decline in BofA's stock price on January 13, 2009 was caused by information "leaking" into the market (*see Dura*, 544 U.S. at 342 (positing example of leakage)) concerning BofA's need for a federal bailout to enable it to complete the Merrill acquisition. Defendants argued that there was no public announcement concerning the merger or BofA's or Merrill's financial condition on January 13. On that basis, defendants denied that the stock price decline on that day could be attributed to the alleged fraud.

In discovery, plaintiffs obtained internal BofA documents and testimony from senior BofA executives directly refuting defendants' contention and demonstrating that the January 13 decline was attributable to the alleged fraud. Among other things, plaintiffs obtained an email sent by BofA's Vice President of Investor Relations to senior BofA officers on January 13, 2009, which addressed the cause of the decline. In the email, the Vice President of Investor Relations stated that BofA's stock price was collapsing because investors had interpreted a speech given that morning by Chairman Ben

Bernanke to mean that BofA required a capital injection – even though the speech did not mention either BofA or Merrill: "Assumption from investors is [Chairman Bernanke] is talking about us in this section [of his speech].... According to the Citi traders, it is making large investors and traders extremely nervous and driving volumes well up on our stock."[19] Based on this internal email, plaintiff's expert was able to opine that the January 13, 2009 stock price decline was caused by market leakage concerning BofA's need for a capital infusion – an opinion that could not have been proffered without discovery of this critical document. *See also In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 511-12 & n.14 (N.D. Ill. 2007) (relying on emails obtained in discovery to disaggregate causes of stock price decline on February 23, 2001, and to show that vast majority of decline was attributable to fraud).

In general, courts widely recognize that extensive fact and expert discovery are critical to identifying the cause of a stock price movement. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 729-30 (11th Cir. 2012) ("To support a finding that Bancorp's misstatements were a substantial factor in bringing about its losses, therefore, State–Boston had to present evidence that would give a jury some indication, however rough, of how much of the decline in Bancorp's stock price resulted not from the fraud but from the general

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[19] *See* Plaintiffs' Omnibus Opposition To Defendants' Motions For Summary Judgment, *In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, No. 09 MD 2058 (PKC) (S.D.N.Y.), at 34 (filed June 29, 2012).

downturn in the Florida real estate market—the risk of which Bancorp is not alleged to have concealed.").

For all these reasons, plaintiffs should not be required to prove "price impact" at the certification stage, prior to the completion of factual and expert discovery.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Table of Authorities iii

Interest of Amici Curiae 1

Summary of Argument 3

Argument 5

I. Private Enforcement of the Securities Laws Through a Meaningful Rule 10b-5 Cause of Action Is Essential to Achieving Congress's Aims 5

A. An Effective Private Rule 10b-5 Right of Action Is an "Essential Complement" to Enforcement by Public Agencies 6

B. Private Litigation Is Critical to Achieving Congress's Aims of Deterring Fraud and Recouping Investor Losses 9

II. The *Basic* Presumption Is Indispensable If Private Enforcement Is to Retain Its Vitality for Institutional Investors 12

A. Institutional Investors Employ Passive Strategies to Manage Securities Portfolios Worth Trillions of Dollars 14

B. Because of the Prevalence of Passive Strategies, Requiring a Demonstration of Actual Reliance Would Thwart Institutional Investors' Pursuit of Valid Securities-Fraud Claims 18

Conclusion 21

Appendix

List of Amici Curiae 1a

TABLE OF AUTHORITIES

CASES

Basic Inc. v. *Levinson*,
485 U.S. 224 (1988) 12, 13, 20

Bateman Eichler, Hill Richards, Inc. v. *Berner*,
472 U.S. 299 (1985) 5, 6

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) 6

Free Enterprise Fund v. *Pub. Co. Accounting Oversight Board*,
130 S.Ct. 3138 (2010) 1

In re Countrywide Financial Corp. Sec. Litigation,
273 F.R.D. 586 (CD Cal. 2009) 21

Janus Capital Group, Inc. v. *First Derivative Traders*,
131 S.Ct. 2296 (2011) 1

J.I. Case Co. v. *Borak*,
377 U.S. 426 (1964) 5, 6

Morrison v. *National Australia Bank Ltd.*,
130 S.Ct. 2869 (2010) 17, 18

Peil v. *Speiser*,
806 F.2d 1154 (CA3 1986) 20

Randall v. *Loftsgaarden*,
478 U.S. 647 (1986) 6, 10

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 5

Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) 6, 20

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STATUTE AND RULES

Sup. Ct. R. 37.3(a) 1

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INTEREST OF AMICI CURIAE[1]

The Council of Institutional Investors is a nonprofit association of pension funds, other employee benefit funds, endowments, and foundations with combined assets that exceed $3 trillion. Its members include major long-term shareowners with duties to protect the retirement assets of millions of American workers. The Council has previously appeared as amicus curiae in cases affecting shareowner rights. See, *e.g.*, *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S.Ct. 2296 (2011); *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Board*, 130 S.Ct. 3138 (2010).

The individual fund *amici* are Amalgamated Bank LongView Funds, the California Public Employees' Retirement System, the California State Teachers' Retirement System, the City of Milwaukee Employes' Retirement System, the Commonwealth of Pennsylvania Public School Employees' Retirement System, the Delaware

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), blanket letters of consent from all parties to the filing of *amicus* briefs have been filed with the Clerk.

Public Employees' Retirement System, the Fire & Police Pension Association of Colorado, the Illinois State Board of Investment, the Municipal Employees' Retirement System of Michigan, the Nathan Cummings Foundation, the New York City Police Pension Fund, the New York State Common Retirement Fund, the Ohio Police & Fire Pension Fund, the Pension Reserves Investment Management Board and the Attorney General of the Commonwealth of Massachusetts, the Public Employees' Retirement Association of Colorado, the Public School Teachers' Pension & Retirement Fund of Chicago, the State Board of Administration of Florida, the State of Wisconsin Investment Board, USS Investment Management Ltd., and the Washington State Investment Board. These *amici* are described more specifically in the appendix to this brief.

The interests of *amici* are directly implicated here. The Council's members commonly employ passive investment management strategies like indexing. These strategies are founded on "faith that share prices reflect publicly available information" and so may often preclude a demonstration of direct reliance on fraudulent misstatements. Cox, Fraud on the Market After *Amgen*, 9 Duke J. Constitutional L. & Pub. Policy 101, 128 (2013) (forthcoming). Yet "[w]ithout trust in the markets in which trades are made, . . . funds could hardly be seen to act consistent with"

fiduciary obligations to their beneficiaries. *Id.*, at 129. At the same time, Congress and the courts have strongly endorsed institutional investors stepping forward to lead securities-fraud actions to recover assets for defrauded investors and deter future frauds. See, *e.g.*, H.R. Conf. Rep. No. 104-369, at 34-35 (1994); 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). *Amici* have thus learned, through direct experience, that the fraud-on-the-market presumption of *Basic Inc.* v. *Levinson* works, and works well, for investors, markets, and the courts.

SUMMARY OF ARGUMENT

Enforcement of the securities laws through private rights of action serves vital purposes, as Congress intended and the Court has long recognized. An efficacious private remedy for securities fraud under Rule 10b-5 powerfully deters wrongdoing and affords the greatest opportunity for defrauded investors to recover some portion of their losses. In this latter respect particularly, governmental enforcement is no substitute for a meaningful Rule 10b-5 remedy, which forms an essential complement to actions by the SEC and Department of Justice.

The fraud-on-the-market presumption of investor reliance on the integrity of securities prices is critical to the beneficial effects that private suits provide. Since *Basic* was decided, passive management of investments, such as

through indexing, has emerged as a common mechanism for investment in U.S. securities markets for institutional and individual investors alike. And the decision to adopt a passive investment management strategy, particularly by sophisticated institutional investors like *amici*, is taken with knowledge of—and hence in reliance on—the continued availability of the Rule 10b-5 cause of action for passively managed assets made possible by the *Basic* presumption.

Without that presumption, investors injured by fraud would have no claim unless they could prove actual, direct reliance on fraudulent misstatements—a burden inconsistent with the common strategies of passive investment management and those investors' reliance on the integrity of market prices. The ramifications of such a radical alteration of the Rule 10b-5 cause of action would be felt not only in class certification, but in the merits determinations of individual actions as well, narrowly restricting the availability of relief to only a certain kind of investor—one that is not necessarily broadly representative of market participants. Eliminating the fraud-on-the-market presumption would be both unnecessary and unwise.

ARGUMENT

I. PRIVATE ENFORCEMENT OF THE SECURITIES LAWS THROUGH A MEANINGFUL RULE 10b-5 CAUSE OF ACTION IS ESSENTIAL TO ACHIEVING CONGRESS'S AIMS.

"[A] dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 161 (2008); accord S. Rep. No. 104-98, at 8 (1995) ("The success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of our markets."). The Court and Congress alike have long and consistently acknowledged that private securities-fraud actions "provide 'a most effective weapon,'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)), and "an indispensable tool" in the perpetual struggle "to protect investors and to maintain confidence in the securities markets," H.R. Conf. Rep. No. 104-369, at 31.

A. An Effective Private Rule 10b-5 Right of Action Is an "Essential Complement" to Enforcement by Public Agencies.

It has been a commonplace of the Court's decisions for half a century that private securities-fraud actions "are 'a necessary supplement to [SEC] action.'" *Bateman Eichler*, 472 U.S., at 310 (quoting *J.I. Case Co.*, 377 U.S., at 432); accord *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *Randall* v. *Loftsgaarden*, 478 U.S. 647, 664 (1986); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). Congress and the SEC both concur in this assessment. See S. Rep. No. 104-98, at 8 ("[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an *essential complement* to the SEC's own enforcement program." (quoting SEC Chairman Arthur Levitt; emphasis added)).

The present importance of private supplementation of SEC enforcement is enhanced by several decades of "phenomenal growth [in] the securities industry" during which funding and staffing levels for the Commission have failed to keep pace. *The Sec. Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (Oct. 29, 1997) (joint statement of Chairman Levitt and SEC

Commissioner Isaac Hunt). [2] The concerns Chairman Levitt aired have only grown with time. "Unless there is a vastly enlarged SEC, private actions inevitably must serve as an enforcement substitute for deterrence purposes, as well as their more traditional role as an avenue for appropriate compensation of victims." Langevoort, Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda, 48 Vill. L. Rev. 1139, 1161 (2003).

Despite those concerns, Congress has chosen against substantially expanding public enforcement. SEC budget authority rose from $913 million in 2005 to $1.3 billion in 2013, an increase of only 4.75% annually. Sec. & Exch. Comm'n, FOIA Document: Budget History (May 7, 2013).[3] (To compare, in 2010, Goldman Sachs spent $1.3 billion just on marketing and technology. Elstein, SEC Budget Puts It in League with Goldman's Marketing Dept., Crain's N.Y. Business (Feb. 14, 2011).[4]) As the SEC's latest budgetary request frankly acknowledges, its "current level of resources is not sufficient to keep pace with the growing size and complexity of the securities markets and of

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[2] http://goo.gl/zvwAzr. All Internet sources cited in this brief are on file with counsel of record.

[3] http://goo.gl/WhuO3q.

[4] http://goo.gl/4US99G.

the agency's broad responsibilities." Sec. & Exch. Comm'n, FY 2014 Congressional Budget Justification 4 (Apr. 10, 2013).[5]

The true measure of the continuing necessity of private actions, however, lies in the decline of SEC securities-fraud enforcement activity. Over the last ten years, enforcement actions categorized by the SEC as "Financial Fraud/Issuer Disclosure" have fallen dramatically: whereas the SEC averaged 175 such actions annually between 2004 and 2008, it brought 73 in 2013 and averaged only 92 over the last three years. Sec. & Exch. Comm'n, Year-by-Year Enforcement Statistics (Dec. 17, 2013).[6] Over the same period, the proportion of the SEC's docket dedicated to securities-fraud enforcement has fallen roughly by half, from 28% in 2004 to just 13% in 2013. Cornerstone Research, Securities Class Action Filings: 2012 Year in Review 23 (2013).

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[5] http://goo.gl/es0FWM.

[6] http://goo.gl/eUnQ1j. Because these data include FCPA enforcement, they actually overstate the volume of SEC enforcement in the financial-fraud arena. See *ibid.* For example, in 2013, 5 of the 73 reported cases were FCPA actions. *Ibid.*

B. Private Litigation Is Critical to Achieving Congress's Aims of Deterring Fraud and Recouping Investor Losses.

When it moved to reform private securities litigation nearly twenty years ago, Congress readily noted that the "private securities litigation system" is vitally "important to the integrity of American capital markets" because of its utility in "deter[ring] wrongdoing" and ensuring that "defrauded investors can recover their losses." H.R. Conf. Rep. No. 104-369, at 31. Overruling *Basic* would sharply undermine these goals and disserve the congressional policy embedded in the federal securities laws.

Halliburton's self-interested assertions of skepticism notwithstanding, empirical evidence demonstrates the correctness of Congress's understanding of private litigation's deterrent effect. See, *e.g.*, Choi & Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, U. Mich. L. & Econ. Research Paper No. 12-022, at 39 (2012) (finding that private actions "provide greater deterrence against more serious securities law violations compared with the SEC"). [7] The "greater institutional commitment of the United States to enforcement" of its securities laws, by both public and private actors, succeeds in

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[7] http://goo.gl/R9sFVD.

repelling issuers prone to fraud while simultaneously lowering the cost of capital for honest issuers. Coffee, Law and the Market: The Impact of Enforcement, 156 U. Pa. L. Rev. 229, 245-246 (2007). "[P]rivate lawsuits promote public and global confidence in our capital markets and help . . . to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." H.R. Conf. Rep. No. 104-369, at 31. Beyond prospective deterrence through the fear of liability, private litigation, particularly by institutional investors, also provides opportunities to prevent future frauds through improved corporate governance. See Council of Institutional Investors, Securities Litigation 8 (2012) (noting that litigation often serves "as a tool to achieve governance reforms that add value and reduce risk at portfolio companies"). This Court's decisions rightly respect the congressionally mandated deterrent purpose, refusing to narrow the ambit of Rule 10b-5 and like provisions when doing so would "insulate those who commit securities frauds from any appreciable liability to defrauded investors" and "seriously impair the deterrent value of private rights of action" by diminishing "the incentives for [securities market actors] to comply with the federal securities laws." *Randall*, 478 U.S., at 664.

Halliburton likewise dismisses the compensatory function of the private Rule 10b-5

right of action that Congress lauded in 1995. But its cynical suggestion that securities class actions should be curtailed because they do not sufficiently compensate defrauded investors, Pet. Br. 41-43, is belied by the fact it would deny many investors any relief at all.[8] And its reassurances that public enforcement is sufficient to replace private securities-fraud claims, let alone make defrauded investors whole, again miss the mark. In 2013, the SEC "obtained total penalties and disgorgements of $3.4 billion, an increase from the $3.1 billion awarded the year before." Sec. & Exch. Comm'n, 2013 Agency Fin. Report 2 (Dec. 12, 2013).[9] However, of that amount, it appears only $54 million was disbursed to harmed investors, just one-tenth of the amount of disgorgements and penalties transferred to the U.S. Treasury—and even that paltry total was further reduced by taxes and fees. *Id.*, at 96. In comparison, settlements of private securities class-action

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[8] "It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation." Issacharoff, Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act, 106 Colum. L. Rev. 1839, 1861 (2006).

[9] http://goo.gl/FwDDIl.

suits yielded $2.9 billion in 2012, the majority of which went into investors' pockets. Ryan & Simmons, Cornerstone Research, Securities Class Action Settlements: 2012 Review and Analysis 2 (2013). Whatever the demerits of the securities class action as a vehicle for compensating defrauded investors, it still far outstrips public enforcement in vindicating this congressional purpose. See H.R. Conf. Rep. No. 104-369, at 31 (noting the value of an efficacious private remedy that recompenses defrauded investors "without having to rely upon government action").

II. THE *BASIC* PRESUMPTION IS INDISPENSABLE IF PRIVATE ENFORCEMENT IS TO RETAIN ITS VITALITY FOR INSTITUTIONAL INVESTORS.

If the private Rule 10b-5 right of action is to remain an important vehicle for achieving these congressional aims, a presumption that market participants rely on public information embedded in market prices is crucial. It is widely, and properly, recognized as forming the keystone of the securities class-action edifice. *E.g.*, Cox, *supra*, at 106 (noting that, absent the *Basic* presumption, "the burden of inquiring whether hundreds, or likely thousands, of investors relied on the alleged misrepresentation would be overwhelming," precluding any possibility of certification); accord *Basic v. Levinson*, 485 U.S. 224, 242

(1988). And without the availability of the class-action device, few investors have sufficient incentive to pursue securities fraud claims at all—because "the recoverable amount is too slight to justify" the cost of an individual suit, a class action "is the only viable option for most aggrieved investors," and the alternative is to forgo suit entirely. Cox, *supra*, at 106, n.17.

Halliburton asserts that the demise of the fraud-on-the-market presumption nonetheless presents no cause for concern, anticipating that institutional investors like the Council's members will take up the slack created by shutting down class-based litigation through pursuit of individual fraud claims. "Sophisticated investors," Halliburton argues, "will be able to demonstrate that they reviewed documents containing the alleged misrepresentations or omissions and can demonstrate actual reliance in individual actions." Pet. Br. 48 (quotation marks and alterations omitted). In reality, overruling *Basic* would erect serious impediments to institutional investors' ability to pursue securities-fraud actions even on an individual basis, and it is naïve—even irresponsible—to assume that institutional investors will (or can) fill the resulting gap in enforcement.

A. Institutional Investors Employ Passive Strategies to Manage Securities Portfolios Worth Trillions of Dollars.

Without the aid of the fraud-on-the-market presumption, only "active" investors—those who "reviewed documents containing the alleged misrepresentations," Pet. Br. 48, and directly relied on those misrepresentations in making investment decisions—will have a cause of action under Rule 10b-5. There is, however, a wide spectrum of investment strategies of varying levels of passivity from which any given investor, regardless of its degree of sophistication, may rationally select. See Cox, *supra*, at 101-103 (offering a taxonomy of investment strategies ranging from the classical active investor, "studiously poring through complex financial information," to indexing, to the wholly passive "dart thrower"). Many institutional investors, for example, incorporate indexing to reduce risk and improve returns. See, *e.g.*, Diamond, CalPERS Committee Rethinking Active Management, Pensions & Investments (Mar. 18, 2013).[10] Contrary to

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[10] http://goo.gl/xI0odc. Because of those investors' fiduciary obligations to their beneficiaries, investment-strategy decisions such as the adoption of indexing "necessarily entail considering the types of recovery methods available" in the event of fraud, including the availability of a Rule 10b-5 remedy

petitioner's argument, then, the ability to bring a securities-fraud claim absent *Basic*'s presumption would turn not on whether investor-plaintiffs are "sophisticated," which institutional investors certainly are, but on whether they actively manage their portfolios. And that is where Halliburton's breezy assurances fall apart.

Among the largest and most sophisticated investors—institutional investors like *amici*—as with investors generally, passive investment management strategies, particularly indexing, are common and govern substantial amounts of assets. [11] The Council's research and the

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and, relatedly, the *Basic* presumption. Council of Institutional Investors, A Survey of *Morrison*'s Impact on CII Members 4 (2013) (noting that, before *Morrison* v. *National Australia Bank*, "funds typically relied on participating in §10(b) class actions to recover securities fraud losses" and documenting reevaluations of investment strategies in response to *Morrison*'s alteration of longstanding precedent).

[11] The prevalence of indexing as an investment strategy has exploded in the years since *Basic* was decided. See, *e.g.*, Investment Company Institute, 2008 Investment Company Factbook 47 (2008), at http://goo.gl/dB8mQQ (documenting ten-fold rise between 1988 and 2007 in percentage of equity mutual fund assets held in index funds). Unlike index funds, however, indexing by institutional

individual experiences of *amici* confirm the importance of passive management strategies to pension funds like the Council's members. See, *e.g.*, Kozlowski, Northern Trust: 1 in 3 Has 40% of Stocks, Bonds in Passive Strategies, Pensions & Investments (Mar. 5, 2012) (documenting prevalence of passive management for equity and fixed-income asset classes);[12] Olsen, Top 200 Pension Funds Actively Moving to Passive Strategies, Pensions & Investments (Feb. 6, 2012) (noting market-adjusted 25% year-on-year increase in passive developed-markets investments among 200 largest U.S. retirement plans).[13] Particularly for domestic securities, the proportion of assets under passive management can be quite high: Some of the country's largest investors index four-fifths or more of their domestic equity assets. Pensions & Investments, Passive Equity Portfolios of 10 Large Pension Funds (Mar. 25, 2013) (reporting rates of passive management in the equity portfolios of the nation's five largest pension

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investors typically involves direct beneficial ownership of the indexed securities.

[12] http://goo.gl/5zrJuw.

[13] http://goo.gl/5XGMUt. See also Council of Institutional Investors, Asset Allocation Survey 2011, at 1 (2011) (finding that more than 90% of responding funds reported at least partially indexing their asset portfolios).

funds ranging from 72% to 87%).[14] Those passively managed portfolios contain substantial assets. One fund alone, the California Public Employees' Retirement System, or CalPERS, passively manages more than $125 billion in assets—half of its total $255 billion portfolio. Kephart, Passive Investing: If It's Good Enough for CalPERS..., Investment News (Mar. 24, 2013).[15] Across the market as a whole, institutional investors use indexing to manage $900 billion in fixed-income assets and more than $3.3 trillion in domestic equities alone—the equivalent of seventy percent of the combined total market capitalization of IBM, Goldman Sachs, Boeing, Chevron, Johnson & Johnson, and the 25 other companies that make up the Dow Jones Industrial Average. Zanona, Index Assets Up 18.4% for Year, Pensions & Investments (Sept. 16, 2013);[16] see S&P Dow Jones Indices, Dow Jones Industrial Average Fact Sheet 1 (2013).[17]

The prevalence of indexing in these portfolios is crucial because, after the Court's decision in *Morrison* v. *National Australia Bank Ltd.*, domestic equities and bonds form the

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[14] http://goo.gl/xm8uG.

[15] http://goo.gl/Ql4g4I.

[16] http://goo.gl/MAJR0J.

[17] http://goo.gl/a1p0ed.

principal classes of assets for which recovery can be had under Rule 10b-5 and that trade in conditions that could trigger the fraud-on-the-market presumption. See 130 S.Ct. 2869, 2884 (2010) ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies."). Any reconsideration of *Basic*'s fraud-on-the-market presumption will accordingly fall most heavily on the very portfolios—domestic equities and bonds—in which pension funds have most enthusiastically embraced passive investment strategies like indexing.

B. Because of the Prevalence of Passive Strategies, Requiring a Demonstration of Actual Reliance Would Thwart Institutional Investors' Pursuit of Valid Securities-Fraud Claims.

Halliburton fails even to acknowledge that abolishing the fraud-on-the-market presumption would radically alter securities-fraud plaintiffs' burden of proof not only at the class certification stage, but also on the merits. See *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S.Ct. 2541, 2552, n.6 (2011) (emphasizing that reliance, having been proven with respect to a Rule 23(b)(3) predominance inquiry, is "an issue [plaintiffs] will surely have to prove *again* at trial in order to make out their case on the

merits"). Yet a return to the pre-*Basic* status quo ante would herald significant difficulties for proving up even individual actions—and particularly so for any institutional investor who undertook to shoulder the burden of private enforcement of Rule 10b-5. Before *Basic*, such investors' assertions of reliance faced deep skepticism, with their sophistication regularly invoked against them as a reason to find an absence of "reasonable reliance" or a failure of "due diligence." See Fletcher, Sophisticated Investors Under the Federal Securities Laws, 1988 Duke L.J. 1081, 1086-1094 (documenting these and numerous other problems faced by sophisticated investors in proving actual reliance before *Basic*). Indeed, even senior U.S. Department of Justice officials have emphasized the difficulty of proving actual reliance, particularly for sophisticated investors, to justify the absence of securities-fraud prosecutions in the wake of the 2008 financial crisis. See PBS Frontline, Lanny Breuer: Financial Fraud Has Not Gone Unpunished (Jan. 22, 2013) ("And if I show that sophisticated Bank One is doing a transaction with sophisticated Bank Two, and sophisticated Bank Two knows fully what it's getting into . . . , then I cannot bring a case.").[18]

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[18] http://goo.gl/BX6B20.

The broader consequence risked by petitioners' plea, then, is not simply that class-based litigation of securities fraud will be effectively curtailed, but that even the rump claims of individual investors will evaporate entirely—not just because the absence of the class device makes such litigation unprofitable, but owing to the difficulty inherent in proving actual reliance on the merits.[19] That result is certainly undesirable, see *Tellabs, Inc.*, 551 U.S., at 313 (describing private Rule 10b-5 claims as "an essential supplement" to public enforcement), but it is unnecessary in equal measure.

"[T]he overarching tenet of *Basic*, reaffirmed in *Amgen*, is irrefutable: Stock prices in markets generally respond to public information that is financially significant." Cox, *supra*, at 111. And *Basic* was correct, also, that the "causal connection" in fraud-on-the-market cases "is no less significant than in a case of direct reliance." 485 U.S., at 242 (quoting *Peil* v. *Speiser*, 806 F.2d 1154, 1160-1161 (CA3 1986)). Indeed, "an important part of the indexer's strategy is the

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[19] Institutional investors opting out of settlements in the current system is far too rare to suggest otherwise. Between 1996 and 2011, opt-outs occurred in only 3% of all securities class-action settlements. Rozen et al., Cornerstone Research, Opt-Out Cases in Securities Class Action Settlements 2 (2013).

belief that markets are sufficiently trustworthy so that such passive investment is consistent with the advisor's fiduciary obligations." Cox, *supra*, at 126; see, *e.g.*, *In re Countrywide Financial Corp. Sec. Litigation*, 273 F.R.D. 586, 602 (CD Cal. 2009) (observing that, because "index purchases rely *exclusively*" on information conveyed through prices, indexing displays "close to perfect reliance on market price-setting"). Congress did not intend the securities laws to be interpreted to ignore such reliance by passive investors on the integrity of American markets. See S. Rep. No. 104-98, at 8 (ascribing the "success of the U.S. securities markets" to "a high level of investor confidence in the integrity and efficiency of our markets"); H.R. Conf. Rep. No. 104-369, at 31 (observing that "protect[ing] investors" is the "overriding purpose of our Nation's securities laws").

CONCLUSION

For these reasons, *amici* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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LIST OF AMICI CURIAE

Amalgamated Bank has over $30 billion of assets under management and under custody for hundreds of employee pension and benefit fund clients, including in its LongView Funds. Founded over twenty years ago, the LongView Funds actively engage portfolio companies to promote governance practices that we believe will support long-term shareholder value creation. In order to protect Fund investments, the Funds occasionally participate in securities litigation, including having been the first investor to take legal action against Enron for egregious accounting malfeasance. By participating as a named plaintiff, the Funds helped recover $7.2 billion for investors.

The California Public Employees' Retirement System (CalPERS) is the largest public pension fund in the United States. The fund administers health and retirement benefits on behalf of more than 3,000 public school, local agency and State employers. As of October 31, 2013, CalPERS had a total membership of 1,678,996 (consisting of 574,759 beneficiaries and 1,104,237 members) with total assets of $277.2 billion under management.

The California State Teachers' Retirement System (CalSTRS) is the largest teachers' retirement system in the United States. CalSTRS' primary responsibility is to provide retirement related benefits and services

to teachers in public schools from kindergarten through community college. As of June 30, 2013, CalSTRS had a total membership of 868,493 (consisting of 599,219 members and 269,274 beneficiaries), and as of December 31, 2013, total assets of $181.1 billion.

The City of Milwaukee Employes' Retirement System is an I.R.C. 401(a) tax qualified retirement plan organized pursuant to the City Charter as an independent corporation under state law to provide retirement, disability and death benefits for employees, retirees, survivors and beneficiaries of the City, Milwaukee Public School non-credentialed employees and other City agencies, including police, fire and general employees. Current assets are approximately $4.8 billion.

The Commonwealth of Pennsylvania Public School Employees' Retirement System (PSERS or System) was established on July 18, 1917, to provide retirement benefits to public school employees of the Commonwealth. The System is a governmental cost-sharing multi-employer defined benefit pension plan, to which all members and 797 reporting units contribute. The members eligible to participate in the System include all full-time public school employees, part-time hourly public school employees who render at least 500 hours of service in the school year, and part-time per diem public school employees who render at

least 80 days of service in the school year in any of the reporting entities in Pennsylvania. PSERS was established by law as an independent administrative board directed by a governing board of trustees which exercises control and management of the System, including the investment of its assets. As of June 30, 2013, the System had over 267,000 active members and approximately 209,000 retirees and beneficiaries. The total net assets of the System totaled $49.3 billion as of June 30, 2013.

The Delaware Public Employees' Retirement System (DPERS) is established pursuant to 29 Del. C. Sec. 8308. It administers nine public pension plans, and has investment authority for three additional plans. At the end of Fiscal Year 2013, pensioners numbered 26,180; monies from the nine plans and three pension commingled investment funds totaled $8.1 billion. The State's contribution rate for the State Employees' Plan for Fiscal Year 2013 was 8.9% of payroll. Employer rates in the other plans that the Board administers range from 6.8% to 27.7% of covered payroll.

The Fire & Police Pension Association of Colorado was established in 1980 pursuant to the Colorado Revised Statutes of 1973, as amended. FPPA administers two funds: the Fire & Police Members' Benefit Investment Fund ($4 billion) and the Fire & Police Members' Self-

Directed Investment Fund ($368 million). The Fire & Police Pension Association administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado. FPPA serves over 24,000 active and retired members. The Fire & Police Members' Benefit Investment Fund includes the assets of those plans that fall under the complete investment authority of the FPPA Board of Directors. This fund includes the assets of the Defined Benefit System, the Statewide Death & Disability Plan, and numerous separate Local "Old Hire" police and fire plans, and Volunteer Fire pension plans. The Defined Benefit System comprises the Statewide Defined Benefit Plan, the Statewide Hybrid Plan, and the Colorado Springs New Hire Pension Plans. The Fire & Police Members' Self-Directed Investment Fund consists of the assets in plans where members control their account by choosing from various mutual fund options selected by the Board of Directors.

The Illinois State Board of Investment is a non-appropriated state agency that is responsible for managing and investing the pension assets of the Illinois General Assembly Retirement System, the Judges' Retirement System of Illinois and the State Employees' Retirement System of Illinois. ISBI's net assets totaled $14.3 billion as of December 31, 2013. In

addition, the Board is responsible for overseeing the Illinois Deferred Compensation Plan (the Plan). The Plan's net assets totaled $3.8 billion as of September 30, 2013, with approximately 51,000 participants.

The Municipal Employees' Retirement System of Michigan (MERS) is an independent public nonprofit organization that has partnered with Michigan municipalities for more than 65 years. As an agent multiple-employer plan, MERS establishes a separate trust for each municipality. Each entity is responsible for the employer contributions needed to provide benefits for its employees and former employees under the Michigan Constitution, the MERS Plan Document and MERS' enabling legislation (Public Act 427 of 1984, as amended). The pension plan is a tax-qualified plan under section 401(a) of the Internal Revenue Code (most recent letter of Favorable Determination issued April 26, 2012). In addition to the Defined Benefit Plan, MERS' other programs include: MERS Defined Contribution Plan, MERS Hybrid Plan, MERS 457 Supplemental Retirement Program, MERS Health Care Savings Program, MERS Retiree Health Funding Vehicle, and Investment Services Program. As of December 31, 2013, MERS' total assets were $8.7 billion, and its total membership was nearly 800 municipal members and 100,000 participants.

The Nathan Cummings Foundation is a private grant making foundation with an endowment of approximately $425 million. The Foundation is rooted in the Jewish tradition and committed to democratic values and social justice. The Foundation is guided by the principle that we must work to close the gap between America's promise and practice and aspires to a society that measures its success by how it treats those who have the least. Specifically, the Foundation seeks to make progress on two pressing and interconnected problems that must be resolved if its vision is to be realized: inequality and climate change.

The New York City Police Pension Fund, created pursuant to New York Local Law 2 of 1940, provides benefits for uniformed members of the New York City Police Department. It currently serves over 75,000 active and retired members, and as of October 2013 had $31.2 billion in assets under management.

The New York State Common Retirement Fund (NYSCRF) holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. As one of the largest public pension funds in the United States, NYSCRF provides pension, disability, and death benefits

for New York state and local government employees and employees of certain other participating employers. As of September 30, 2013, NYSCRF had more than one million employees, beneficiaries, and retirees, and total assets of approximately $164 billion. NYSCRF has served as lead plaintiff in numerous securities litigation class actions resulting in some of the largest recoveries for shareholders in history, including *In re Worldcom, Inc. Sec. Litigation*, No. 02-cv-3288 (DLC) (SDNY), with a settlement of more than $6 billion; *In re Cendant Corp. Sec. Litigation*, No. 98-cv-1664 (WHW) (DNJ), with a settlement over $3.2 billion; and *In re McKesson Corp. HBOC, Inc., Sec. Litigation*, No. C-99-20743 RMW (ND Cal.), with a settlement over $1 billion.

The Ohio Police and Fire Pension Fund (OP&F) was created by the Ohio General Assembly in 1965, replacing 454 separate local police and firemen's relief and pension funds in Ohio. The statewide Fund began operating January 1, 1967. On that date, the local pension funds transferred their assets and liabilities to the OP&F. Assets transferred to OP&F in 1967 were approximately $75 million. As of January 29, 2014, OP&F has approximately $14 billion in assets and our members include more than 28,000 active police officers and firefighters, more than 18,000 retired members and nearly 8,000 beneficiaries and survivors.

The Pension Reserves Investment Management Board of the Commonwealth of Massachusetts (PRIM) is the trustee of the Massachusetts Pension Reserves Investment Trust (PRIT) Fund, a defined benefit public pension fund with 285,000 beneficiaries and $57,085,493,546 in assets under management as of January 30, 2014. PRIM works diligently on behalf of Massachusetts state employees and teachers, and also local municipal and county retirement systems throughout the Commonwealth of Massachusetts, to invest their pension assets in a manner that maximizes returns while mitigating risk. **The Attorney General of the Commonwealth of Massachusetts** is the chief lawyer and law enforcement officer of the Commonwealth. The Attorney General is an advocate and resource for the Commonwealth and its residents in many areas, including consumer protection, combating fraud and corruption, protecting civil rights, and promoting meaningful economic recovery.

The Public Employees' Retirement Association of Colorado provides retirement and other benefits to the employees of more than 500 government agencies and public entities in the state of Colorado, including employees of the Colorado state government, public school teachers, many university and college employees, judges, many employees of cities and towns, State Troopers, and the

employees of a number of other public entities. It is the 21st largest public pension plan in the United States and has over $40 billion in assets, approximately 200,000 active members, and approximately 100,000 benefit recipients.

Established by the Illinois state legislature in 1895 as **The Public School Teachers' Pension and Retirement Fund of Chicago**, the Chicago Teachers' Pension Fund (CTPF) is the administrator of a multi-employer defined benefit public employee retirement system providing retirement, survivor, and disability benefits to retired teachers and employees of the Chicago Public Schools. CTPF has almost 28,000 retirees and over 29,000 active members. CTPF is administered in accordance with Illinois Compiled Statutes (ILCS) Chapter 40, Articles 1,17,20. CTPF is governed by a 12-member Board of Trustees; six are elected by the teacher contributors, three are elected by the annuitants, one is elected by the principal contributors, and two are appointed by the employer, Board of Education. The CTPF Trustees and investment staff oversee a well-diversified investment portfolio of approximately $10 billion.

The State Board of Administration of Florida (SBA) is a body of Florida state government that provides a variety of investment services to clients and governmental entities. These include managing the assets of

the Florida Retirement System (FRS), the Local Government Surplus Funds Trust Fund (Florida PRIME™), the Florida Hurricane Catastrophe Fund, and over 30 other fund mandates. The FRS presently has approximately 647,000 active (working) members and 992 participating employers. Members are employees of state, county and city governments, school boards, community colleges and universities, and special districts. As of December 31, 2013, the SBA managed assets across all mandates totaling approximately $174 billion.

The State of Wisconsin Investment Board (SWIB) is an independent agency of the state whose purpose is to provide professional investment management of the Wisconsin Retirement System trust funds, as well as other state trust funds. The Wisconsin Retirement System provides benefits to more than 572,000 current or former employees of state agencies, the university system, school districts and most local governments in Wisconsin. The WRS is the 9th largest U.S. public pension fund and the 28th largest public or private pension fund in the world. As of December 31, 2013, the assets under management by SWIB were over $100 billion.

USS Investment Management Limited (USSIM) is a wholly owned subsidiary of Universities Superannuation Scheme Limited

(USS), which acts as USS's investment manager and advisor and which operates from its London office. It is regulated by the Financial Conduct Authority. USS is the sole trustee company of the Universities Superannuation Scheme (Scheme). The Scheme was established in 1974 as the principal final salary pension scheme for universities and higher education institutions in the UK. USS administers the Scheme and runs the pensions administration and group functions from the head office in Liverpool. It is regulated by the Pensions Regulator. The Scheme's membership has grown to include over 400 institutions with approximately 290,000 individual members and is the second largest pension fund in the UK with assets of approximately £40 billion ($65.9 billion).

The Washington State Investment Board manages investments for 17 retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges. In addition, the Board manages investments for 16 other public funds that support or benefit industrial insurance, colleges and universities as well as developmental disability programs. The Board has $94.6 billion in assets under management.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-317

Supreme Court, U.S.
FILED
FEB - 5 2014
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In the Supreme Court of the United States

HALLIBURTON CO., ET AL.,
Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CURRENT AND FORMER MEMBERS OF CONGRESS AND STAFF AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. When Congress Is Aware of Competing Positions on Settled Law and Votes Not to Change That Settled Law, Congress Preserves the Law as It Stands. 2

II. Congress Has Preserved *Basic* and the Fraud-on-the-Market Theory. 4

A. Congress rejected efforts to abrogate *Basic* when enacting the PSLRA. 4

1. History 6

2. Text 9

B. Congress similarly maintained *Basic* when enacting SLUSA and subsequent legislation. 11

III. The Other Legislators' Arguments That Congress Has Not Preserved *Basic* Are Unsupportable. 12

CONCLUSION 15

APPENDIX: List of Amici Curiae 1a

TABLE OF AUTHORITIES

CASES

Aaron v. SEC,
446 U.S. 680 (1980) 4

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 1, 4, 15

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) ..... *passim*

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 3, 13

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 3, 14

Citibank, N.A. v. K-H Corp.,
968 F.2d 1489 (2d Cir. 1992) 13

Currie v. Cayman Res. Corp.,
835 F.2d 780 (11th Cir. 1988) 13

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 14

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 2

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 4

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 12

Patterson v. McClean Credit Union,
491 U.S. 164 (1989) 4

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 3, 12, 14

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 14

Watson v. United States,
552 U.S. 74 (2007) 4

Wool v. Tandem Computers Inc.,
818 F.2d 1433 (9th Cir. 1987) 13

STATUTES AND LEGISLATIVE MATERIAL

15 U.S.C. § 78u-4(a)(2) 10

15 U.S.C. § 78u-4(a)(3) 10

15 U.S.C. § 78u-4(a)(4) 10

15 U.S.C. § 78u-4(a)(5) 10

15 U.S.C. § 78u-4(a)(6) 10, 11

15 U.S.C. § 78u-4(a)(7) 10

15 U.S.C. § 78u-4(b)(1)(2) 10

15 U.S.C. § 78u-4(b)(3)(B) 10

15 U.S.C. § 78u-4(b)(4) 10

15 U.S.C. § 78u-4(c) 11

15 U.S.C. § 78u-4(e) 10, 11

15 U.S.C. § 78u-4(f) 10

15 U.S.C. § 78u-5 11

Class Action Fairness Act, Pub. L. No. 109-2 (2005) 12

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 12

I.R.C. § 501 3

Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 ..... *passim*

Pub. L. No. 111-203, 124 Stat. 1376, § 929Y (July 11, 2010) 12

Pub. L. No. 111-203, 124 Stat. 1376, § 929Z 12

Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002) .. 12

Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5 ..... 3, 9

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j 5, 9, 10, 12

Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353 (1998) 1, 2, 11, 15

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

141 Cong. Rec. S17984 (Daily ed. Dec. 5, 1995) 9

Tim Ferguson, Business World: A Contract to Restore Contract to Securities Law, *Wall Street Journal*, Oct. 25, 1994 6

H.R. Conf. Rep. No. 104-369 (1995) 2

H.R. Rep. No. 104-50 (1995) 7

May 25, 1995 letter from Arthur Levitt to Hon. Alfonse M. D'Amato, 141 Cong. Rec. S9126 8

Private Securities Litigation Reform Act of 1995, Report of the Comm. on Banking, Housing, & Urban Affairs of the U.S. Senate, S. Rep. No. 104-98 (June 19, 1995) 7, 8

Securities Litigation Reform Proposals: Hearings on S. 240 Before the Subcomm. on Securities of S. Comm. on Banking, Housing, and Urban Affairs, 104th Cong., 1st Sess. (1995) 7

S. Rep. No. 104-98 (1995) 8

S. 667, 104th Cong. (1st Sess. 1995) 8

INTEREST OF AMICI CURIAE

Amici are current and former Members of Congress and staff, several of whom were involved in drafting and enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737.[1] Some Amici were in favor of the Act, and some opposed it. Regardless, this Court was correct last Term when it concluded that, in enacting the PSLRA, "Congress rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013) (discussing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)). Some other former legislators and staffers have filed an amici brief claiming that this Court's conclusion is inaccurate in light of the PSLRA's full legislative history. (Brief for Former Members of Congress, Senior SEC Officials, and Congressional Counsel as Amici Curiae ("Br.")). Their view is mistaken. Congress indeed validated *Basic* when enacting the PSLRA and subsequent securities legislation.

SUMMARY OF ARGUMENT

Congress has twice legislated on the specific issue Halliburton raises here: private securities class-action litigation. In both the PSLRA and the Securities Litigation Uniform Standards Act (SLUSA), Pub. L.

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's office.

No. 105-353 (1998), Congress imposed limits on such class actions to strike a balance between the need to protect investors, on the one hand, and issuers' ability to raise capital without fear of strike suits, on the other. *See* H.R. Conf. Rep. No. 104-369, at 31 (1995). In enacting the PSLRA, Congress was expressly invited to revisit *Basic*. It refused to do so. Thus, Congress did not intend to simply refrain from commenting altogether—but instead sought to preserve the law as it stood. That is clear both from Congress's decision not to reconsider *Basic* and from numerous provisions of the PSLRA that make sense only if class-based fraud-on-the-market suits are permitted. Later, when Congress decided to supplement the PSLRA by enacting SLUSA, Congress again left *Basic* intact. Viewed in light of Congress's policy objectives and the alternatives it considered, the enactment of the PSLRA and SLUSA constitutes legislative validation of *Basic*.

ARGUMENT

I. When Congress Is Aware of Competing Positions on Settled Law and Votes Not to Change That Settled Law, Congress Preserves the Law as It Stands.

When Congress, this Court, or a federal agency takes a position on an important legal issue and that position reflects the settled state of the law, it is understood that further Congressional action occurs against that legal background. Thus, when Congress takes action in that area but does not overturn that settled legal position, it is deliberately preserving that position. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–56 (2000) (Congressional action regarding tobacco regulation "effectively ratified

the FDA's previous position" about its jurisdiction because Congress "enacted this legislation against the background of the FDA repeatedly and consistently asserting" that position); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (Congressional action regarding Section 501 of the Internal Revenue Code implicitly showed that Congress accepted the IRS's interpretations of that section in light of Congress's "prolonged and acute awareness of so important an issue" and the competing positions it generated).

Indeed, this Court has made this very point (implicit Congressional approval of important, settled legal positions) with respect to other provisions of the PSLRA. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (noting that the PSLRA "ratified the implied right of action" under Rule 10b-5, which had become "a prominent feature of federal securities regulation"); *id.* at 163 (noting that the PSLRA also implicitly adopted this Court's previous decision in *Central Bank* that there is no private liability for aiding and abetting securities violations) (discussing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

By contrast, if the legal landscape is unsettled or if the debated legal provision at hand is not a Congressional action's focus, then the Congressional action does not necessarily endorse an existing interpretation of that provision. *See, e.g.*, *Central Bank*, 511 U.S. at 185–87 (not relying on Congress's inaction to determine whether Rule 10b-5 permits liability for aiders and abettors because the Court had not clearly

expressed an interpretation before (so there was nothing for Congress to react to), and because the legislative signals themselves were unclear); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) (not relying on Congress's inaction regarding a scienter requirement in certain statutes because "the legislative consideration of those statutes was addressed principally to matters other than that at issue here").

These principles show why this Court's decisions interpreting Congressional statutes have "special force" as *stare decisis*: "'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 172–73 (1989)). Thus, when "Congress has long acquiesced in the interpretation [the Court has] given," *id.*, the Court can safely infer that Congress has accepted the Court's interpretation of Congress's policies. *See Watson v. United States*, 552 U.S. 74, 82–83 (2007).

As shown below, that is exactly why this Court correctly observed in *Amgen* that Congress has endorsed *Basic* and its embrace of the fraud-on-the-market theory.

II. Congress Has Preserved *Basic* and the Fraud-on-the-Market Theory.

A. Congress rejected efforts to abrogate *Basic* when enacting the PSLRA.

In its 1988 decision in *Basic*, this Court made clear that Congressional policy supported the fraud-on-the-market theory. 485 U.S. at 245–46 ("The presumption of reliance employed in this case" is consistent with

"congressional policy embodied in the 1934 Act," which was enacted "to facilitate an investor's reliance on the integrity of [the securities] markets."). Similarly, the SEC filed an amicus brief in *Basic* supporting the theory, because it furthered "important policies under the federal securities laws" and "the underlying goal of honest markets." Br. of SEC, *Basic*, *supra*, at 25–26.

The *Basic* Court also emphasized the critical point that, without the fraud-on-the-market theory, Section 10(b) investor suits for misrepresentations effectively could not even exist as class actions: "Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Basic*, 485 U.S. at 242.

Thus, when considering any significant securities legislation after *Basic*, Members of Congress were aware that the Court and the SEC had interpreted Congress's policies to support the fraud-on-the-market theory. Congress therefore understood that the ball was in its court if it wished a different result.

Indeed, seven years after *Basic* was decided, Congress enacted the PSLRA—the most substantial legislation ever passed to reform securities class actions. The policy concerns prompting the PSLRA—regarding the perception of abusive class-action securities litigation—are the same ones Petitioner Halliburton raises here. And *Basic* was a central focus of Congressional attention for years. Starting in the PSLRA's infancy, "a prime target" of the Republican Party's 1994 Contract With America was

securities actions that "allege 'frauds on the market.'" Tim Ferguson, Business World: A Contract to Restore Contract to Securities Law, *Wall Street Journal*, Oct. 25, 1994, at A17. Naturally, *Basic* became a central part of the PSLRA debate.

Thus, the relevant question here is straightforward: Did Congress keep *Basic* and the fraud-on-the-market theory intact in the PSLRA such that established securities class actions would be preserved? The answer—shown by both the PSLRA's history and text—is a resounding yes.

1. History

Consider the early history first. As the other amici legislators and staff acknowledge in their brief, the initial version of the PSLRA (H.R. 10) would have abrogated *Basic* entirely by requiring plaintiffs' eyeball reliance on misleading statements. (Br. 6.) SEC Chairman Arthur Levitt testified that this requirement would be "antithetical to our entire system of disclosure" and that this would "eliminate the notion of fraud on the market." Serial No. 104-2 at 194. Chairman Levitt further explained in his written statement that the bill would overturn the holding "of the Supreme Court in . . . *Basic*" and "fundamentally alter existing law." Serial No. 104-2 at 203–04.

That version was rejected. Representative Christopher Cox, a champion of securities litigation reform, noted in remarks directed to Chairman Levitt that the bill would be amended "because frankly, we found your arguments persuasive." *Id.* at 209.

Then a bill emerged (H.R. 1058) from the House Committee on Commerce that would have significantly

limited (but not entirely abrogated) the fraud-on-the-market theory endorsed in *Basic*. For example, the bill would have limited the fraud-on-the-market theory to cases involving securities traded on national exchanges, would not have clearly permitted claims based on indirect reliance (e.g., where a broker relied on a misrepresentation and misinformed the plaintiff), and would have made it easier for defendants to rebut the presumption of fraud on the market. *See Securities Litigation Reform Proposals: Hearings on S. 240 Before the Subcomm. on Securities of S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 252–53, 363, 364 (1995). Again, however, the SEC opposed these efforts to undermine *Basic*. *See, e.g.*, H.R. Rep. No. 104-50 at 44 (1995) ("The Commission recommends that the language [regarding securities not on national exchanges] be amended to clarify that both direct and indirect reliance would suffice."). Other witnesses recognized that this weak version of the fraud-on-the-market theory fell far short of the current state of the law as stated by this Court in *Basic*. *See id.* at 369 (Report by the Committee on Securities Regulation and the Committee on Federal Courts of the Association of the Bar of the City of New York) ("Proposed changes in the law on reliance and fraud on the market are counterproductive and *should be withdrawn in favor of current case law in the area*.") (emphasis added). This bill (H.R. 1058) was also rejected.

The Senate similarly rejected versions of legislation that would have abrogated *Basic*'s fraud-on-the-market theory. For example, the original Committee Print of S. 240 would have required an investor's eyeball reliance on misleading forward-looking statements. *Private*

Securities Litigation Reform Act of 1995, Report of the Comm. on Banking, Housing, & Urban Affairs of the U.S. Senate, S. Rep. No. 104-98, at 42 (June 19, 1995). But on May 25, 1995, Committee Chairman Alfonse M. D'Amato "ordered S. 240 favorably reported," S. Rep. No. 104-98, at 3 (1995), after offering a substitute Committee Print that "deleted the requirement that an investor prove he or she 'had actual knowledge of and actually relied on' a fraudulent statement," *id.* at 42 (Additional Views of Senators Sarbanes, Bryan, and Boxer). As reflected in a letter SEC Chairman Levitt wrote to Senator D'Amato, this change appeared to be a direct response to concerns raised by the SEC:

> The Committee staff appears to be genuinely interested in the Commission's views of the draft legislation and has attempted to be responsive. I was pleased to see the latest drafted *deleted the requirement that a plaintiff must read and actually rely upon the misrepresentation before a claim is actionable*.

May 25, 1995 letter from Arthur Levitt to Hon. Alfonse M. D'Amato, 141 Cong. Rec. S9126 (emphasis added).

The Senate also considered eliminating the presumption of reliance embedded in the fraud-on-the-market theory by delegating to the SEC the authority to determine when a party could invoke the presumption. S. 667, 104th Cong. (1st Sess. 1995). That effort to weaken the theory as established in *Basic* similarly failed.

The legislative history thus shows that both chambers of Congress and various congressional committees considered abolishing or modifying the

fraud-on-the-market presumption. The extended debate over *Basic* was a key part of the congressional debate that culminated in the PSLRA. But in enacting the PSLRA, Congress chose to leave the fraud-on-the-market presumption untouched.

The settled doctrine of fraud on the market underlying securities class actions as stated in *Basic* was preserved in the process of enacting the PSLRA. Senator Carol Moseley Braun (an original co-sponsor of S. 240, which ultimately became the law) confirmed that Congress preserved the doctrine: "The House bill abolished liability for fraud on the market. The Senate bill *left that doctrine unchanged*, and the conference bill adopts the Senate approach." 141 Cong. Rec. S17984 (Daily ed. Dec. 5, 1995) (emphasis added).

2. Text

The PSLRA's provisions show that Congress indeed preserved the fraud-on-the-market theory while simultaneously imposing a number of stricter requirements and limitations on plaintiffs bringing securities suits. As noted in *Basic*, securities class actions for alleged misrepresentations under Section 10(b) and Rule 10b-5 would effectively no longer exist without the fraud-on-the-market theory. *Basic*, 485 U.S. at 242. Congress proved that it understood that such suits would continue by affirmatively regulating them (not eliminating them) through the PSLRA.

Indeed, in the statutory section devoted to "Private class actions," the PSLRA regulates securities class actions in great detail, implementing procedures such as the following:

- certification of the class representative, 15 U.S.C. § 78u-4(a)(2);
- requiring certifications filed with the complaint, *id.*;
- appointment of lead plaintiff for the class, *id.* § 78u-4(a)(3);
- restrictions on class representatives' recovery, *id.* § 78u-4(a)(4);
- restrictions on settlements under seal, *id.* § 78u-4(a)(5);
- restrictions on class counsel's attorney fees, *id.* § 78u-4(a)(6); and
- requirements for detailed disclosure of settlement terms, § 78u-4(a)(7).

These provisions make sense for securities class actions alleging misrepresentations under Section 10(b) only if there is a fraud-on-the-market theory to support those actions. In other words, *Basic* authorized fraud-on-the-market class actions—the PSLRA simply regulates and limits them. And, of course, the various other restrictions the PSLRA imposes generally on plaintiffs in securities suits apply to the class actions as well.[2]

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[2] As examples of these limitations, Congress established heightened pleading requirements, *id.* § 78u-4(b)(1)(2); imposed a stay on discovery pending adjudication of motions to dismiss, *id.* § 78u-4(b)(3)(B); required plaintiffs to prove loss causation, so that defendants are not liable for price declines unrelated to fraud, *id.* § 78u-4(b)(4); limited damages in cases in which the market rebounds quickly after negative disclosure, *id.* § 78u-4(e); limited defendants' joint and several liability, *id.* § 78u-4(f); authorized

In sum, the PSLRA's enactment shows that Congress deliberately preserved *Basic* and the fraud-on-the-market theory. If this Court were to overrule *Basic*, it would effectively nullify Congress's carefully crafted—and explicit—regulation of securities class actions.

B. Congress similarly maintained *Basic* when enacting SLUSA and subsequent legislation.

Three years after the enactment of the PSLRA, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353 (1998), which sought to curb abuse of state-court class actions by requiring securities-fraud class actions to be filed in federal court, and therefore to comply with the additional requirements of the PSLRA. When it addressed for a second time perceived class-action abuses, and in the face of evidence that the PSLRA alone was not achieving Congress's intended goals, Congress still chose not to take any further action with respect to the fraud-on-the-market theory; instead, it chose to simply move more cases into the PSLRA regime. Moreover, the majority of class actions that created the concerns that motivated SLUSA were fraud-on-the-market cases, but Congress chose to allow plaintiffs to pursue them in federal court rather than abolish or curtail such claims. Thus, SLUSA expressly contemplates preserving such securities class actions and *Basic*'s fraud-on-the-market theory.

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sanctions for abusive litigation, *id.* § 78u-4(c); limited damages and attorney's fees, *id.* § 78u-4(a)(6), (e); and created a safe-harbor for forward-looking statements, *id.* § 78u-5.

Subsequent legislative events, including the Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002), and the Class Action Fairness Act, Pub. L. No. 109-2 (2005), likewise involved no efforts to revisit *Basic*, even as parties, such as Halliburton, continually raised concerns about securities class actions. The same is true of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which directed the SEC to study whether private rights of action under Section 10(b) should be extended to cover extraterritorial securities transactions and conduct (addressing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)). *See* Pub. L. No. 111-203, 124 Stat. 1376, § 929Y (July 11, 2010). The Dodd-Frank Act also directed the GAO to study the impact of authorizing a private right of action against aiders and abettors of violations of the securities laws (addressing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162–63 (2008)). *See* Pub. L. No. 111-203, 124 Stat. 1376, § 929Z. Congress is actively regulating securities suits, and it is leaving *Basic* and the class actions it underlies in place.

* * *

In light of all of the evidence, Congress's decision to maintain the status quo in such a heavily regulated field is intentional. Congress has kept *Basic* intact.

III. The Other Legislators' Arguments That Congress Has Not Preserved *Basic* Are Unsupportable.

The other legislators essentially make three points in their amici brief in an effort to show that Congress did not approve *Basic*, but the legal and historical

backdrop discussed above reveals these points to be fundamentally flawed.

First (and foremost), the other legislators claim that Congress had no opinion regarding *Basic* and the fraud-on-the-market theory because Congress did not formally codify that theory. (Br. 5.) But that ignores the reality of which Congress was acutely aware that—absent legislative action—*Basic* would remain the law. Just as the other legislators acknowledge regarding Congressional action in the face of other efforts to change settled law, it is "hardly conceivable that Congress * * * was not abundantly aware of what was going on." (Br. 20 (quoting *Bob Jones Univ.*, 461 U.S. at 599).) The reality is that opponents of the fraud-on-the-market theory tried and failed to convince a majority of Congress to abandon or even modify it.

Relatedly, the other legislators argue that Congress's decision not to formally codify *Basic* stands in contrast with its decision to codify the loss-causation requirement. (Br. 21.) But unlike the settled endorsement of the fraud-on-the-market theory in *Basic*, there was no settled position on the loss-causation requirement. *Compare Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992) (likening loss causation to proximate cause and holding that "[t]o establish loss causation a plaintiff must show that the economic harm that it suffered *occurred as a result of* the alleged misrepresentations"); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988) (same), *with Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1436–37 (9th Cir. 1987) (holding that plaintiffs need only allege that the market price paid by them exceeded the value of the security at the time of

purchase). Thus, codification of the loss-causation requirement in the PSLRA settled an unclear area of the law, as this Court recognized in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005) (holding that the PSLRA rejected the Ninth Circuit's position and required proximate causation); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (codification of heightened scienter standard in PSLRA "signaled Congress' purpose to promote greater uniformity among the Circuits"). Moreover, the loss-causation requirement is highly relevant to fraud-on-the-market cases, which means that Congress's decision to codify that requirement suggests its agreement with fraud-on-the-market principles as they stood at the time, i.e., as set forth by *Basic*.

Similarly, the other legislators claim that Congress's decision not to codify *Basic* stands in contrast with its response to *Central Bank*. (Br. 21–22.) But Congress's response to *Central Bank* actually supports the conclusion that it approved *Basic*. In *Central Bank*, this Court refused to recognize aiding-and-abetting liability in private securities-fraud actions. Congress responded by permitting the SEC to pursue such liability, but it said nothing about such liability in private claims. This Court drew the inference that Congress's silence indicated its approval of *Central Bank*'s rejection of such liability in private suits. *See Stoneridge*, 552 U.S. at 162–63. The PSLRA's silence regarding *Basic* similarly reveals congressional approval of the settled law concerning fraud on the market.

Second, the other legislators offer a speculative argument that the PSLRA does not show Congressional approval of *Basic* because the statute was purposely narrow, and designed to garner supermajorities in both houses of Congress to override President Clinton's veto. (Br. 19.) But this ignores that the PSLRA is the most substantial legislation ever passed to reform securities class actions—and *Basic* was a principal feature of the existing background. Additionally, there is no evidence that Congress would have overruled *Basic* if it had to muster simple majorities in both chambers. Indeed, the fact that Congress has not taken up the issue again—and the fact that the SEC has never wavered in its support of the fraud-on-the-market theory—suggest a high degree of satisfaction with the law as it stands.

Finally, the other legislators argue that Congress's response to the fraud-on-the-market theory is entitled to less weight because the theory originated in this Court. (Br. 25.) To the contrary, that means Congress knew it had the choice to alter the theory through legislation, and affirmatively chose not to. Moreover, as explained above, in enacting the PSLRA and SLUSA, Congress made major changes to the law governing securities class actions and placed its stamp upon the law in this field, but left the fraud-on-the-market presumption untouched.

CONCLUSION

Just last Term, this Court concluded in *Amgen* that in enacting the PSLRA, Congress rejected calls to revisit *Basic*. *See* 133 S. Ct. at 1201. That conclusion is correct: Congress considers *Basic* to be an essential part of the very fabric of our nation's securities laws.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix List of Amici Curiae 1a

LIST OF AMICI CURIAE

Barbara Boxer has served as United States Senator from California since 1993, and she previously served as United States Representative from California for ten years. She served on the Senate Committee on Banking, Housing, and Urban Affairs and the Subcommittee on Securities in 1995.

Edward J. Markey has served as United States Senator from Massachusetts since 2013, and he previously served as United States Representative from Massachusetts for 37 years. He served as Chairman of the House Commerce Subcommittee on Telecommunications and Finance from 1987 to 1994 and as the Ranking Member of the Subcommittee in 1995.

John D. Dingell has served as United States Representative from Michigan since 1955. He served as Chairman of the U.S. House Committee on Energy and Commerce from 1981 until 1994. He was Ranking Member of the Full Committee from 1995 until 2006 and then again Chairman from 2007 until 2008.

John J. Conyers has served as United States Representative from Michigan since 1965, and he is the Ranking Member of the House Committee on the Judiciary.

Maxine Waters has served as United States Representative from California since 1991, and she is currently the Ranking Member of the House Committee on Financial Services.

Jerrold Nadler has served as United States Representative from New York since 1992, and he has

served as Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties.

Bobby L. Rush has served as United States Representative from Illinois since 1993, and he was a member of the House Commerce Subcommittee on Telecommunications and Finance in 1995. He also served as conferee on the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203).

Carol Moseley Braun served as United States Senator from Illinois from 1993 to 1999. She served on the Senate Committee on Banking, Housing, and Urban Affairs in 1995.

Gary Ackerman served as United States Representative from New York from 1983 to 2013, and he served on the House Committee on Financial Services.

William L. Clay, Sr. served as United States Representative from Missouri from 1969 to 2001, and he was the Ranking Member of the Committee on the Post Office and Civil Service in 1995.

John Wiley Bryant served as United States Representative from Texas from 1983 to 1997, and he served on the House Committee on Commerce in 1995.

Jeffrey S. Duncan served, from 1990 to 1994, as Senior Finance Policy Analyst on the House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance, which was then chaired by Representative Edward J. Markey and had jurisdiction over securities and exchanges, the securities industry, and the Securities and

Exchange Commission. From 1995 to 2007, Mr. Duncan served as Legislative Director for Rep. Markey, who from 1995 to 1997 served as the Ranking Democrat on the Subcommittee. In this capacity, Mr. Duncan was responsible for the Subcommittee's work on securities legislation and its oversight activities involving securities and exchanges.

Consuela M. Washington served as Counsel from 1979 to 1994, Minority Counsel from 1995 to 2001, Senior Minority Counsel from 2001 to 2006, and Chief Counsel for Commerce, Trade, and Consumer Protection from 2007 to 2008, all with the U.S. House Committee on Energy and Commerce, to whom she was principal adviser on legislation regulating the Nation's securities markets, securities industry, and the Securities and Exchange Commission until changes in Committee jurisdiction in 2001.

Timothy J. Forde served as Counsel to the Subcommittee on Telecommunications and Finance in 1992; Senior Counsel to the Subcommittee on Telecommunications & Finance from 1993 to 1994; Minority Counsel to the Committee on Commerce from 1995 to 1997; and Counselor to Chairman Arthur Levitt, Chairman of the U.S. Securities and Exchange Commission from 1997 to 1998.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR, PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER SEC CHAIRMEN WILLIAM H. DONALDSON AND ARTHUR LEVITT, JR. AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Amici will address the following question:

Whether the proposition that the market prices of actively traded securities generally reflect publicly available information is a premise of the federal securities laws and regulations.

TABLE OF CONTENTS

Interest of the Amici 1

Statutes and Rules Involved 3

Summary of Argument 3

Argument 7

I. Congress fashioned the securities laws on the premise that market prices reflect publicly available information 8

II. SEC rules have long relied on market prices generally reflecting publicly available information 11

A. The SEC's selective disclosure prohibition, like other insider trading prohibitions, is premised on the need to maintain the relationship between publicly available information and market prices 11

B. The Commission's integrated disclosure and shelf registration regulations operate on the same premise 13

C. Other rules also are premised on the fact that market prices generally reflect publicly available information 18

D. If the premise of these regulations is mistaken, the logical response would be further and more burdensome disclosure requirements 20

III. Section 10(b) and Rule 10b-5 were intended to and do have a broader scope than Section 18(a) 22

Conclusion 25

Appendix: Statutory and Regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 3

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985)..... 7

Dura Pharmaceuticals v. Broudo, 544 U.S. 336 (2005)..... 7

Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011)..... 7

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)..... 24

J.I. Case Co. v. Borak, 377 U.S. 426 (1964) 7

Merck & Co., Inc., v. Reynolds, 559 U.S. 633 (2010)..... 7

SEC v. Zandford, 535 U.S. 813 (2002) 24

Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010)..... 3

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007)..... 7

Statutes and Regulations:

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1797 19

Securities Act of 1933, 15 U.S.C. 77 *et seq* 13

15 U.S.C. 77e..... 13

15 U.S.C. 77f..... 13

Securities Exchange Act of 1934, 15 U.S.C. 78 *et seq*. 8

***Statutes and Regulations* (cont.):**

15 U.S.C. 78b 8
15 U.S.C. 78b(3) 8-9
15 U.S.C. 78b(4) 9
15 U.S.C. 78j 6, 23, 24
15 U.S.C. 78j(b) 24
15 U.S.C. 78m 14
15 U.S.C. 78r(a) 6, 22, 23, 24
17 C.F.R. 229.1 *et seq* 14
17 C.F.R. 230.415(a)(1)(x) 16, 17
17 C.F.R. 230.415(a)(5) 16
17 C.F.R. 230.424(b)(2) 16
17 C.F.R. 239.13 14
17 C.F.R. 239.13(b)(1) 14
17 C.F.R. 240.10b-5 ..... 3, 6, 22, 23
17 C.F.R. 240.13(d) 19
17 C.F.R. 240.15c2-12(b)(5)(i)(C) 18
17 C.F.R. 243.100 11

Miscellaneous:

H.R. Rep. No. 1383, 73rd Cong. 2d Sess. (1934) 9
H.R. Rep. No. 910, 100th Cong. 2d Sess. (1988) 12
S. Rep. No. 1455, 73rd Cong. 2d Sess. (1934) 9
Securities Investor Protection Act of 1991: Hearing Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing and Urban Affairs, 102d Cong. 1st Sess. (1991) 7
45 Fed. Reg. 5972 (Jan. 24, 1980) 15, 16
46 Fed. Reg. 41902 (Aug. 18, 1981) 16

***Miscellaneous* (cont.):**

47 Fed. Reg. 11380 (Mar. 16, 1983) 15

48 Fed. Reg. 46801 (Oct. 14, 1983) 15

48 Fed. Reg. 52889 (Nov. 23, 1983) 16, 17, 18

65 Fed. Reg. 51716 (Aug. 24, 2000) 11, 12, 13

72 Fed. Reg. 73534 (Dec. 27, 2007) 14, 15

75 Fed. Reg. 33100 (June 10, 2010) 18, 19

76 Fed. Reg. 34579 (June 14, 2011) 19, 20

Milton Cohen, *"Truth in Securities" Revisited*, 79 Harv. L. Rev. 1340 (1966) 14

Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Sta. L. Rev. 385 (1990) 8

Instructions to SEC Form S-3, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCcQFjAA&url=https%3A%2F%2Fwww.sec.gov%2Fabout%2Fforms%2Fforms-3.pdf&ei=XI_uUsSFBIKsyAHt9IH4Dg&usg=AFQjCNFQP2nobmFhfVBXMILnyQyhDLUKPQ&sig2=rUWNv9kN-pefJ5Y5SILh4A&bvm=bv.60444564,d.aWc 15

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INTEREST OF THE AMICI

William H. Donaldson served as Chairman of the Securities and Exchange Commission (2003-2005, appointed by President George W. Bush).[1] He has

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

also served as Chairman and CEO of the New York Stock Exchange; Chairman, President and CEO of Aetna Inc.; and Co-Founder, Chairman and CEO of Donaldson Lufkin and Jenrette (DLJ). He was the founding Dean and tenured Professor of Management at the Yale Graduate School of Management.

Arthur Levitt, Jr., served as Chairman of the Securities and Exchange Commission (1993-2001, appointed by President William J. Clinton). He has also served as Chairman of the American Stock Exchange and Chairman of the New York City Economic Development Corporation.

In the view of amici, the system of federal securities regulation is based in large part on the need to foster the confidence of investors in the integrity of securities prices and the securities markets. In particular, investors require confidence that the prices of actively traded securities reflect honest and public disclosures of information, as required by the securities laws. The SEC has long based disclosure requirements—as well as limitations on those requirements to make them less burdensome—on the well-founded premise that the prices of actively traded securities generally reflect publicly available information. Petitioners attack that premise. But if it were now to be rejected, the consequence would logically be a movement toward an increased and more burdensome set of regulatory and disclosure requirements to ensure the integrity of the securities markets and investor confidence in them.

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

SUMMARY OF ARGUMENT

The SEC and this Court have long recognized that private enforcement of the securities laws under Rule 10b-5, 17 C.F.R. 240.10b-5, and other provisions is essential to protection of the integrity of the nation's securities markets. Amici agree with that assessment, and believe that overruling *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), would disserve that important purpose. The premise underlying the *Basic* presumption is a limited form of the efficient capital markets hypothesis, *i.e.*, the proposition that the market prices of actively traded securities generally reflect publicly available information. *See Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010) (Easterbrook, J.) ("When someone makes a false (or true) statement that adds to the supply of available information, that news passes to each investor *through the price of the stock*. And since all stock trades at the same price at any one time, every investor effectively possesses the same supply of information."). Amici will address the ways in which that key premise underlies the system of federal securities regulation and SEC rules.

I. Congress recognized from the very beginning of federal securities regulation the need to prevent the manipulation of securities prices through false or misleading disclosures. Accordingly, the reporting and disclosure regimes put in place by the federal securities laws have always been based in part on the need to ensure that truthful information is dis-

closed to the public so that such information can be reflected in securities prices. If that goal is achieved, securities prices will be more fair and will be perceived by investors to be more fair—fulfilling a key purpose of the securities laws and a crucial element in assuring the fairness and safeguarding the integrity of the securities markets.

II. The SEC has promulgated regulations that are specifically based on the premise that securities prices generally reflect publicly available information. For example, Regulation FD requires public, not selective, disclosure of material information to market analysts and others by officials and employees of public corporations. The rationale of that rule, like the rationale of the other rules regulating insider trading, is that selective disclosures destroy investor confidence, because some individuals are able to use selectively disclosed information to take unfair advantage of market prices that generally reflect only publicly available information. The regulation was designed to maintain the integrity of market prices by prohibiting such disclosures.

The SEC in a number of areas has also relied on the fact that market prices of securities reflect publicly available information to *decrease* the burden on firms under the securities laws. Thus, key SEC regulations governing integrated disclosure permit firms with significant public float to register their offerings using an abbreviated form that permits incorporating prior disclosures by reference, rather than repeating the same information. The justification for the integrated disclosure is that the market price will already have incorporated the previously

disclosed information, so that no further repetition or elaboration on that information is necessary.

Similarly, "shelf registration" rules permit firms to register securities for sale up to three years in advance of sale. Firms can thus take advantage of favorable opportunities to sell securities quickly with only a brief further disclosure about the specific securities being sold. Shelf registration rules are based on the premise that there is no need at the time of sale for disclosure of all of the information disclosed when the security was registered, because the market price of the security at the time of sale will already reflect the disclosures in the shelf registration. The only information that has to be specifically disclosed at the time of sale is the new information about the particular sale, which the market can be expected easily and quickly to absorb. Other rules, too, requiring disclosures by municipal bond issuers and beneficial owners of securities-based swaps are also premised on the close relationship between market prices and publicly available information.

If the SEC could not rely on market prices of actively traded securities generally to reflect publicly available information, then the rationale of all of these regulations—and, indeed, a grounding principle of federal securities regulation generally—would be called into doubt. Markets for actively traded securities today are widely covered by analysts administering trillions of dollars in mutual funds, pension funds, IRA accounts, and other pools of assets. If such markets cannot be expected to efficiently incorporate material information into the prices of securi-

ties, the logical result would be consideration of additional regulatory requirements to foster informational efficiency and investor confidence. These could include further and more burdensome regulations requiring securities issuers to select, highlight, and repeat particularly important information for investors. Such requirements would foster the ability of market prices to operate efficiently and to reflect important publicly available information, but they would also increase expenses for firms. Moreover, regulations that have *eased* the burdens on securities issuers in reliance on the informational efficiency of markets would have to be reconsidered in favor of the possibility of more stringent requirements for disclosing, highlighting, and publicizing material information.

III. Section 18(a) of the Securities Exchange Act, 15 U.S.C. 78r(a) creates a right of action against those who make false or misleading statements in certain SEC filings. Petitioners' amici argue that the supposed "eyeball" reliance requirements of Section 18(a) should be applied to Rule 10b-5 actions. The scope of Section 18(a), however, is much narrower than that of Section 10(b) and Rule 10b-5, because Section 18(a) extends liability only to those who actually make false or misleading statements in SEC filings. It does not extend, as does Section 10(b) and Rule 10b-5, to false and fraudulent statements and other manipulative devices and contrivances that are *not* filed with the SEC. To limit the action under Rule 10b-5 to the narrow scope of Section 18(a) would be to undercut a key provision of the Act, in violation of Congress's express intent.

ARGUMENT

The SEC and this Court have long recognized that "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by the Department of Justice and the [SEC]." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see, e.g.*, *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) ("[W]e repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action' ") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).[2] Amici agree, and need not repeat those points.

In this brief, amici address the reliance of federal securities laws and regulations on the core premise of the fraud-on-the-market doctrine: that the market

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[2] In recent years alone, the Commission has informed the Court of its view that private actions serve an essential role in its filings in this Court in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), *Merck & Co., Inc., v. Reynolds*, 559 U.S. 633 (2010), *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), and *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005). As then-Chairman Richard Breeden explained in congressional testimony, the SEC "does not have adequate resources to detect and prosecute all violations of the federal securities laws," private actions therefore "perform a critical role in preserving the integrity of our securities markets," and such actions are "also necessary to compensate defrauded investors." *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing and Urban Affairs*, 102d Cong. 1st Sess. 15-16 (1991).

prices of actively traded securities, which are widely covered by investment advisors and analysts, generally reflect publicly available information. Rejecting that premise would undermine the rationale of many existing rules and suggest the need for more expensive and burdensome disclosure and publicity requirements, to ensure that markets incorporate publicly available information more reliably and efficiently into the prices of actively traded securities.

I. CONGRESS FASHIONED THE SECURITIES LAWS ON THE PREMISE THAT MARKET PRICES REFLECT PUBLICLY AVAILABLE INFORMATION

The close relationship between market prices and publicly available information—including in particular the need to protect the integrity of market prices from the influences of false and fraudulent information—has been a cornerstone of federal securities regulation from the beginning. Indeed, Congress made its concern with the integrity of market prices explicit when it enacted the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78 *et seq.*

1. Section 2 of the Act, entitled "Necessity of regulation," 15 U.S.C. 78b, "focuses almost exclusively on the critical importance of market prices." Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Sta. L. Rev. 385, 391 (1990). A key goal of the Act was to "insure the maintenance of fair and honest markets." 15 U.S.C. 78b. But Congress found that "the prices of securities on [securities exchanges and over-the-counter markets] are susceptible to manipulation and control, and the dissemination of such prices gives rise

to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities." 15 U.S.C. 78b(3). In particular, false and fraudulent information disseminated by market participants has an effect on securities prices, at least until the truth ultimately comes out. Congress found that the result of that distortion of market prices can be to produce "widespread unemployment and the dislocation of trade, transportation, and industry, and [to] burden interstate commerce and adversely affect the general welfare." 15 U.S.C. 78b(4). The system of federal securities regulation was designed in part to combat threats to the integrity of market prices, *i.e.*, to ensure that honest, not fraudulent, information is reflected in market prices, on which investors may then rely.

The committee reports on the Exchange Act reflect the need to ensure that market prices reflect honest, not fraudulent, information. As the House Report explained, "[t]he idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers . . . brings about a situation where the market price reflects as nearly as possible a just price." H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 11 (1934). Although "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, . . . truth does find relatively quick acceptance on the market." *Ibid.* *See* S. Rep. No. 1455, 73rd Cong. 2d Sess. 68 (1934) ("Insofar as the judgment of either [buyer or seller] is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of the law of supply and demand.").

2. Congress's concerns in the 1930s are, if anything, even more cogent today. In many ways, modern markets have increased the possibilities for fraud and manipulation by means of false, deceptive, or fraudulent information that infects the market and is quickly reflected in market prices.

On the New York Stock Exchange alone, average daily trading volume has increased from 1.5 million shares in 1930-1939 to 1.975 billion shares in 2005-2009; even more shares trade on the NASDAQ, which did not exist in the 1930s.[3] Ticker tapes have been replaced by instantaneous transmission of news and high-speed trading. The growth of the markets and technology since the 1930s have tightened the relationship between information flow and market price.

Moreover, the modern tax code and other incentives encourage individuals to rely on the integrity of the markets. For instance, the nation's private retirement funding and college savings regime rests on tax-favored vehicles, such as IRAs, 401(k) plans, and 529 plans. These plans typically employ passive investment strategies and make routine purchases of well-diversified portfolios on a periodic (*e.g.*, pay-period) basis. Typically, the investor does not exercise individual discretion or have specific knowledge of the securities being purchased, let alone the opportunity for "eye-ball" reliance on an issuer's statements. The massive funds that are invested in reg-

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[3] The New York Stock Exchange volume was extracted from the tables at http://www.nyse.com/financials/1022221393023.html. The NASDAQ numbers can be found at http://www.nasdaqtrader.com/Trader.aspx?id=marketshare.

istered securities each month through these plans are predicated on the integrity of the market and of securities prices.

II. SEC RULES HAVE LONG RELIED ON MARKET PRICES GENERALLY REFLECTING PUBLICLY AVAILABLE INFORMATION

Consonant with Congress's purpose, the SEC has long relied on the principle that market prices of actively traded securities generally reflect publicly available information in fashioning regulations. It has actively worked to foster the relationship between prices and information, so that investors may continue to invest with confidence in the integrity of market prices.

A. The SEC's Selective Disclosure Prohibition, Like Other Insider Trading Prohibitions, is Premised on the Need to Maintain the Relationship Between Publicly Available Information and Market Prices

Regulation FD ("Fair Disclosure"), promulgated by the Commission in 2000 and codified at 17 C.F.R. 243.100 *et seq.*, addresses selective disclosure of information by securities issuers. It "provides that when an issuer . . . discloses material nonpublic information" to securities market professionals and others in a similar role, "it must make public disclosure of that information" as well. 65 Fed. Reg. 51716 (Aug. 24, 2000).

The Commission expressly based the rationale for Regulation FD on the need to maintain the close relationship between securities prices and publicly available information:

> We believe that the practice of selective disclosure leads to a loss of investor confidence in the integrity of our capital markets. *Investors who see a security's price change dramatically and only later are given access to the information responsible for that move rightly question whether they are on a level playing field with market insiders.*

Ibid. (emphasis added). As the Commission explained, "[s]elective disclosure has an adverse impact on market integrity that is similar to the adverse impact from illegal insider trading." *Ibid.* As with insider trading, "investors lose confidence in the fairness of the markets when they know that other participants may exploit 'unerodable informational advantages' derived not from hard work or insights, but from their access to corporate insiders." *Ibid.* Because publicly available information is generally reflected in market prices, but private information is generally not, the integrity (and perceived integrity) of the markets depends on material information becoming publicly available.

The Commission also drew for support on a congressional report noting that "[t]he investing public has a legitimate expectation that *the prices of actively traded securities reflect publicly available information* about the issuer of such securities." 65 Fed. Reg. at 51716 n.6 (quoting H.R. Rep. No. 910, 100th Cong. 2d Sess. 8 (1988)) (emphasis added). Indeed, the Commission expressed sufficient confidence in the fact that publicly available information will be reflected in the market price that it did not require any particular or special type of publicity. Instead,

it permitted issuers to make the necessary disclosure "by filing or furnishing a Form 8-K [ordinarily used to report important matters], or by disseminating information 'through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, nonexclusionary distribution of the information to the public.'" *Id.* at 51723. So long as the information is reasonably available to the public, the Commission relied on the fact that it will be reflected in the prices of actively traded securities, whose integrity the public will be entitled to rely on.

B. The Commission's Integrated Disclosure and Shelf Registration Regulations Operate on the Same Premise

The SEC has adopted two important sets of regulations, dealing with integrated disclosure and shelf registration. Both have *eased* disclosure burdens on firms on the express premise that market prices of actively traded securities generally incorporate publicly available information.

1. *Integrated Disclosure.* Under the Securities Act of 1933, 15 U.S.C. 77 *et seq.*, issuers must file a registration statement disclosing a wide variety of information before offering a security for sale. 15 U.S.C. 77e, 77f. The registration statement must disclose not only very substantial information about the offering itself, but also very extensive and detailed information about the issuer, its current and past financial position, management's analysis of the financial condition of the issuer and its operations, a variety of types of transactions with interested parties, disagreements with its accountants, and many

other items. *See* 17 C.F.R. 229.1 *et seq.* Under the Exchange Act, virtually all publicly traded firms must make periodic disclosures of some of this same information. 15 U.S.C. 78m; 17 C.F.R. 229.1 *et seq.*

The SEC undertook a years-long project to integrate the disclosures required under the two statutes, thus substantially easing the burdens on firms and the process of capital formation. *See generally* Milton Cohen, *"Truth in Securities" Revisited*, 79 Harv. L. Rev. 1340 (1966) (proposing and discussing details of integrated disclosure). As ultimately approved in the 1980s and since amended, large, publicly traded companies may use an abbreviated form (Form S-3) to register a new offering under the Securities Act. *See* 17 C.F.R. 239.13. For the most part, an issuer may use the abbreviated form only if it has a sufficiently large "float" of publicly traded securities (currently $75 million) and satisfies certain other conditions. 17 C.F.R. 239.13(b)(1).[4] The abbreviated registration form requires disclosure of information about the proposed offering, such as the number of shares, the selling price, etc. But the abbreviated form does not require full disclosure of all of the information about the firm, its business, etc., ordinarily required when a new offering is made. Instead, the abbreviated form, "*in reliance on the efficient market theory*, allows maximum use of incorporation by reference of Exchange Act reports and

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[4] The "[p]ublic float has for many years been used as an approximate measure of a stock's market following and, consequently, *the degree of efficiency with which the market absorbs information and reflects it in the price of a security.*" 72 Fed. Reg. at 75356 (emphasis added).

requires the least disclosure to be presented in the prospectus and delivered to investors" for firms that that have "widespread following in the marketplace." 47 Fed. Reg. 11380, 11382, 11384 (Mar. 16, 1983) (emphasis added); *see* Instructions to Form S-3, Items 11 and 12.

As the Commission explained in a recent revision of the integrated disclosure rules, "integrated disclosure has, since its inception, been premised on the idea that a company's disclosure in its registration statement can be streamlined *to the extent that the market has already taken that information into account*." 72 Fed. Reg. 73534, 73536 (Dec. 27, 2007). An early proposal noted that "more extensive disclosure requirements" for firms whose securities are already actively traded are not necessary because "information concerning the issuer is generally available in the marketplace *and is properly reflected in the price of the securities being distributed*." 45 Fed. Reg. 5972, 5975 (Jan. 24, 1980) (emphasis added).[5] The point of the regulation is not that average investors can be expected to look up and find all of the information in each of the prior documents; the SEC recognized that a crucial document, the Form 10-K, "has not been primarily designed for delivery to shareholders" and "has a structure and technical quality which, though useful for analytical purposes, is not generally considered to be as readable as the

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[5] *See also* 48 Fed. Reg. 46801, 46803 (Oct. 14, 1983) ("Form S-3, for example, is available only to reporting companies who are well followed in the marketplace; it relies on the efficient market theory in allowing maximum use of incorporation by reference of Exchange Act reports.").

annual report to shareholders." *Id.* at 5974. Instead, as the Commission in a slightly later release noted, the abbreviated form "is predicated on the Commission's belief that the market operates efficiently" for companies which "are widely followed by professional analysts," because the previously disclosed information "has already been disseminated *and accounted for by the market place.*" 46 Fed. Reg. 41902, 41904 (Aug. 18, 1981) (emphasis added).[6]

2. *Shelf Registration.* Ordinarily, securities have to be registered under the Securities Act at the time an offering is made. But under the "shelf registration" rule adopted in 1983, *see* 48 Fed. Reg. 52889 (Nov. 23, 1983), securities may be registered "for an offering to be made on a continuous or delayed basis in the future," with sale permitted up to three years after the registration is effective for widely traded firms that use Form S-3. 17 C.F.R. 230.415(a)(5). At any time during that period, the registrant may immediately offer the securities for sale by disclosing only the details of the particular offering being made—*i.e.*, the number of shares, price, etc. *See* 17 C.F.R. 230.424(b)(2).

Shelf registration gives issuers great flexibility, because it "enables a registrant to time its offering to

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[6] *See also* 46 Fed. Reg. 41902, 41904 (Aug. 18, 1981) ("Proposed Form S-3 *recognizes the applicability of the efficient market theory to the registration statement framework* with respect to those registrants which usually provide high quality corporate reports, including Exchange Act reports, and whose corporate information is broadly disseminated, because such companies are widely followed by professional analysts and investors in the market.") (emphasis added).

avail itself of the most advantageous market conditions." 48 Fed. Reg. at 52891. Registrants can thus "obtain lower interest rates on debt and lower dividend rates on preferred stock." *Ibid.* The "rule also permits variation in the structure and terms of securities on short notice, enabling registrants to match securities with the current demands of the marketplace." *Ibid.* "[B]ecause only a single registration statement need be filed for a series of offerings," the "[s]implification of the . . . registration process also . . . reduc[es] costs." *Ibid.*

Aside from specialized categories of securities for which shelf registration had historically been permitted, the Commission permits shelf registration only for the securities of the large, actively traded firms that can take advantage of Form S-3 and the abbreviated integrated disclosure rules. 17 C.F.R. 230.415(a)(1)(x); *see* 48 Fed. Reg. at 52893-94. Because the market prices of those actively traded securities generally reflect publicly available information, the Commission determined that the only additional information that is needed at the time of sale concerns the details of the specific offering. As the Commission explained, the rule "*recognize[s] the applicability of the efficient market theory* to those companies which provide a steady stream of high quality corporate information to the marketplace and whose corporate information is broadly disseminated." 48 Fed. Reg. at 52892 (emphasis added). Thus, "at the time [the] registrants determine to make an offering of securities, a large amount of information already has been disseminated to and digested by the marketplace," and the new information about the particular offering can be quickly and easi-

ly incorporated in prices. *Ibid.* For firms with less actively traded securities, the assumption that market prices generally reflect publicly available information is less justifiable, and the Commission accordingly does not generally permit such firms the benefits of shelf registration.

C. Other Rules Also Are Premised on the Fact That Market Prices Generally Reflect Publicly Available Information

Other rules too are premised on the proposition that market prices of actively traded securities generally reflect publicly available information.

1. *Municipal securities disclosures.* In 2010, the SEC amended its rules to require municipalities that issue bonds to disclose certain events in a timely manner. Those events include delinquencies, defaults, adverse tax decisions, ratings changes, certain other facts indicating financial stress, and bankruptcy. See 17 C.F.R. 240.15c2-12(b)(5)(i)(C).[7] The purpose of the new rules is to promote "the informational efficiency of the municipal bond market," *i.e.*, to make more information publicly available so that it can be reflected in the prices of municipal bonds. 75 Fed. Reg. 33100, 33150 (June 10, 2010). As the Commission explained, "[i]nformational efficiency helps investors efficiently allocate capital, since it helps to ensure *that a security's price ac-*

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[7] The rule requires brokers, dealers and underwriters to obtain undertakings by a municipal issuer to make the required disclosures. 17 C.F.R. 240.15c2-12(b)(5)(i). The effect is to require the disclosures by the municipality itself.

curately reflects important information." *Ibid.* (emphasis added).

The theory of the new disclosures is not that each investor in a municipal security is expected to consult the SEC's records to determine if the issuer of the security has made a relevant disclosure. Rather, the expressed basis for the new rules is that "the municipal security's *price serves to convey aggregate information* to investors," thereby "facilitating investment decisions." 75 Fed. Reg. at 33150 (emphasis added).

2. *Beneficial Ownership of Security-Based Swaps.* SEC regulations have long "require[d] a person who is the beneficial owner of more than five percent of certain equity securities to disclose information relating to such beneficial ownership." 76 Fed. Reg. 34579, 34581 (June 14, 2011) (footnote omitted); *see* 17 C.F.R. 240.13(d). In 2011, the Commission reexamined its rules regarding a particular kind of ownership—security-based swaps—in the light of certain changes made by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1797. The Commission concluded that the beneficial-interest disclosure requirements should be extended to security-based swaps, since such swaps can give their owners an interest essentially similar to that of stock purchasers.

The Commission determined that the benefits of the new rule would outweigh its costs. In its view, the rule would contribute to market efficiency, because the newly disclosed information, like the information disclosed under the existing rules requir-

ing reporting of beneficial ownership, would be reflected in the market prices of securities. As the Commission explained, the new disclosures "may contribute to market efficiency because it could help facilitate *the accurate pricing* of securities." 76 Fed. Reg. 34588 (emphasis added). "The transparency provided by the application of [the new] rules should help the market accurately price securities," and also "may enable purchasers and sellers of securities to receive a benefit by avoiding costs, if any, associated with participation in transactions based on mispriced securities." *Ibid.* Without the rule, "the pricing of a security would not readily reflect, if at all, ownership interests in the issuer derived from security-based swaps." *Ibid.* The justification for the disclosures is thus based on the need to ensure that highly relevant information is made public *so that it will affect the market price.*

D. If the Premise of These Regulations Is Mistaken, the Logical Response Would be Further and More Burdensome Disclosure Requirements

The Commission's rationale for many regulations, including all of the regulations discussed above, would be called into question if the premise underlying them is mistaken. No one doubts that information, if it is sufficiently highlighted and brought to the attention of market professionals and the public, will be reflected in the prices of actively traded securities. If public disclosures in SEC filings cannot be relied on to filter into market prices, the alternative would be to require such disclosures to be more prominently displayed, more easily available and understandable, and more extensive, so that the

markets could operate more efficiently. Indeed, without such steps (and especially with a weakening of private enforcement that overruling *Basic* would lead to), the result would be substantially decreased protection for investors.

In some cases, such as the integrated disclosure regulations permitting abbreviated disclosures for actively traded firms, the result could be to weaken the *de*regulatory requirements that have eased the burden on firms. If the Commission's premise that past disclosures in periodic Exchange Act filings are incorporated into market prices is wrong, then the Commission logically would have to require further and more direct disclosures to ensure that they are so incorporated. The same conclusion follows with respect to the shelf registration rules. If disclosures in a shelf registration regarding the firm and its condition are not incorporated into the market prices of the firm's securities, the alternative would be to require new and more widely publicized disclosures at the time a new security is sold, once again to ensure the integrity of market prices.

The same principle would require consideration of more extensive disclosure requirements that are more likely to be incorporated in market prices with respect to the other regulations discussed above. At present, firms may choose a variety of different methods to make disclosures to comply with the rule forbidding selective disclosures. But if market prices of actively traded securities did not generally incorporate publicly available information, consideration would have to be given to further steps to ensure that the market did become aware of the infor-

mation. Firms could be required to make disclosures in a particular way, to repeat the disclosures in several media, to select and highlight the most material disclosures that are most relevant to the market, or to take other steps to ensure that the information that had been selectively disclosed reached the public and the market. Similarly, the Commission would have to consider similar more extensive disclosure requirements with respect to the municipal securities disclosures and beneficial ownership requirements discussed above, as well as their analogues throughout the system of securities regulation.

In short, the proposition that market prices of actively traded securities generally reflect publicly available information is a key premise of the system of federal securities regulation. Congress designed the system to operate under that assumption and to ensure the integrity of the publicly available information that is incorporated into security prices. The Commission too has long relied on the same premise and has designed the disclosure system based on it. This Court's recognition in *Basic* that investors too rely on that premise is well-supported and should be reaffirmed.

III. SECTION 10(b) AND RULE 10b-5 WERE INTENDED TO AND DO HAVE A BROADER SCOPE THAN SECTION 18

Amici Joseph A. Grundfest et al. argue that, because the remedy under Section 18(a) of the Exchange Act, 15 U.S.C. 78r(a), is asserted to be "most analogous" to the remedy under Rule 10b-5, the reliance requirement (and the precise incidents of that

requirement that a few courts have found) under Section 18(a) should be imported into the Rule 10b-5 context. Grundfest Amici Br. 16; *see also* Pet. Br. 35. In particular, they argue that, because Section 18(a) requires proof that the plaintiff acted "in reliance upon" a "false or misleading" "statement in any application, report, or document filed" with the SEC," 15 U.S.C. 78r(a), that same reliance element should be imported into Rule 10b-5. Amici further argue that, because some lower courts have construed the Section 18(a) reliance requirement to require direct proof of reliance on an individual basis by each plaintiff, Rule 10b-5 should be construed to require the same type of proof. Amici Br. 19-20.

Even assuming that the decisions cited by amici—two from the Second Circuit and two from the Southern District of New York, none of which focused closely on reliance under Section 18(a)—correctly construed Section 18(a), the argument confuses the different purposes and scope of Section 18(a) and Section 10(b) of the Act. Section 18(a) provides a remedy only against "[a]ny person" who "shall make or cause to be made" a materially "false or misleading" "statement in any application, report, or document filed" under the Exchange Act or in an undertaking in a registration statement filed with the SEC. 15 U.S.C. 78r(a). Section 18(a) therefore does not apply to private, non-reporting companies or to statements made orally or in press releases, e-mail blasts, or any other communications that are not filed with the SEC. It also applies only to those who "make or cause to be made" the false statement in the SEC filing; it does not by its terms extend to

others who may make use of a false statement to defraud investors.

Section 10(b) extends much further. Section 10(b) makes it illegal "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j. It extends not merely to false or misleading statements in filings with the Commission, but also to statements (or other "device[s] or contrivance[s]") in any other medium, oral or written, that are "manipulative or deceptive." 15 U.S.C. 78j(b). Rule 10b-5 was promulgated "pursuant to the power conferred by Section 10(b)," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976), and "is coextensive with the coverage of Section 10(b)." *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002). To limit an action under Section 10(b) and Rule 10b-5 to the precise scope and incidents of an action under Section 18(a) would conflict with Congress's express intent to create a *broader* remedy under Section 10(b) that could address a much wider range of misconduct and fraud. It should be rejected.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

1. Section 78(b) of Title 15 of the United States Code provides:

> For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:
>
> (1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of in-

terstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

2. Section 78(j)(b) of Title 15 of the United States Code provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

3. Section 78(r)(a) of the Title 15 of the United States Code provides:

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

4. 17 C.F.R. 240.10b-5 (Rule 10b-5) provides:

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

AMICUS CURIAE BRIEF

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF FINANCIAL ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Relationship Between The ECMH And The Modest Proposition That Stock Prices Move In Response To Material Information. 4

II. Current Disagreements Among Economists Over The Efficiency Of Securities Markets Do Not Undermine The Modest Assumption That Securities Prices Generally Respond To Information Reasonably Promptly, In A Predictable Direction 9

A. Disagreement Among Economists Concerning The Extent To Which Stock Prices Reflect Underlying Values Is Not The Same As A Disagreement Over Whether Prices Respond To Information. 9

B. Economists Broadly Agree That Stock Prices In Developed Markets Generally Do Respond To Information. 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES:

Rex v. De Berenger,
3 M.& S. 67, 105 Eng. Rep. 536
(K.B. 1814) 12

Schleicher v. Wendt,
618 F.3d 679 (7th Cir. 2010) 5

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Supreme Court Rule 37.6 1

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BRIEF OF FINANCIAL ECONOMISTS AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF *AMICI*

Amici include academic financial economists who teach and write about public securities markets.[1] We file this brief in order to clarify the areas of agreement and disagreement among economists regarding the "Efficient Capital Markets Hypothesis" ("ECMH"). *Amici* include:

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[1] This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

There is widespread debate about market efficiency among economists, and the signatories of this brief include participants with varying positions on that debate. It is critical, however, to be clear about what issues are in dispute—and what issues are not. Economists disagree about whether markets *perfectly* process information and how quickly they do so; about whether prices reflect the fundamental value of the underlying stock; about the size and significance of "bubbles" and other pricing anomalies in the market and the extent to which non-informational factors affect prices; and about whether it is possible to "beat the market" by pursuing various investment strategies designed to exploit pricing anomalies. Such disagreements existed when *Basic* was decided in 1988, and they exist today.

But economists do *not* generally disagree about whether market prices respond to new material information. In particular, there is little doubt that the stock price will increase reasonably promptly after favorable news about a company is released and decline after unfavorable news.

Our conclusion that prices generally move reasonably promptly in the predicted direction in response to unexpected material public information (favorable or unfavorable) is perfectly consistent with the view that there are sometimes anomalies in the way markets process information and that bubbles can exist.

ARGUMENT

I. The Relationship Between The ECMH And The Modest Proposition That Stock Prices Move In Response To Material Information.

Because economists disagree about the extent to which securities markets are efficient, it is crucial to be clear about the precise economic propositions at issue. The ECMH entails a great deal more than the modest proposition that markets typically respond reasonably promptly to material information. That much is generally viewed as common ground among contemporary economists.

Eugene Fama's seminal work in this area distinguished among three different types of market efficiency:

> "Weak-form" efficiency means that historical prices are not predictive of future prices. Excess profits cannot be earned using strategies based on historical prices.
>
> "Semi-strong form" efficiency implies that all public information is reflected in a stock's current market price, and that security prices adjust to new publicly available information so that it is impossible to earn excess returns by trading on that information.
>
> "Strong-form" efficiency implies that all information in the market, whether public or private, is accounted for in the market price. Investors cannot consistently earn excess profits over a

long period of time—even if they have inside information.[2]

Although all three models are sometimes described as variations of the ECMH, references to that hypothesis in the context of describing how financial markets actually operate typically refer to the "semi-strong" version (SSEMH).[3] The SSEMH has been employed in a variety of different contexts for a variety of different purposes. Some claims are more controversial than others among economists.

The key point for present purposes is that while the proposition that market prices respond relatively promptly to material information about a stock is true if the SSEMH is true, it does not depend on the SSEMH being true. The SSEMH entails that the market price instantly (or at least very quickly) and fully incorporates all publicly available information about the stock. It does not tolerate even modest lags or other anomalies.

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[2] Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970). *See also Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, J.) (explaining the difference between these three forms of market efficiency).

[3] *See* Eugene Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1575 (1991) ("I take the market efficiency hypothesis to be the simple statement that security prices fully reflect all available information . . . . A weaker and economically sensible version of the efficiency hypothesis says that prices reflect information to the point where the marginal benefits of acting on the information (the profits to be made) do not exceed the marginal cost."). Standard finance textbooks provide similar definitions. *See, e.g.*, Richard Brealey, Stewart Myers & Franklin Allen, *Principles of Corporate Finance* 317-18 (10th ed. 2011); Stephen A. Ross, Randolph W. Westerfield & Jeffrey Jaffe, *Corporate Finance* 430-31 (9th ed. 2010).

Professional economists have debated for decades the extent to which the securities markets actually conform to the SSEMH. Excellent work has been done on both sides of this debate. Indeed, the Nobel Committee awarded last year's prize in Economics to both Eugene Fama, the "father" of the efficient markets hypothesis, and Robert Shiller, one of that hypothesis's leading critics.

The SSEMH is based on two propositions: (1) that most investors rationally invest on the basis of available information; and (2) to the extent that some investors act irrationally, their investments do not affect prices because well-funded, highly sophisticated investors can drive the prices back to fundamentals in a process known as "arbitrage."

Authors writing in the field of behavioral economics disagree with both propositions. First, they argue that investor irrationality is pervasive rather than occasional or limited. Second, they argue that because of the costs and risks of arbitrage—the arbitrager must typically borrow money in anticipation of the market correcting itself, which may not happen quickly enough—arbitrage does not always drive prices back to fundamentals.[4] As one critic puts it, "real-world arbitrage is risky and therefore limited," and its effectiveness depends "on the availability of close substitutes for securities

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[4] *See, e.g.*, Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* 10-12 (2000) (noting instances of investor irrationality); Daniel Kahneman & Mark Riepe, *Aspects of Investor Psychology*, 24 J. Portfolio Mgt. 52 (1998) (same); Fischer Black, *Noise*, 41 J. Fin. 529 (1986) (arguing that investors sometimes trade on "noise" rather than information).

whose price is potentially affected by noise trading."[5] SSEMH proponents disagree about the magnitude of the limits on arbitrage and argue that any anomalies are quickly eliminated in the market.[6]

The debate has played out through a series of empirical studies. In the 1980s, for example, Robert Shiller published stock market data that in his view showed that stock market prices were considerably more volatile than the SSEMH could account for.[7] Other scholars found that stock prices tended to overreact to news—good news about a company might cause the price to increase in the short term and then fall in the long term as the market digested the information more carefully.[8] Other findings include superior performance of small companies and predictability of returns according to market to book ratios.[9] As Professor Shleifer points out, "this evidence points to excess returns based on stale information, in contrast to semi-strong form market efficiency."[10] Defenders of the SSEMH, however,

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[5] Shleifer, *Inefficient Markets*, at 13.

[6] *See, e.g., id.* at 4 (summarizing arguments by Milton Friedman and Eugene Fama that "[t]he process of arbitrage brings security prices in line with their fundamental values even when some investors are not fully rational and their demands are correlated, as long as securities have close substitutes").

[7] See Robert J. Shiller, *Do Stock Prices Move Too Much to be Justified by Subsequent Changes in Dividends*? 71 Am. Econ. Rev. 421 (1981).

[8] *See* Werner F. M. De Bondt & Richard Thaler, *Does the Stock Market Overreact?* 40 J. Fin. 793 (1985).

[9] *See* Shleifer, *Inefficient Markets*, at 18-19 (collecting sources).

[10] *Id.* at 18.

have argued that the data can be explained on the basis of hidden factors that are consistent with investor rationality.[11] Or they argue that the anomalies are trivial, and tend to disappear after they are identified as rational investors take advantage of them.[12]

We have outlined these debates in some detail because it is important to understand what is and is not in dispute. Economists disagree about the ability of arbitrage to compensate for investor irrationality; the possibility of "beating the market" through investment strategies based on either value investing or exploiting irrational tendencies of investors; the importance of non-information-based factors to stock prices; and the speed and completeness of the market's ability to incorporate material information about a stock.

But economists generally do *not* disagree about whether markets respond to material

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[11] *See, e.g.*, Eugene F. Fama & Kenneth R. French, *Multifactor Explanations of Asset Pricing Anomalies*, 51 J. Fin. 55 (1996); Eugene F. Fama & Kenneth R. French, *Common Risk Factors in the Returns on Bonds and Stocks*, 33 J. Fin. Econ. 3 (1993); *see generally* Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in 2 *Handbook of Law and Economics* 948 n.1 (Polinsky & Shavell, eds. 2007) (collecting studies).

[12] *See, e.g.*, Burton G. Malkiel, *A Random Walk Down Wall Street* 267-300 (10th ed. 2011); Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?* 21 J. Applied Corp. Fin. 8, 15 (2009) (noting that funds established to take advantage of behavioral economics strategies have failed to outperform the market); William Schwert, *Anomalies and Market Efficiency*, in *Handbook of Economics and Finance* 940 (2003) (finding that anomalies identified by critiques tend "to disappear, reverse, or attenuate").

information. As Professor Shiller recently wrote in explaining the extent of his disagreement with Professor Fama, "Of course, prices reflect available information."[13]

II. Current Disagreements Among Economists Over The Efficiency Of Securities Markets Do Not Undermine The Modest Assumption That Securities Prices Generally Respond To Information Reasonably Promptly, In A Predictable Direction.

Economists' debates about the efficiency of securities markets are interesting and important, and they have significant implications for government regulatory policy as well as strategies that investors should pursue. But it is important to be clear that economists generally agree that stock prices respond to material information in a predictable direction.

A. Disagreement Among Economists Concerning The Extent To Which Stock Prices Reflect Underlying Values Is Not The Same As A Disagreement Over Whether Prices Respond To Information.

The SSEMH, as stated by Professor Fama and other proponents of efficient markets, does not simply say that stock prices move in response to information; rather, it holds that the market

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[13] Robert J. Shiller, *Sharing Nobel Honors, and Agreeing to Disagree*, N.Y. Times, Oct. 26, 2013, available at http://www.nytimes.com/2013/10/27/business/sharing-nobel-honors-and-agreeing-to-disagree.html?_r=0.

completely digests all public information about the stock, so that security prices fully reflect all available information (or at least that prices reflect information to the point where the marginal benefits of acting on information do not exceed the marginal costs of doing so) and that prices are a function *only* of that relevant information.

Critics of SSEMH, on the other hand, insist that this dynamic is not the whole story. Sometimes markets incorporate information slowly or incompletely, and sometimes stock prices display volatility that *cannot* be explained by changes in the available information about stocks.[14]

The focus of these debates is on whether stock prices reflect fundamental value—that is, the actual value of the company—*not* on whether stock prices can be counted on to move up or down in response to information. That is why so much of the literature criticizing the SSEMH refers to fundamental value and fundamental efficiency.[15] That literature goes far beyond the question of whether markets respond in a predictable direction and reasonably promptly to material information.

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[14] *See, e.g.*, Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. Econ. Perspectives 83, 84 (2003).

[15] *See, e.g.*, Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic and Policy Analysis*, 47 Stan. L. Rev. 7, 20 (1994) (cited Petrs. Br. 16 for the proposition that "capital markets are not fundamentally efficient"); William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?* 54 Emory L. J. 843, 898 (2005) (cited Petrs. Br. 18 for the proposition that, during the 1998-2001 technology bubble, "stock prices [were] far away from fundamental values").

Economists have tested the SSEMH empirically primarily by testing whether it is, in fact, possible to earn excess returns through particular trading strategy. The results are disputed; Andrei Schleifer and Lawrence Summers, for example, have argued that it *is* possible to make excess returns—that is, to "beat the market"—under certain circumstances.[16]

The critical point, however, is that this debate about excess returns has little to do with the modest assumption that prices move reasonably promptly in a predictable direction in response to favorable or unfavorable public information. The excess returns debate goes to whether stock prices are fundamentally *accurate*, not whether they move in response to information. Moreover, behavioral economists do not dispute that market prices generally remain the best available indicia of share value, and their advice to investors generally dovetails with that offered by proponents of the SSEMH. Professor Shiller, for example, has acknowledged that it is "unlikely that the average amateur investor can get rich quickly by trading in the markets based on publicly available information . . . . I personally believe this, and in my own investing I have avoided trading too much, and have a high level of skepticism about investing tips."[17]

The supporters and critics of the SSEMH also debate the extent of any need for regulation of the market. But there is a general consensus that fraudulent misrepresentations harm market

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[16] *See, e.g.*, Andrei Shleifer & Lawrence H. Summers, *The Noise Trader Approach to Finance*, J. Fin. Econ. Persp. 19 (Spring 1990).

[17] Shiller, *Sharing Nobel Honors*.

participants and should not be condoned; the SSEMH, after all, depends on the availability of public and *truthful* information to drive prices. Nor do skeptics of market efficiency dispute that information *affects* prices—they simply assert that other things affect prices, too. Because the market responds to public statements, there is a substantial public interest in ensuring that those statements are truthful.

The economic proposition that prices move reasonably promptly in a predictable direction in response to favorable or unfavorable public information does not require that markets be anywhere near perfectly efficient. Nor does it require that one take any position on whether particular trading strategies might "beat the market" or whether government regulation is appropriate.

B. Economists Broadly Agree That Stock Prices In Developed Markets Generally Do Respond To Information.

The recognition of a relationship between information and stock prices is considerably older than the ECMH and related ideas developed by Professor Fama and others in the 1960s.[18] William O. Douglas, who was intimately involved in drafting

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[18] Courts and commentators have recognized that stock markets respond to and reflect material information—including false information—for at least two centuries. *See, e.g., Rex v. De Berenger*, 3 M.& S. 67, 105 Eng. Rep. 536 (K.B. 1814); *see also* Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 456 (1984).

the Securities Act, articulated this understanding in 1934:

> [E]ven though an investor has neither the time, money, nor intelligence to assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the market price.[19]

Douglas's formulation did *not* assert that the price perfectly reflected all available information or the stock's fundamental value, and he did not deny that other factors, including various forms of irrationality, might also affect prices. His point was simply that stock prices respond to material public information. Both proponents and critics of the SSEMH can agree that Douglas was correct on this point.

It is not accurate to say there is a "consensus" among economists rejecting the SSEMH. It is accurate to say that the SSEMH is controversial, but that controversy simply does not extend to rejecting the relationship between information and price movement. As one journalist who has written an intellectual history of the economic debate concluded, "[behavioral economists] still believe that markets work pretty well and that trying to outguess the collective wisdom of millions of investors is usually futile."[20] Most important, economists

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[19] William O. Douglas, *Protecting the Investor*, 23 Yale L.J. 522, 524 (1934).

[20] Justin Fox, *Is The Market Rational? No, say the experts. But neither are you – so don't go thinking you can outsmart it*, Fortune (Dec. 9, 2002), available at

generally agree that material information—whether truthful or fraudulent—will generally affect the price of a stock and that the effect will be in a predictable direction.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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http://money.cnn.com/magazines/fortune/fortune_archive/2002/12/09/333473/index.htm?; *see also* Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009).

AMICUS CURIAE BRIEF

No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* INSTITUTIONAL INVESTORS SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. OVERTURNING *BASIC* WOULD TAKE AWAY THE SPECIAL ROLE THAT CONGRESS AND THE COURTS HAVE ALWAYS ACCORDED INSTITUTIONAL INVESTORS. 9

II. OVERTURNING *BASIC*'S REBUTTABLE PRESUMPTION OF RELIANCE WOULD WREAK HAVOC WITH DECADES OF SECURITIES REGULATION AND HAVE DEVASTATING PRACTICAL CONSEQUENCES. 12

A. Halliburton's Position Would Disrupt Investment Strategies Of Institutional Investors. 12

B. Halliburton's Position Would Likely Doom Private Enforcement of the Securities Laws. 14

C. Halliburton's Position Would Eliminate Recoveries For Investors With Passive Investment Strategies Such As Index Investing, Even For The Most Egregious Securities Frauds. 18

III. REPUDIATION OF *BASIC* BY THIS COURT WOULD JEOPARDIZE OTHER LONG-SETTLED DOCTRINES OF SECURITIES LAW. 20

IV. HALLIBURTON'S ARGUMENT FOR ELIMINATING *BASIC*'S FRAUD-ON-THE-MARKET PRESUMPTION RELIES ON A MISLEADING PICTURE OF MODERN SECURITIES-FRAUD LITIGATION. 23

A. Plaintiffs Must Provide Rigorous Proof. 24

B. Courts Enforce The Preconditions For Invoking The *Basic* Presumption. 26

C. Trial and Post-Trial Procedures Protect Defendants. 27

CONCLUSION 34

TABLE OF AUTHORITIES

CASES:

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 15, 18, 26

Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.,
315 F. Supp. 2d 666 (E.D. Pa. 2004).....16

Basic Inc. v. Levinson,
485 U.S. 224 (1988) .....*passim*

Black v. Finantra Capital, Inc.,
418 F.3d 203 (2d Cir. 2005).....16

Cammer v. Bloom,
711 F. Supp. 1263 (D.N.J. 1989).....24

Cooper v. Pac. Life Ins. Co.,
458 F. Supp. 2d 1368 (S.D. Ga. 2006).....27

Dodona I, LLC v. Goldman, Sachs & Co.,
847 F. Supp. 2d 624 (S.D.N.Y. 2012) 26

Dwoskin v. Rollins, Inc.,
634 F.2d 285 (5th Cir. 1981) 27

Edwards v. California,
314 U.S. 160 (1941) 17

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 15, 26

Finkel v. Docutel/Olivetti Corp.,
817 F.2d 356 (5th Cir. 1987) 27

Freeman v. Laventhol & Horwath,
915 F.2d 193 (6th Cir. 1990) 26

GAMCO Investors, Inc. v. Vivendi, S.A.,
927 F. Supp. 2d 88 (S.D.N.Y. 2013) 27, 33

Ganino v. Citizens Utility Co.,
228 F.3d 154 (2d Cir. 2000).....20

Grace v. Perception Tech. Corp.,
128 F.R.D. 165 (D. Mass. 1989) 27

In re Apple Computer Sec. Litig.,
886 F.2d 1109 (9th Cir. 1989) 21

In re Cavanaugh,
306 F.3d 702 (9th Cir. 2002) 11

In re Cendant Corp. Sec. Litig.,
264 F.3d 201 (3d Cir. 2001).....11

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Nos. 98-CV-1664, 98-CV-0381,
98-CV-0759, 2005 WL 3500037
(D.N.J., Dec. 21, 2005).....16

In re Connetics Corp. Sec. Litig.,
257 F.R.D. 572 (N.D. Cal. 2009) 19

In re Countrywide Fin. Corp. Sec. Litig.,
273 F.R.D. 586 (C.D. Cal. 2009).....18

In re Countrywide Fin. Corp. Sec. Litig.,
588 F. Supp. 2d 1132 (C.D. Cal. 2008).....23

In re Dot Hill Sys. Corp. Sec. Litig.,
594 F. Supp. 2d 1150 (S.D. Cal. 2008).....22

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
245 F.R.D. 147 (S.D.N.Y. 2007) 25

In re Initial Pub. Offerings Sec. Litig.,
471 F.3d 24 (2d Cir. 2006).....26

In re Merck & Co. Vytorin/Zetia Sec. Litig.,
2012 U.S. Dist. LEXIS 138080
(D.N.J. Sept. 25, 2012) 19

In re Merrill Lynch & Co. Research Reports Sec. Litig., 568 F. Supp. 2d 349
(S.D.N.Y. 2008).....15

In re Metropolitan Sec. Litig.,
No. CV-04-25-FVS, 2010 U.S. Dist.
LEXIS 4209 (E.D. Wash.
Jan. 20, 2010) 23

In re Nortel Networks Sec. Litig.,
2003 U.S. Dist. LEXIS 15702
(S.D.N.Y. Sept. 5, 2003) 19

In re Schering Plough Corp. Sec. Litig.,
2003 U.S. Dist. LEXIS 26297
(D.N.J. Oct. 9, 2003).....19

In re Vivendi Universal S.A. Securities Litig.,
284 F.R.D. 144 (S.D.N.Y. 2012) 32-33

In re Vivendi Universal, S.A. Securities Litigation, 765 F. Supp. 2d 512 (S.D.N.Y. 2011) 30

In re Wet Seal, Inc. Sec. Litig., 518 F. Supp. 2d 1148 (C.D. Cal. 2007) 22

In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2005 WL 375314 (S.D.N.Y. Feb. 17, 2005) 22-23

In re Worlds of Wonder Sec. Litig., 35 F.3d 1407 (9th Cir. 1994) 22

Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001) 24

Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 756 F. Supp. 2d 928 (N.D. Ill. 2010) 28-30

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 10, 16

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) 31

Schaffer v. Timberland Co., 924 F. Supp. 1298 (D.N.H. 1996) 27

Shanahan v. Vallat, No. 03-civ-3496, 2004 WL 2937805 (S.D.N.Y. Dec. 19, 2004) 16

Swack v. Credit Suisse First Boston,
230 F.R.D. 250 (D. Mass. 2005) 27

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,
546 F.3d 196 (2d Cir. 2008).....26

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 10, 11, 16

United States v. Schiff,
602 F.3d 152 (3d Cir. 2010).....25

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 27

Wielgos v. Commonwealth Edison Co.,
892 F.2d 509 (7th Cir. 1989) 21

STATUTES AND REGULATIONS:

15 U.S.C. § 78u-5.....7, 22

15 U.S.C. §78u-4(a)(3)(B)(vi) 12

Pub. L. No. 104-67, 109 Stat. 737 (1995) 5, 10

Rule 10b-5.....6, 14, 15, 22

OTHER AUTHORITIES:

H.R. Rep. No. 104-369 (1995) 10, 12

John Binder, *The Event Study Methodology Since 1969*, 11 REV. QUANTITATIVE FIN. & ACCT. 111 (1998) 25

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Mary K. Kane, *et al.*, WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE (2012) 11

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INTEREST OF *AMICI CURIAE*[1]

This brief *amicus curiae* is filed by institutional investors that collectively manage more than $1.36 trillion of assets in carrying out their obligations to over 18.9 million individuals. Consequently, these investors—whose assets are at risk from securities fraud—have a vital interest in this Court's well-settled precedent allowing plaintiffs to rely on the rebuttable fraud-on-the-market (FOTM) presumption in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). *Amici* include:

Connecticut State Treasurer as Trustee for the Connecticut Retirement Plans and Trust Funds, with over $27 billion in assets under management and 190,000 pension plan participants and beneficiaries.

APG Algemene Pensioen Groep N.V., the asset manager for Stichting Pensioenfonds ABP (the pension fund for all public employees in the government and education sectors in the Netherlands), with approximately $394 billion in assets under management and 2.8 million participants.

Arbejdsmarkedets Tillaegspension, the Danish national pension fund, with approximately $107 billion in assets under management and 4.8 million beneficiaries.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, contributed any money to fund the preparation or submission of this brief. The parties have filed letters giving blanket consent to the filing of *amicus* briefs in this case.

Arkansas Public Employees Retirement System, with approximately $5.7 billion in assets under management and over 100,000 beneficiaries.

Arkansas Teacher Retirement System, with approximately $14 billion in assets under management and 113,000 participants.

City of Atlanta Firefighters' Pension Fund, with approximately $620 million in assets under management.

City of Austin Police Retirement System, with approximately $582.8 million in assets under management and 2,380 beneficiaries.

City of Miami Police Relief and Pension Fund, with approximately $111 million in assets under management and 1,000 beneficiaries.

Clearwater Employees Retirement System, with approximately $842 million in assets under management and 2,500 beneficiaries.

District of Columbia Retirement Board, with approximately $6.1 billion in assets under management and 23,500 participants.

Employee Retirement System of the City of Providence, with approximately $360 million in assets under management and 5,800 participants.

Erie County Employees Retirement System, with approximately $227 million in assets under management and 1,900 participants.

Första AP-fonden, one of the five buffer funds in the Swedish national income pension system, with approximately $51 billion in assets under management.

Houston Municipal Employees Pension System, with approximately $2.3 billion in assets under management and 26,000 participants.

Indiana Public Retirement System, Indiana Public Employees' Retirement Fund, and Indiana State Teachers' Retirement Fund, with assets under management of approximately $27.1 billion and 450,000 members.

Industriens Pension, a Danish pension fund with approximately $21 billion in assets under management and 400,000 beneficiaries.

Jacksonville Police and Fire Pension Fund, with approximately $1.48 billion in assets under management and 5,000 beneficiaries.

Louisiana Sheriffs' Pension & Relief Fund, with approximately $2.5 billion in assets under management and 23,000 beneficiaries.

Mn Services N.V., with approximately $128 billion in assets under management for a wide variety of pension funds in the Netherlands and United Kingdom with 1.5 million participants.

Montana Board of Investments, with approximately $13 billion in assets under management and over 30,000 beneficiaries.

North Carolina Retirement System, with approximately $83 billion in assets under management and 900,000 members.

PFA Pension, a Danish company, with approximately $60 billion in assets under management and 1 million participants.

PGGM Investments, with approximately $205 billion of assets under management for 2.5 million participants in the Netherlands.

Plantation Police Retirement System, with approximately $111 million in assets under management and 114 beneficiaries.

The Regents of the University of California, which manages a portfolio of investments totaling over $82 billion, providing benefits to current and retired employees and supporting the University's mission of education, research, and public service.

Sacramento County Employees' Retirement System, with approximately $7.3 billion in assets under management and 24,000 members.

Sampension, a Danish fund, with approximately $51 billion in assets under management and 732,000 beneficiaries.

San Diego City Employees' Retirement System, with approximately $6.3 billion in assets under management and 20,000 participants.

San Mateo County Employees' Retirement Association, with approximately $2.7 billion in assets under management and over 5,000 beneficiaries.

Sjunde AP-Fonden, the Swedish default pension fund, with approximately $27 billion in assets under management and 3 million beneficiaries.

Utah Retirement Systems, with approximately $29.25 billion in assets under management and 285,000 beneficiaries.

Virginia Retirement System, with approximately $62.2 billion in assets under management and 641,000 total members, retirees and beneficiaries.

SUMMARY OF ARGUMENT

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court agreed with numerous Courts of Appeals and with the Securities and Exchange Commission (SEC) that there should be a rebuttable presumption that, in well-developed and open markets, (i) material public information is reflected in the market price of a security and (ii) investors rely on the integrity of this market price in making investment decisions. 485 U.S. at 247.

Both Congress and this Court have recognized the important role played by institutional investors such as *amici*. Such investors contribute a substantial portion of the capital invested in the nation's securities markets. Congress recognized and endorsed a leading role for institutional investors in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). Congress recognized that institutional investors have a long-term perspective that aligns their interests with those of the companies in which they invest. Institutional investors have no interest in meritless securities litigation, which only harms their own investments, but they have a strong interest in policing fraud and enforcing the securities laws. Institutional investors strongly favor the *Basic* presumption.

Petitioner Halliburton asks this Court to overrule *Basic* and discard the fraud-on-the-market presumption, a central element of securities-law

doctrine that has policed the securities markets and protected investors from fraud for 25 years. A decision by this Court to overturn *Basic* would not only imperil the efficacy of class actions in redressing securities fraud—it would also jeopardize a host of other doctrines governing the trading of securities upon which both investors and companies have been relying for decades.

First, it would disrupt investment strategies of institutional investors that depend on the integrity of the market price of stock in making investment decisions. Investment practices of institutional investors are built on the cornerstone that securities markets are fundamentally fair and that prices reflect available public information. If this Court were to hold that these assumptions are false or no longer recognized, it would force radical changes in those strategies to protect investors' legal rights, if not outright abandonment of those strategies.

Next, eliminating the *Basic* presumption will not simply foreclose private securities fraud class actions. As a practical matter, it will also doom individual suits by institutional investors (either at the outset of class litigation or later), because such suits also rely on the *Basic* presumption. Investors using passive investment strategies (such as index investors) also rely on the integrity of the market (within the meaning of *Basic*) and the presumption that relevant public information is incorporated into price. Halliburton's position would deprive such investors of a 10b-5 remedy as well.

In addition, overruling *Basic* would call into question other well-settled doctrines that rely on the

efficiency and integrity of securities markets. The truth-on-the-market (TOTM) defense, which is a logical corollary to the FOTM doctrine, would be threatened if *Basic* were rejected, precisely because the genesis of the TOTM defense was *Basic* itself. In addition, companies frequently assert, as a defense to charges that they made false or misleading statements, that their SEC filings and conference calls contained adequate risk disclosures. Similarly, the PSLRA establishes a safe harbor for forward-looking statements meeting certain criteria. 15 U.S.C. § 78u–5. But if this Court were to overrule *Basic* and require actual, verifiable, individualized reliance, then defendants wishing to establish a "bespeaks caution" defense would need to prove that plaintiffs were actually and individually aware of the defendants' risk disclosures, investor conference calls, and other cautionary statements. The defense of "negative causation" in cases under § 11 of the Securities Act of 1933 would also be called into question if *Basic* were to be overruled.

Furthermore, the widespread, practical, efficient, and effective practice of allowing companies to engage in conference calls with selected investors or to rely on stock analysts to disseminate material information to investors would no longer be sufficient. If *Basic* were to be overruled, the investment community would have no choice but to demand that they or their investment decision makers receive and individually review all filings, press releases, investor conference calls and other public statements in order to be able to prove reliance in a securities-fraud action. Thus, overruling *Basic* would exact an exorbitant price on institutional investors and public companies alike.

The fundamental flaw in Halliburton's criticism of the *Basic* presumption is that it ignores the practical realities of modern securities litigation. In truth, and directly contrary to the mischaracterizations of Halliburton and its *amici*, that presumption is rigorously litigated and not automatically available to plaintiffs. Plaintiffs typically present expert testimony and event studies to establish the preconditions of the presumption. Courts enforce the requirements of *Basic* and disallow the presumption where its elements are not satisfied. Defendants are able to rebut the presumption. And defendants are afforded ample trial and post-trial procedures to address the reliance issue.

The *Household Finance* and *Vivendi* proceedings (the latter of which is the subject of an *amicus* brief supporting Halliburton) demonstrate that, even under the *Basic* presumption, defendants are able to contest reliance on an individualized basis, post-trial, after a jury verdict is returned. Far from helping Halliburton's argument, the *Vivendi* experience shows the multiple layers of procedures available to protect defendants. Halliburton ignores the practical, nuts-and-bolts aspects of securities litigation that have developed in the decades in which courts have applied the *Basic* presumption.

ARGUMENT

I. OVERTURNING *BASIC* WOULD TAKE AWAY THE SPECIAL ROLE THAT CONGRESS AND THE COURTS HAVE ALWAYS ACCORDED INSTITUTIONAL INVESTORS.

In the aggregate, pension funds that invest in U.S. markets cover tens of millions of active and retired members and control trillions of dollars in assets. Each year these funds invest billions of additional dollars in the U.S. capital markets on behalf of their beneficiaries.

As institutional investors, pension funds have a long-term outlook and an interest in deterring meritless litigation. Their overriding responsibility is to invest for the retirement and long-term security of their millions of active and retired members. Institutional investors – and, we believe, all investors – are vitally concerned that investors not be harmed by the illegal conduct of those who issue and sell publicly traded securities.

Because institutional investors are typically under an obligation to protect the investments they make on behalf of their millions of beneficiaries, these *amici* have a particularly significant interest in the procedural requirements for bringing lawsuits against publicly traded companies and their officers to redress violations of the federal securities laws. Indeed, it is doubtful that any party has a greater stake in the procedural requirements for securities class actions than institutional investors, who are concerned about securities fraud as much as, if not more so than, individual investors—and who have much more at stake. This Court has consistently—

and often unanimously—avowed that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (8-0). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 331 n.4 (2007) (8-1).

Further, many state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Therefore, in many cases, taxpayers would be on the hook if investment funds suffered losses due to the chicanery and malfeasance of the issuers of publicly traded securities.

Congress recognized and endorsed this leading role for institutional investors in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). The PSLRA was born of congressional frustration with what it perceived as "nuisance filings." *Merrill Lynch v. Dabit*, 547 U.S. at 81. *See also Tellabs*, 551 U.S. at 320. Accordingly, Congress acted "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs" in securities class actions. *Tellabs*, 551 U.S. at 331. Congress founded this policy on its conviction that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.).

The PSLRA enacted new methods for judicial selection of lead plaintiffs and lead counsel in securities class actions. *See id.* These reforms were designed to encourage the selection of institutional investors as lead plaintiffs precisely because such entities are "deemed to have a large enough financial interest in the litigation and sufficient professional expertise in directing litigation to ensure that class members' interests are competently and dutifully served." Mary K. Kane, *et al.*, WRIGHT & MILLER ON FEDERAL PRACTICE & PROCEDURE § 1808 at n.22 (2012). "Institutional investors, [Congress] believed, are less likely to bring abusive or meritless litigation." *Id.* at n.23.

Congress deliberately favored institutional investors in the PSLRA. The PSLRA creates a rebuttable presumption for the appointment as lead plaintiffs investors who have the "largest financial interest" in the relief sought by the class. *See In re Cendant Corp. Sec. Litig.*, 264 F.3d 201 (3d Cir. 2001); *In re Cavanaugh*, 306 F.3d 702 (9th Cir. 2002). "Congress prescribed new procedures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs." *Tellabs*, 551 U.S. at 320-21. *See also* Mary K. Kane, *et al.*, WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE § 1806 (2012); Charles M. Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve As Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471 (2008).

Thus, at the same time that Congress *discouraged* meritless securities class actions, *see* 15

U.S.C. §78u-4(a)(3)(B)(vi), Congress *encouraged* class actions brought by institutional investors such as the *amici* here because they "do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Rep. No. 104-369, at 35 (1995).

II. OVERTURNING *BASIC*'S REBUTTABLE PRESUMPTION OF RELIANCE WOULD WREAK HAVOC WITH DECADES OF SECURITIES REGULATION AND HAVE DEVASTATING PRACTICAL CONSEQUENCES.

A. Halliburton's Position Would Disrupt Investment Strategies Of Institutional Investors.

The FOTM presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), endorses as a formal holding the "common-sense" notion, *id.* at 245, that investors rely on the integrity of the market price of stock in making investment decisions. *Id.* at 246 ("An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."). This has been the rule for nearly three decades. If the Court were now to announce to the investing public that this presumption will no longer be recognized, the consequences could be dire. The investment strategies of institutional investors are built on the cornerstone that United States securities markets are fundamentally fair and that prices reflect available public information. If this Court were to hold that these assumptions are false, it would topple the central pillar of institutional investors' investment strategies and raise a serious question as

to whether, consistent with their fiduciary duties, they can continue to rely on them.

Such a result could trigger significant market disruption. If this Court accepts Halliburton's invitation to declare that securities markets exhibit "fundamental inefficiency" and that "irrationality . . . is on the rise," Pet. Br. 16, 19 (quoting headings), then institutional investors will be forced to alter their settled investment practices and adapt to new and unpredictable guidelines.

At the very least, if the *Basic* presumption were eliminated, institutional investors would face a host of additional burdens and expenses:

(i) Institutions would incur greater costs because they would be forced to create the capacity to collect and review the disclosures of thousands of companies if they seek to retain any possibility of asserting a claim in the event of fraud.

(ii) The prospect of increased monitoring of corporate disclosures could create an incentive to reduce the number of holdings in their portfolios, thereby reducing diversity and increasing risk within the institutions' portfolios and likely withdrawing funding from smaller companies.

(iii) The additional burdens could create less willingness to invest in companies or sectors with an unproven track record, distorting the securities markets and potentially reducing the funds available for innovative companies and sectors.

(iv) Institutions would be faced with the Hobson's choice of either abandoning the advantage of low-cost passive investment strategies or absorbing the losses occasioned by corporate fraud.

Under Halliburton's view, an investor that uses indexing or a similar strategy cannot demonstrate the reliance necessary to bring a Rule 10b-5 claim for securities fraud.

All of these burdens are inconsistent with Congress' decision to favor institutional investors in the PSLRA. Congress specifically provided the mechanism for institutional investors to lead the prosecution of securities-fraud class actions, but that vital congressional policy would be directly and completely undercut if those same institutional investors were denied the right to a remedy themselves without the *Basic* presumption of reliance that this Court adopted seven years before passage of the PSLRA.

B. Halliburton's Position Would Likely Doom Private Enforcement of the Securities Laws.

Overturning or recasting *Basic*'s FOTM presumption would create insuperable barriers to securities-fraud class actions and would eviscerate the congressional goal—reaffirmed in the PSLRA—to promote vigorous enforcement of the securities laws. In *Basic*, this Court reasoned that denying use in a securities-fraud action of a rebuttable presumption of the plaintiffs' reliance on "any public material misrepresentations," 485 U.S. at 247, and instead requiring actual proof of it for each class member at the class certification stage (as Halliburton urges) "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Id.* at 245. This Court also observed that

"[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.* at 242. This Court reiterated the same concerns in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (*Halliburton I*) ("limiting proof of reliance in such a way would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market. We also observed that requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones.") (citations, quotation marks, and brackets omitted), and in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market theory, the requirement that Rule 10b–5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class.").

In this case, there was a 42% drop in Halliburton's stock price on December 7, 2001, when the company announced adverse legal judgments. J.A. 230, 343-44. Yet Halliburton does not merely concede—it actually boasts—that class actions would be impossible in securities-fraud cases without the doctrine formulated in *Basic*. *See* Pet. Br. at 26 ("In any non-securities context, the class in this case could not be certified."); *see also id.* at 26-27. Yet this Court's recent decisions continue to reaffirm the

importance of private actions for the enforcement of the securities laws: "Nothing in the PSLRA, . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs*, 551 U.S. at 320 n.4 (quoting *Merrill Lynch v. Dabit*, 547 U.S. at 81).

Halliburton asserts that, even without the *Basic* presumption, institutional investors would still be able to bring suit as opt-out plaintiffs. Pet. Br. 48. But individual investors also rely on the *Basic* presumption. *See, e.g.*, *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 358-59 (S.D.N.Y. 2008); *In re Cendant Corp.*, Nos. 98-CV-1664, 98-CV-0381, 98-CV-0759, 2005 WL 3500037, at *3-4 (D.N.J., Dec. 21, 2005); *Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F. Supp. 2d 666, 676-77 (E.D. Pa. 2004); *Shanahan v. Vallat*, No. 03-civ-3496, 2004 WL 2937805, at *5 (S.D.N.Y. Dec. 19, 2004)

Moreover, when opt out litigants "expressly rely on information developed in the class litigation in support of their claims" they are "like all of the other prospective class members, [] the beneficiaries of the class action litigation which had been filed and was being litigated on their behalf."[2]

It is still the case that opt-out cases in securities class actions are exceedingly rare. *See*

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[2] Kevin LaCroix, Securities Class Action Opt-Outs: Back with a Vengeance?, D&O DIARY, Nov. 19, 2012, http://www.dandodiary.com/articles/optouts/.

Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements* (Cornerstone Research 2013) at 1 (presenting the first comprehensive quantitative analysis of opt-out securities lawsuits and settlements); *see id.* at 2 (noting that there were only 38 opt-outs among 1,272 securities class-action settlements). Averages of the opt-out payments when compared to the settlement payments present a data set severely skewed by just a couple of cases; more revealing and more representative, the authors concluded, is the fact that the median opt-out recovery was a paltry "3.8% of the related class action settlement[]." *Id.* at 2. Thus, despite the rather forced enthusiasm of Halliburton's cheer-leading for a securities-fraud victim's opportunity to opt out and pursue its own case, this is not an adequate substitute for the class-action regime that currently exists under the *Basic* presumption. Thus, what Halliburton promotes as a panacea is but a "promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Thus there is no way for Halliburton to avoid the drastic and adverse consequences that would ensue should the Court accept Petitioners' invitation to eliminate the *Basic* presumption that is essential to securities-fraud class actions.

C. Halliburton's Position Would Eliminate Recoveries For Investors With Passive Investment Strategies Such As Index Investing, Even For The Most Egregious Securities Frauds.

Index investors also rely on the *Basic* presumption. As this Court dryly observed in *Basic*, "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. *Who would knowingly roll the dice in a crooked crap game?*" *Basic*, 485 U.S. at 246-47 (emphasis added). By definition, index investors rely principally—often exclusively—on the integrity of the market price of stock in making their investment decisions. As the Court reconfirmed just a year ago, "it is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 133 S. Ct. at 1192. Accordingly, eliminating *Basic* will disrupt this common investment strategy, too.

Halliburton ignores the courts that have already rejected its premise that an index-based securities fraud action is outside the presumption of reliance that was essential to the holding in *Basic*. For example, the courts have rejected a defendant's argument that, because index purchasers seek to match a predetermined index of securities, such purchasers do not rely on any misrepresentation. *See In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009). On the contrary,

because index purchasers seek only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations), index purchasers rely *exclusively* upon the market to incorporate any representations (including misrepresentations) into the price of securities. This is close to perfect reliance on market price-setting. As one trial court recently noted, "the law fully supports the notion that *index purchases and the like are in fact a perfect example of reliance on the market.*" *In re Merck & Co. Vytorin/Zetia Sec. Litig.*, 2012 U.S. Dist. LEXIS 138080, at *18-19 (D.N.J. Sept. 25, 2012) (emphasis added). *See also Basic*, 485 U.S. at 242.

Similarly, "the fact that a portion of [an institutional investor's] shares were bought by simply replicating index funds such as the S&P 500 does not perforce preclude [the institutional investor] from invoking the fraud-on-the-market theory, because 'these [index] funds relied on both the efficiency of the market . . . as well as [the institutional investor's] historical and current stock price trends.'" *In re Schering Plough Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26297, at *15 (D.N.J. Oct. 9, 2003).

Another court rejected the argument that the plaintiff, which made some of its trades "based on a computer program that was designed to mirror a stock index," was not typical of the class of investors because there was no evidence suggesting "that the index did not . . . rely on the integrity of the market." *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 578 (N.D. Cal. 2009); *see also In re Nortel Networks Sec. Litig.*, 2003 U.S. Dist. LEXIS 15702, at *10 (S.D.N.Y.

Sept. 5, 2003) ("a jury may conclude that pursuing an index strategy entails reliance").

Thus, by overturning the *Basic* presumption in accord with Halliburton's wishes, this Court would ineluctably likewise toll the death knell for securities-fraud victims who seek redress for their injuries via individual lawsuits or index-based claims. They would simply be left without a meaningful remedy absent changes to their investment strategies.

III. REPUDIATION OF *BASIC* BY THIS COURT WOULD JEOPARDIZE OTHER LONG-SETTLED DOCTRINES OF SECURITIES LAW.

Halliburton's position, if endorsed by the Court, would undermine other well-settled doctrines of securities law. One likely doctrinal casualty would be the truth-on-the-market (TOTM) defense, which has justly been described as a natural "corollary" to the FOTM doctrine. *Ganino v. Citizens Utility Co.*, 228 F.3d 154, 167 (2d Cir. 2000). The TOTM defense could be threatened if *Basic* is rejected precisely because the genesis of the TOTM defense was *Basic* itself, which stated that the FOTM presumption could be rebutted by showing that a corrective disclosure "credibly entered the market and dissipated the effects of the misstatements." *Basic*, 485 U.S. at 249. The TOTM defense has often been invoked in situations where purportedly truthful information has entered the market from sources other than the corporate defendant.

In one of the leading TOTM cases, *In re Apple Computer Sec. Litig.*, 886 F.2d 1109 (9th Cir. 1989), plaintiffs alleged that Apple had failed to disclose material risks associated with the launch of the company's "Lisa" computer. However, Apple's optimistic statements that were proffered as the basis for Apple's liability were issued amid pervasive and persuasive press reports that portrayed Lisa as a gamble and that, furthermore, described in detail the glitches to which the new product was prone. In these circumstances, the Ninth Circuit held that "in a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made available to the market by other sources." *Id.* at 1115.[3] Defendants in securities-fraud lawsuits are only too happy to invoke the efficiency of the market when it can deliver them from liability.[4]

Other well-known defenses are likewise based on the assumption that securities markets are efficient in the sense that all public information is reflected in the market price. They, too, would be

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[3] *See also id.* at 1114-15 ("The Supreme Court approved the trial court's adoption of the fraud on the market theory. However, it stressed that the presumption of reliance could be rebutted by a showing that information sufficient to correct the defendants' alleged misstatements was transmitted through market price in the same fashion as the misstatements themselves.").

[4] *See also Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 515 (7th Cir. 1989) (company did not need to provide assumptions underlying projection because "professional investors and analysts surely deduced what was afoot" and "supplied their own assumptions about the likelihood the firm will encounter trouble or that the rules will change").

imperiled if *Basic* were overruled. For example, companies frequently assert, as a defense to falsity, that their SEC filings and conference calls contain adequate risk disclosures under the "bespeaks caution" doctrine. *See, e.g., In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425 (9th Cir. 1994); *In re Dot Hill Sys. Corp. Sec. Litig.*, 594 F. Supp. 2d 1150, 1160 (S.D. Cal. 2008); *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1165 (C.D. Cal. 2007).

Similarly, the PSLRA establishes a safe harbor for forward-looking statements meeting certain criteria. 15 U.S.C. § 78u–5. However, if this Court were to overrule *Basic* and require actual, verifiable, individualized, "eyeball" reliance rather than presumed reliance, then defendants wishing to establish a "bespeaks caution" defense would need to prove that plaintiffs were not merely on legally sufficient notice of the defendants' risk disclosures and cautionary statements, but were instead actually and individually aware of the risk disclosures and cautionary statements.

The defense of "negative causation" in cases under § 11 of the Securities Act would also be called into question if *Basic* were overruled. Just as plaintiffs in § 10b-5 cases commonly use event studies to demonstrate market efficiency in order to benefit from the FOTM presumption at class certification and to prove loss causation at summary judgment or trial, defendants in § 11 cases commonly use event studies (see Part IV-A, *infra*) to demonstrate their negative-causation defense under § 11(e), because "the negative causation defense in Section 11 and the loss causation element in Section 10(b) are mirror images." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 375314, at

*6 (S.D.N.Y. Feb. 17, 2005); *see also In re Metropolitan Sec. Litig.*, No. CV-04-25-FVS, 2010 U.S. Dist. LEXIS 4209, at *13 (E.D. Wash. Jan. 20, 2010) (same); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1170 (C.D. Cal. 2008) (same).

Moreover, Halliburton's position would cause significant costs to be imposed upon issuers of securities. Today, companies consistently rely on the market to disseminate material information on their behalf through earnings calls, public filings, and the like. If institutional investors began to demand individual copies of all filings, press releases, and public statements (in order to be able to prove reliance if *Basic* were overruled), public companies themselves would incur the enormous price of this administrative burden. Some might even seek to be listed on exchanges outside of the United States in less-developed markets with untested regulations and laws, rather than bear the cost of providing the direct, individual notice to myriad investors such as *amici* that overruling *Basic* would inevitably entail.

In short, rejecting the *Basic* presumption would call into question well-settled doctrines and practices of securities law.

IV. HALLIBURTON'S ARGUMENT FOR ELIMINATING *BASIC*'S FRAUD-ON-THE-MARKET PRESUMPTION RELIES ON A MISLEADING PICTURE OF MODERN SECURITIES-FRAUD LITIGATION.

Petitioners suggest that securities plaintiffs can trigger a rebuttable presumption of their reliance on the market merely by strolling into the

courtroom. That is not so. The fraud-on-the-market presumption is rigorously litigated and not automatically available to plaintiffs.

A. Plaintiffs Must Provide Rigorous Proof.

The FOTM presumption is available only where plaintiffs can show that the market for the security at issue is sufficiently informationally efficient. In general, plaintiffs must meet the multi-factor test developed in *Cammer v. Bloom*, 711 F. Supp. 1263 (D.N.J. 1989), and *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). These factors include: (1) average trading volume, (2) number of securities analysts following the stock, (3) number of market makers, (4) whether the company is entitled to file an S-3 Registration Statement, (5) evidence of a cause-and-effect relationship between unexpected news and stock-price changes, (6) the company's market capitalization, (7) the relative size of the bid-ask spread for the security, and (8) the company's float (that is, the extent to which shares of the security are held by the public, rather than insiders).

Under the fifth *Cammer/Krogman* factor, plaintiffs typically offer expert proof of market efficiency through a rigorous and widely accepted scientific methodology called an event study. For more than 40 years, economists have employed event studies to determine market efficiency. An event study, when utilized in this context, is an expert technique used to measure the effect of new, company-specific information on the market price of a company's publicly traded securities. New information may include, for example, news issued

in company press releases or SEC filings or through third-party analysts or other sources. Event studies have appeared in hundreds of academic articles as scientific evidence in evaluating how new information affects securities prices. *See, e.g.*, David I. Tabak & Frederick C. Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, Ch. 19, LITIGATION SERVICES HANDBOOK, THE ROLE OF THE FINANCIAL EXPERT (3d ed. 2001); John Binder, *The Event Study Methodology Since 1969*, 11 REV. QUANTITATIVE FIN. & ACCT. 111-37 (1998).

Courts have repeatedly recognized that the event-study methodology is an accepted and reliable way to show both market efficiency and damages. *See, e.g.*, *United States v. Schiff*, 602 F.3d 152, 173 n.29 (3d Cir. 2010) (an event study "is the tool 'most often used by experts to isolate the economic losses caused by the alleged fraud'"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 170 (S.D.N.Y. 2007) ("numerous courts have held that an event study is a reliable method for determining . . . the market's responsiveness to certain events").

As Halliburton's own *amici* acknowledge, "[e]vent studies are routinely employed to show that a market is efficient at the class certification stage." Br. of Law Professors 27. "Thus, courts are already considering experts' event studies examining the effect of disclosures at the class certification stage to prove that a market generally incorporates information into prices, to trigger the *Basic* presumption of reliance." *Id.*

B. Courts Enforce The Preconditions For Invoking The *Basic* Presumption.

Proving the preconditions necessary to trigger the *Basic* presumption of reliance is difficult. Numerous courts have held that plaintiffs in particular cases have failed to meet the burden of showing the elements necessary to invoke the *Basic* presumption. For example, lower courts have held *Basic*'s presumption to be unavailable to investors in newly issued securities,[5] mortgage-backed bonds,[6] and collateralized debt obligations.[7]

Further, this Court's decisions in *Basic*, *Halliburton I*, and *Amgen* all confirm that the FOTM presumption *is rebuttable*, and numerous courts have allowed defendants to rebut it. For example, in *Basic* itself, the Court explained that "*[a]ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added). The Court gave three examples:

- a showing that market-makers are privy to the truth, so the misrepresentation has no impact on price;

---

[5] *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); Freeman v. Laventhol & Horwath, 915 F.2d 193, 199 (6th Cir. 1990).

[6] *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008).

[7] *See, e.g., Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 651 (S.D.N.Y. 2012).

- a showing that the truth enters the market credibly, so the misrepresentation's impact on price is diffused; or
- a showing that plaintiffs did not rely on the integrity of the market price.

485 U.S. at 248-49. Lower courts have adhered to these directives.[8]

C. Trial and Post-Trial Procedures Protect Defendants.

In *Basic*, this Court opined that defendants can also respond to the fraud-on-the-market presumption at trial. *See* 485 U.S. at 249 n.29 (noting that objection as to market efficiency "is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate"); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) (noting need for trial proof).

Indeed, even after a verdict is rendered, defendants in securities class actions typically get another bite at the apple. After a plaintiff class obtains a verdict, class members often must respond

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[8] *See, e.g., Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 364 n.25 (5th Cir. 1987); *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 291 n.4 (5th Cir. 1981); *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 101-02 (S.D.N.Y. 2013); *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 262 (D. Mass. 2005) (citing *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989)); *Cooper v. Pac. Life Ins. Co.*, 458 F. Supp. 2d 1368, 1377 (S.D. Ga. 2006); *Schaffer v. Timberland Co.*, 924 F. Supp. 1298, 1308-09 (D.N.H. 1996).

to post-trial interrogatories and file post-trial claim forms before they receive any payment. Individualized reliance and damages can be tested through this process. Thus, there is no guarantee that a plaintiff class will receive compensation in the amount of the jury verdict, and the post-trial process provides further protections for a defendant. *See* Alba Conte & Herbert B. Newberg, 7 NEWBERG ON CLASS ACTIONS § 22:61, at 284 (4th ed. 2002) ("[R]ebuttal of individual reliance will not defeat class certification and may be resolved after trial on common issues.").

An illustrative example of post-verdict proceedings that present the opportunity for a defendant to challenge individual claimants' reliance is *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, No. 02-C-5893, 2012 U.S. Dist. LEXIS 135135, at *5 (N.D. Ill. Sept. 21, 2012). At trial in *Household*, the defendants unsuccessfully sought to rebut the presumption of reliance:

> At trial, defendants offered, and the jury rejected, two of the three types of evidence that can be used to rebut the presumption of reliance, *i.e.*, that market makers were privy to the truth, and the truth had credibly entered the market and dissipated the effects of the omissions and misstatements.

Id. at *5; *see also Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 756 F. Supp. 2d 928, 931-32 (N.D. Ill. 2010). "Thus, in phase two" post-trial proceedings, "the focus has been on the third kind of rebuttal evidence, that which severs the link between the alleged omissions and misstatements

and either the price paid or received by any claimant." *Household*, 2012 U.S. Dist. LEXIS 135135 at *5; *see also Household*, 756 F. Supp. 2d at 930 (establishing phase II protocol).

The *Household* district court allowed the defendants to propound further discovery to both the lead plaintiffs and absent class members post-verdict. Claimants were required to answer, under penalty of perjury, whether they would have purchased Household stock absent the misrepresentation. The court summarily dismissed claims of "a substantial number of claimants" – indeed, of 2,476 claimants – on the ground that they had failed to answer this question on the claim form.[9]

Thus, the *Household* defendants have *so far* successfully rebutted the presumption of reliance for more than two thousand class members, whose claims total over $60 million.[10] Another 9,500 claims, valued at another $60 million, are expected to be rejected on the same ground.[11] As things currently stand, the *Household* defendants soon will have successfully rebutted the reliance of some 12,000 of the more than 45,000 claimants, thereby reducing their total damages exposure by over $120 million.

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[9] *Household*, 2012 U.S. Dist. LEXIS 135135, at *22-*23.

[10] *See Household*, Docket Entry 1886 (ruling that "List 3" claims "will be rejected . . . for failing to answer the claim form question"); *Household*, Docket Entry 1860, at 2 (List 3 comprises "2,476 claims valued at $60,344,054").

[11] *Household*, Docket Entry 1940, at 4 (Oct. 23, 2013 hearing transcript).

Household remains on track, moreover, for trials at which still more claims may be rejected: "Defendants have . . . created a triable issue of fact as to the reliance of claimants who: (1) responded 'yes' to the claim form question; (2) submitted duplicate claims with conflicting answers to the claim form question; and (3) submitted multiple claims with different answers to the claim form question. These claims must be resolved at trial."[12]

The *Household* district court has been careful, through this process, to ensure that the defendants have a reasonable opportunity for discovery. Allowed several months "to take discovery of any class member,"[13] and permitted to depose representatives of the largest claimants, the *Household* defendants actually took fewer depositions than the district court had authorized.[14]

Halliburton's *amicus* Vivendi complains of its treatment in the post-trial proceedings in *In re Vivendi Universal, S.A. Securities Litigation*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011), but the record

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[12] *Household*, 2012 U.S. Dist. LEXIS 135135, at *17. Vivendi's *amicus* brief in this action misleadingly asserts that in *Household* "a special master would determine which reliance challenges could be resolved as a matter of law and which ones required a trial." Vivendi Br. at 20 n.8. In truth, the district court tasked the special master only with resolving certain ministerial objections and grouping the thousands of claimants according to how they had answered the claim form questionnaire, so the court might process them more efficiently.

[13] *Household*, 2012 U.S. Dist. LEXIS 135135, at *18 (citing Nov. 22, 2010 Mem. Op. & Order at 9; Jan. 5, 2011 Hr'g Tr. at 20, 25-26).

[14] *Household*, Docket Entry 1766 (June 10, 2011 status report).

undermines Vivendi's objections. In fact, Vivendi won a significant post-verdict victory when this Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), dramatically reduced its exposure for a massive fraud that had been proven at trial. After the plaintiffs obtained a verdict, the district court also permitted Vivendi to "rebut[] the presumption of reliance" of the remaining plaintiffs through "an individualized inquiry into the buying and selling decisions of particular class members." *Id.* at 584. Vivendi had attempted to rebut, on a class-wide basis, the fraud-on-the-market presumption of reliance by asserting a "truth on the market" defense, but the jury rejected this defense.

Nevertheless, after the verdict was rendered, the court held that Vivendi had not waived its right to contest reliance on an individualized basis by failing to pursue the issue at class certification; the court opined that "courts in securities fraud actions have consistently recognized that issues of individual reliance can and should be addressed after a class-wide trial, through separate jury trials if necessary." *Id.* at 584-85. Vivendi itself extolls—in its *amicus* brief to this Court—precisely how these procedures will safeguard the rights of securities-fraud defendants:

> Recognizing that the presumption adopted by *Basic* is supposed to be rebuttable, the district court rejected a motion by the class plaintiffs for immediate entry of final judgment after the verdict, and held that Vivendi must first have the opportunity to rebut the presumption of reliance as to particular

> class members. *In re Vivendi*, 765 F. Supp. 2d at 584-87. This "individualized inquiry," the court explained, could take place only after the trial because when the class action verdict was entered Vivendi did "not yet know the identity of most class members." *Id.* at 584-85. Class members have submitted claim forms and the process of challenging reliance on an individualized basis will soon begin, as *Basic* allowed.

Vivendi Br. 17-18. It is perplexing that Vivendi nonetheless complains that the process it faces in the district court is "fundamentally unfair." *Id.* at 18. But in any event Vivendi's objections really go to case-management decisions by the district court (chiefly regarding the extent of discovery Vivendi will be permitted), rather than to anything inherent in *Basic* and its FOTM presumption. Vivendi faults the district court for confining discovery to a "limited number of investors" (*id.* at 20), but Vivendi fails to mention that it was Vivendi itself that proposed that limitation.[15]

---

[15] The district court explained the details of the procedure by which Vivendi can rebut reliance on an individualized basis:

> Vivendi has stated that it "has no intention of contesting the individual reliance of each and every Class member" but instead "only intends to challenge the reliance of sophisticated persons and entities, such as large institutional investors, who may not satisfy the standard of reasonable reliance . . . ." Once the claim forms have been submitted, Vivendi will

The bottom line is that Vivendi will be permitted to rebut the presumption of FOTM reliance before the entry of final judgment and before the payment of any damages. Moreover, Vivendi already has successfully rebutted the presumption in a separate suit by an individual investor. *See GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 101-02 (S.D.N.Y. 2013). Thus, Vivendi's objections are contradicted by the facts of its own case. In any event, such case-management quibbles are no basis for this Court to undo thirty years of doctrine in securities law and to cripple the leading role in private policing of the securities markets that Congress has assigned to institutional investors.

> have the opportunity to screen large investors by analyzing the information included in Section II of the Proof of Claim form . . . .
>
> Second, based on the information provided in the claims forms, interrogatories relating to reliance will be sent to the limited number of "sophisticated persons and entities" whose reliance defendants choose to challenge.
> . . .
>
> Third, a Special Master will determine which claimants' interrogatory responses raise a triable issue of material fact sufficient to potentially rebut the presumption of reliance.

In re Vivendi Universal S.A. Securities Litig., 284 F.R.D. 144, 155 (S.D.N.Y. 2012).

CONCLUSION

In sum, what Halliburton and its *amici* seek here is not an application of legal *principles* long accepted by this Court, but the implementation of a radical new *policy* that is at odds with the central role that Congress has assigned to institutional investors. The place for Petitioners to pursue that kind of profound policy shift is not before this Court, but in the Legislative Branch of Government.

The judgment below should be affirmed.

Respectfully submitted,

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HALLIBURTON CO. AND DAVID LESSAR,

Petitioners,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. *Stare Decisis* Considerations Apply With Full Force To Petitioners' Request That This Court Overrule *Basic*. 8

A. *Stare Decisis* Applies With Particular Force In This Case Because *Basic* Implements A Statute And Is Therefore Subject To Congressional Supervision And Revision. 9

B. Overruling *Basic* Would Implicate Important Reliance Interests. 17

II. Petitioners' Argument In Favor Of Relaxing *Stare Decisis* Constraints In This Case Are Meritless. 21

A. *Stare Decisis* Applies With Full Force To Decisions Elaborating The Requirements Of An Implied Private Right Of Action. 21

B. *Basic* Is Not The Kind Of Procedural Or Evidentiary Rule That Warrants Lesser *Stare Decisis* Protection. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds,
113 S. Ct. 1184 (2013) 12, 13, 15, 26

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ..... passim

Bivens v. Six Unknown Fed. Narcotics Agents,
403 U.S. 388 (1971) 23, 24

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 25

Bush v. Lucas,
462 U.S. 367 (1983) 14

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 11, 26

Citizens United v. Federal Elections Comm'n,
558 U.S. 310 (2010) 10

Correctional Servs. Corp. v. Malesko,
534 U.S. 61 (2001) 23

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 26

Erica P. John Fund, Inc. v. Halliburton Co.,
131 S. Ct. 2179 (2011) 13

Hilton v. South Carolina Pub. Rys. Comm'n,
502 U.S. 197 (1991) 17

Hohn v. United States,
524 U.S. 236 (1998) 8

Hubbard v. United States,
514 U.S. 695 (1995) 17

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 23, 26

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 11

Mills v. Electric Auto-Lite Co.,
396 U.S. 375 (1970) 25

Morrison v. National Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 11

Musick, Peeler & Garrett v. Employers Ins. of Wausau,
508 U.S. 286 (1993) 11, 22

Payne v. Tennessee,
501 U.S. 808 (1991) 26, 27

Pearson v. Callahan,
555 U.S. 223 (2009) 27

Piper v. Chris-Craft Indus., Inc.,
430 U.S. 1 (1977) 23

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 27

Rasul v. Bush,
542 U.S. 466 (2004) 8

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 24

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) ..... passim

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 23

United States v. Gaudin,
515 U.S. 506 (1995) 27

Vasquez v. Hillery,
474 U.S. 254 (1986) 17

Virginia Bankshares v. Sandberg,
501 U.S. 1083 (1991) 25

Statutes

15 U.S.C. § 10(b) 11, 24

15 U.S.C. § 78aa-1 11

15 U.S.C. § 78bb(f)(1) 12, 18

15 U.S.C. § 78u-4(e) 15

15 U.S.C. § 929Y 12

Civil Rights Act of 1991,
Pub. L. No. 102-66, 105 Stat. 1071 27

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1376 (2010) 11

Private Securities Litigation Reform Act of 1995,
Pub. L. No. 104-67, 109 Stat. 737 ..... passim

Sarbanes-Oxley Act of 2002,
Pub. L. No. 107-204, 116 Stat. 745 11

Securities Litigation Uniform Standards Act of 1998,
Pub. L. No. 105-353, 112 Stat. 3227 ..... 6, 12, 18

Regulations

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 ..... passim

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Richard A. Epstein, *The Supreme Court 1987 Term, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) 16

William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) 10

FISCAL CHALLENGES: AN INTER-DISCIPLINARY APPROACH TO BUDGET POLICY (Elizabeth Garrett et al., eds., 2008) 2

MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2d ed. 2011) 1

Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) 1

H.R. 10, 104th Cong., 1st Sess. (1995) 13

HOWELL E. JACKSON, ANALYTICAL METHODS FOR LAWYERS (2003) 2

HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS (1999) 2

PRECEDENT AND THE U.S. SUPREME COURT (Christopher J. Peters ed., expected 2014) 1

Securities and Exchange Commission, Index Funds, http://www.sec.gov/answers/indexf.htm 20

Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992) 2, 10

Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340 (2007) 10

Testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission Concerning Litigation Reform Proposals Before the Subcommittee on Telecommunications and Finance, Committee on Commerce, United States House of Representatives (Feb. 10, 1995), available at http://www.sec.gov/news/testimony/testarchive/1995/spch025.txt. 19

Amanda Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. (2005) 3

INTEREST OF *AMICI*

Amici Michael Gerhardt, Deborah Hellman, Howell E. Jackson, Michael E. Solimine, and Amanda L. Tyler submit this brief as *amici curiae* in support of respondent in this case. The *amici curiae* have studied and written on the topic of *stare decisis*, the issue addressed in this brief. Specifically,

Michael Gerhardt is the Samuel Ashe Distinguished Professor of Constitutional Law and Director of the UNC Center on Law and Government at the University of North Carolina at Chapel Hill. He has written extensively on *stare decisis*, including one of the leading treatises on the subject THE POWER OF PRECEDENT (2d ed. 2011).

Deborah Hellman is a Professor of Law and the F.D.G. Ribble Professor at the University of Virginia School of Law, where she teaches constitutional law, contracts, and legal theory. Her work on *stare decisis* includes a forthcoming book chapter, "An Epistemic Defense of Precedent," which will appear in PRECEDENT AND THE U.S. SUPREME COURT (Christopher J. Peters ed., expected 2014), and *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995). Hellman was a fellow at the Woodrow Wilson International Center for Scholars (2005-06) and was the Eugene P. Beard Faculty Fellow in

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[1] Letters from the parties consenting generally to the filing of briefs of *amici curiae* are on file with the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Ethics at the Edmond J. Safra Center for Ethics at Harvard University (2004-05). She was awarded a National Endowment for the Humanities Fellowship for University Teachers in 1999. Before joining the Virginia faculty, Hellman taught at the University of Maryland School of Law. Hellman has been a visiting professor at the University of Pennsylvania Law School and at the University of Virginia.

Howell E. Jackson is the James S. Reid, Jr., Professor of Law at Harvard Law School. His research interests include financial regulation, international finance, consumer protection, federal budget policy, and entitlement reform. Professor Jackson is a senior editor for Cambridge University Press Series on International Corporate Law and Financial Regulation. He is also co-editor of FISCAL CHALLENGES: AN INTER-DISCIPLINARY APPROACH TO BUDGET POLICY (2008), co-author of ANALYTICAL METHODS FOR LAWYERS (2003) and REGULATION OF FINANCIAL INSTITUTIONS (1999), and author of numerous scholarly articles.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has taught since 1986. He teaches and writes in civil procedure, federal courts, complex litigation, appellate procedure, and conflict of laws. His scholarship has addressed various aspects of the legislative process, including an empirical analysis of congressional responses to Supreme Court decisions interpreting federal statutes. *See* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

Amanda L. Tyler is a Professor of Law at the University of California Berkeley School of Law. She was previously a member of the faculty at the George Washington University Law School and has also served as a visiting professor at Harvard Law School, New York University School of Law, and the University of Virginia School of Law. Professor Tyler's research and teaching interests include the federal courts, the separation of powers, habeas corpus, and statutory interpretation. She has published works in numerous legal journals, including the Harvard Law Review, Yale Law Journal, and Stanford Law Review. In the field of statutory interpretation, Professor Tyler's article *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. (2005), focuses on statutory *stare decisis*.

SUMMARY OF ARGUMENT

This Court has long applied a particularly rigorous version of *stare decisis* to decisions that construe federal statutes and, therefore, are subject to revision by Congress. Contrary to petitioners' claims, there is no basis for declining to apply that rule in this case. In fact, principles of *stare decisis* call for special reluctance to overrule this Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

I. Statutory *stare decisis* facilitates congressional oversight of judicial elaboration of federal statutes by allowing Congress to assume with confidence that it need intervene in the development of the law only when it comes to believe that a judicial decision is wrong or has become outdated. Any other rule would pose an unnecessary burden on Congress to codify decisions with which it agrees, and would prevent Congress from enacting further legislation that depends for its proper functioning on the continued stability of this Court's decisional law. With respect to the statute at issue in this case, Congress has paid careful attention to the development of the Rule 10b-5 class actions made possible by the *Basic* presumption, enacting laws that assume their existence and address the very practical concerns petitioners identify as a reason to overrule the Court's decision. For example, in the Private Securities Litigation Reform Act, Congress restricted securities class actions in numerous ways, including by limiting damages, delaying discovery, providing new sanctions for frivolous class action suits, and creating new rules for the selection of lead plaintiffs.

As importantly, statutory *stare decisis* leaves the task of modifying decisions like *Basic* to the branch of government that is best suited to evaluate the often-complicated factual claims underlying the call for its repeal and the unavoidable political judgments those requests entail. It might, of course, be argued that because the Court waded into these debates when it first decided *Basic*, it is therefore appropriate to consider them afresh now. That is a palpable *non sequitur*. Rightly or wrongly, the *Basic* Court invoked usual tools of statutory interpretation in 1988. *Stare decisis*, a primary such tool, was not relevant to the original analysis in *Basic*. *Stare decisis* should, however, dominate the reconsideration of that holding now. This Court has since curtailed recognition of implied rights of action precisely to avoid such entanglements without significant legislative guidance. But that does not justify taking a second dip in the pond. Strict adherence to statutory *stare decisis* avoids both unnecessary additional entanglements with issues best decided by legislators and the appearance that the decision whether to reconsider a statutory precedent is driven by changes in the Court's composition or policy perspective. In short, judicial interpretation of acts of Congress does operate on a ratchet, which in the usual case such as this it is for Congress to loosen.

Stare decisis also protects reliance interests, and in this case Congress, the Executive, and investors have all come to rely substantially on the Court's decision in *Basic*. Congress, for example, has enacted statutes that rely for their intended operation on the continued existence of the Rule 10b-5 class actions made possible by the fraud-on-the-market

presumption. Thus, the Securities Litigation Uniform Standards Act (SLUSA) was enacted to channel most securities class actions into federal court by pre-empting state laws that permit parallel state law securities claims in state court. Were this Court to overrule *Basic*, and thereby effectively eliminate most federal securities class actions in federal court, SLUSA would have a dramatically different effect, eliminating state law class actions without providing any federal replacement. That is something Congress surely did not intend.

Likewise, requiring investors personally to review and understand the disclosures of every company in which they invest, or face the prospect of having no remedy for market-moving frauds, would require a radical transformation of the way in which the industry has operated for decades. And it could make some kinds of investing (for example, passive investments through index funds) materially less attractive, thereby distorting capital markets.

II. Petitioners' additional arguments against applying statutory *stare decisis* in this case are unfounded. Although *Basic* elaborates a judicially implied private right of action, this is not one of the rare areas of law (like antitrust or maritime law) in which Congress has effectively delegated common law powers to the courts. As discussed, Congress has carefully superintended the details of the Rule 10b-5 private right of action, particularly with respect to class actions. Accordingly, all the reasons for applying a strong presumption of statutory *stare decisis* in deference to that congressional oversight apply to decisions elaborating the details of an implied right of action.

Petitioners are likewise wrong in comparing *Basic*'s presumption to the kind of procedural or evidentiary rules the Court has said warrant less *stare decisis* protection because they do not engender reliance interests. *Basic* established a substantive rule of securities law, declaring what a plaintiff must establish to prove a claim, rather than the procedures and evidence through which that claim must be proven. And as discussed, *Basic* has generated substantial reliance interests, and congressional oversight, that preclude any argument that this is the kind of rule Congress would leave to the courts.

ARGUMENT

I. *Stare Decisis* Considerations Apply With Full Force To Petitioners' Request That This Court Overrule *Basic*.

This Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), interprets a statute enacted by Congress and, as a consequence, is subject to revision by the legislative branch if, and in the manner, our elected representatives see fit. Congress has, in fact, paid detailed attention to the issue of Rule 10b-5 class actions in the wake of *Basic*. The doctrine of *stare decisis* accordingly applies to *Basic* with particular force, triggering a strong presumption that it is for Congress, rather than the courts, to change statutory rules. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (citation omitted); *Rasul v. Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (describing the Court's "almost categorical rule of *stare decisis* in statutory cases"). Despite petitioners' claims to the contrary, those considerations apply with full force in this case.

A. *Stare Decisis* Applies With Particular Force In This Case Because *Basic* Implements A Statute And Is Therefore Subject To Congressional Supervision And Revision.

The strong statutory *stare decisis* presumption arises from the respect owed the legislative branch and the reality that Congress is often better suited to evaluate whether an existing statutory rule or interpretation should be abandoned in light of changed circumstances or policy judgments. That is nowhere more true than in a case like this one. Congress has repeatedly considered the statute's scope. And the arguments for overruling *Basic* are rooted in questions that Congress regularly considers, such as the manner in which the securities markets function and whether existing law produces litigation that imposes an excessive burden on commerce.

1. While courts inevitably must develop rules to implement, or fill interstices within, a statutory regime, the ultimate authority and responsibility for enacting and revising legislation lie with Congress. Indeed, particularly when judges must develop rules with little specific statutory guidance – as they must, for example, in elaborating the details of an implied private right of action – the legitimacy of that judicial decision making is premised in substantial part on Congress's ability to revise rules with which it disagrees.

Statutory *stare decisis* facilitates that important congressional oversight. On a practical level, it permits Congress to presume that it need not enact legislation expressly adopting every judicial

construction of a statute with which it agrees. Instead, Congress may rely on the understanding that it need only respond to interpretations it thinks wrong or outdated. That predictability is particularly important when Congress enacts other measures that depend for their effectiveness or fairness on the continued application of prior judicial decisions.[2]

Accordingly, when a statutory precedent has come under fire, the question for the Court is not simply whether ordinary *stare decisis* considerations would warrant revisiting the precedent, for Congress is perfectly capable of making the same calculus – *e.g.*, whether the rule has proven unworkable, whether overturning it would unfairly impose hardships upon those who have relied on it, or whether the rule has been overtaken by changes in the world or our understanding of it. *See, e.g.*, *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 362-63 (2010). The Court must also ask whether there is a sufficient reason to depart from the ordinary understanding that revising statutory precedents is the job of the politically accountable branches, not the courts.

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[2] Congressional revision of statutory decisions is not a mere theoretical possibility; it is a regular occurrence. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992); Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340 (2007).

2. This case presents a particularly compelling candidate for strict adherence to the Court's strong presumption of statutory *stare decisis*.

a. Congress has shown that it is carefully attending to this cause of action.

As this Court has recognized, Congress has repeatedly enacted legislation to govern aspects of private Rule 10b-5 litigation, including class action suits, often in response to this Court's decisions. *See, e.g.*, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 293-94 (1993) (explaining that after the Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), adopted a short statute of limitations for Rule 10b-5 actions, "Congress intervened by limiting the retroactive effect of our decision") (citing 15 U.S.C. § 78aa-1);[3] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157-58 (2008) (explaining that after the Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), held "that § 10(b) liability did not extend to aiders and abettors," Congress enacted legislation "direct[ing] prosecution of aiders and abettors by the SEC"); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(2), 124 Stat. 1376, 1864 (2010) (revising Court's ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), that

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[3] In the Sarbanes-Oxley Act of 2002, Congress went a step further, amending 28 U.S.C. § 1658 to provide a longer statute of limitations than adopted in *Lampf*. Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801.

Securities Exchange Act did not apply extraterritorially, to permit suits by the SEC for some extraterritorial conduct); *id.* § 929Y (requiring the SEC to conduct study on whether Congress should likewise authorize private suits for extraterritorial conduct).

Of particular relevance are the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227. In *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 113 S. Ct. 1184 (2013), the Court explained that the PSLRA enacted a series of special provisions for securities class actions, including heightened pleading requirements, limitations on recoveries, new rules for selecting lead plaintiffs, sanctions for frivolous litigation, and authorization for a stay of discovery pending any motion to dismiss.[4] *Id.* at 1200. SLUSA was then enacted to "curtail[] plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law." *Id.* (citing 15 U.S.C. § 78bb(f)(1) (prohibiting most state law securities fraud class actions)).

Both the PSLRA and SLUSA are premised on Congress's understanding that the Rule 10b-5 class

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[4] While the PSLRA applies to the Securities Exchange Act's express causes of action as well, this Court has recognized that the statute was plainly directed at the far more common class litigation under the Rule 10b-5 implied private right of action. *See Stoneridge*, 552 U.S. at 165.

actions made possible by the *Basic* presumption[5] would remain a "prominent feature of federal securities regulation," *Stoneridge*, 552 U.S. at 165. Indeed, in enacting the PSLRA, Congress "homed in on the precise policy concerns raised" by petitioners in this case. *Amgen*, 133 S. Ct. at 1200 (explaining that in the PSLRA, Congress "addressed the settlement pressures associated with securities-fraud class actions"); Petr. Br. 34-49. Rather than legislatively overrule the *Basic* presumption, Congress instead opted to carefully and specifically modify the rules under which 10b-5 classes can be certified and prosecuted. *See Amgen*, 133 S. Ct. at 1200-01 (describing measures and noting that Congress "rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*").[6]

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[5] As this Court has recognized, "[a]bsent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." *Amgen*, 133 S. Ct. at 1193; *see also Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (same).

[6] The Court explained that the first version of the PSLRA included a provision abrogating *Basic*. *See Amgen*, 133 S. Ct. at 1201; *see also* H.R. 10, 104th Cong., 1st Sess. (1995). Witnesses in the House Committee on Commerce likewise testified in favor of overruling *Basic*. *See Common Sense Legal Reform Act: Hearings before the Subcommittee on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess., 92, 236-237, 251-252, 272 (1995). But the provision overruling *Basic* was not included in the final legislation. *See Amgen*, 133 S. Ct. at 1201.

Whether or not such actions amount to congressional ratification of *Basic* is beside the point for purposes of *stare decisis*. The point instead is that Congress is not only perfectly capable of ratifying or rejecting *Basic* in the abstract but has been especially attentive to securities fraud class actions in particular. Respect for that authority counsels strongly against judicial revision of that established precedent. *Cf. Stoneridge*, 552 U.S. at 162-63 (refusing to recognize implied private right of action under Rule 10b-5 against aiders and abettors because Congress had, in the PSLRA, enacted a different solution to the same perceived problem by authorizing the SEC to prosecute aiders and abettors).

b. Considerations of institutional competence reinforce that conclusion. Petitioners' argument for overturning *Basic* depends in substantial part on claims about the actual operation of securities markets. *See* Petr. Br. 15-22. Even with the assistance of *amicus* briefs and citations to law review articles, this Court is less well-suited than Congress to evaluate such complex empirical claims. That this evaluation must inevitably be influenced by political and ideological pressures, wherever it is made, is all the more reason to leave it with the politically responsible branches. Moreover, Congress has available to it fact-finding tools that far outstrip the capacity of any court. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 389 (1983). And in this context, it may rely on the recommendations of the expert agency assigned to administer the nation's securities laws.

In addition, even if the Court were convinced that the present fraud-on-the-market regime

warranted revision, Congress has far greater flexibility in responding to the problems petitioners identify than would this Court. While the Court may decide to overrule *Basic*'s presumption of reliance, Congress could choose to address the underlying policy concerns in a different, perhaps more direct, way – for example, by enacting further restrictions on securities class actions or the remedies available in such litigation. *Cf.* 15 U.S.C. § 78u-4(e) (limiting damages in securities class actions when the market rebounds quickly after a negative disclosure). Or, if Congress chose to require proof of individual reliance, it might also enact measures to counteract the potential for that change to reduce deterrence and enforcement – perhaps by requiring greater dissemination of financial statements directly to shareholders, enlarging the enforcement capacity of the SEC, or increasing criminal penalties. *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PENN. L. REV. 69 (2011) (proposing elimination of fraud-on-the-market theory be counterbalanced by doubling of the SEC's enforcement budget).

Of course, all of those alternative options – like the elimination of *Basic* itself – involve trade-offs between protecting defendants from vexatious litigation, on the one hand, and decreased enforcement and deterrence, on the other. *See Amgen*, 133 S. Ct. at 1199-1202. How to balance those competing interests depends in part on empirical judgments (about, *e.g.*, the relative proportion of meritorious to vexatious securities litigation) and in part on value judgments (about, *e.g.*, the relative importance of protecting innocent defendants from meritless suit and providing truly

injured investors a remedy) that are the typical fare of the political, not the judicial, process.

Indeed, the basis of the parties' disagreement, and the underpinnings of petitioners' broad-based attack on the premise of economic rationality more generally, are not just matters of abstract economic theory. If they were, Congress also would be an unlikely forum to judge their theoretical validity. Instead, the disagreements implicate deep political and even philosophical disputes about whether people en masse or individually are reliable judges of their own welfare and therefore about the extent to which governments should intervene to protect individuals from what some may view as irrational choices. The securities laws intervene in markets primarily by protecting investors from false and misleading information. Correcting and punishing lies and deceit is universally recognized as a proper role of government. *See, e.g.*, Richard A. Epstein, *The Supreme Court 1987 Term, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 59 (1988). But the extent and kind of that protection are principally issues of political philosophy and political value and therefore preeminently questions to be resolved in the political fora. We hope that petitioners and their *amici* would agree that this Court is not such a forum.

It is no answer that *Basic* itself necessarily involved the Court in resolving a contested policy question, in part on the basis of its review of contestable empirical evidence. The prospect of being drawn into such decision making may be a reason to hesitate before implying private rights of action in

the first place. *See Stoneridge*, 552 U.S. at 164-65 (explaining that in the years since the Court's recognition of the Rule 10b-5 right, the Court has abandoned the practice of liberally implying rights of action). But as this Court has recognized, it is too late for this Court to disestablish the Rule 10b-5 right of action. *See id.* at 165 (noting that Congress has "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action"). The Court is thus left with either re-entering the political fray or leaving revisions to the political branches. The rule of statutory *stare decisis* provides the wisest answer, avoiding the appearance that both the substance of the law, and the choice to revise it, depend more on the proclivities of the Court's current membership than on neutral principles. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact").

B. Overruling *Basic* Would Implicate Important Reliance Interests.

Stare decisis also "has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). In this case, overruling *Basic* would implicate important reliance

interests of Congress, the Executive Branch, the securities industry, and investors.

1. Congress repeatedly has enacted legislation in reliance upon the existence of the *Basic* presumption and the Rule 10b-5 class actions that decision was designed to foster. For example, in enacting SLUSA, Congress broadly pre-empted state laws permitting securities class actions under state law in state courts. *See* 15 U.S.C. § 78bb(f)(1). No doubt, Congress believed that this very significant incursion on state sovereignty was acceptable in large part because Rule 10b-5 class actions in federal court remained as an available substitute. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(5), 112 Stat. 3227, 3230 (congressional statement that SLUSA was enacted to establish "national standards for securities class action lawsuits involving nationally traded securities"). Overruling *Basic* would pull the rug out from under Congress's feet and turn SLUSA into something very different from what Congress intended: instead of channeling securities class actions into federal court (where they would be governed by the PSLRA regime), SLUSA would have the effect of eliminating securities class actions altogether by preempting state class actions in the absence of any viable alternative in the federal system.

2. The SEC has likewise relied on *Basic* in drafting its disclosure regulations on the assumption that shareholders need not directly review required disclosures in order to seek a remedy for the harms caused by false disclosures through their effect on market prices. During hearings leading up to the

enactment of the PSLRA, for example, the chairman of the SEC explained:

> Much of the Commission's disclosure regulation, however, is premised on the assumption that the market will absorb all available information and incorporate it into a company's stock price. We do not, for example, require that companies mail their periodic SEC reports to every shareholder.

Testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission Concerning Litigation Reform Proposals Before the Subcommittee on Telecommunications and Finance, Committee on Commerce, United States House of Representatives (Feb. 10, 1995), *available at* http://www.sec.gov/news/testimony/testarchive/1995/spch025.txt.

3. *Basic* also has affected the way in which the securities industry has structured its operations. Under *Basic*, investors need not read every corporate disclosure that has the potential to cause injury to be assured of an available remedy if the statement proves to be false and, through its effect on market prices, causes the investors a loss. But absent *Basic*, investors would be forced to examine for themselves the information they have previously trusted the market to digest, or forgo any ability to recover for any losses occasioned by fraudulent statements.

Importantly, investors in the market today would not have reviewed individual corporate disclosures over the past several years, in reliance on *Basic*'s holding that they are nonetheless protected by the securities laws. But the ruling petitioner seeks would retrospectively strip investors of that

protection for later-filed securities fraud actions that are based on misrepresentations made prior to this Court's ruling.

Going forward, the so-called "eyeball reliance" that petitioner seeks could force conscientious institutional investors (particularly those with fiduciary obligations) to radically change their operations to maximize the potential for recovery for losses occasioned by securities fraud. That could include incurring new expenses to create the capacity to collect and understand disclosures from possibly thousands of companies in which the institution holds stock. Conversely, it could create an incentive for such investors to reduce the number of their holdings (and thereby the diversity of their portfolios, increasing risk) to make the monitoring of corporate disclosures more manageable. Likewise, aware that the deterrent effect of the prospect of class litigation has been reduced, investors could well become less willing to invest in stocks of companies (or sectors of the economy) with an unproven track record for integrity, thereby further distorting securities markets.

Abandonment of *Basic* could also render infeasible (or at least considerably less useful) one of the most common forms of securities investing – the use of index funds and other passively managed investments. An index fund simply purchases and holds the stocks of companies listed in a market index, such as the Standard & Poor's 500 index, so that the fund can be expected to mirror the performance of the index. *See* Securities and Exchange Commission, Index Funds, http://www.sec.gov/answers/indexf.htm. These funds

are attractive precisely because their administrative costs are kept low by managers *not* expending the resources required to decide which stocks to buy and sell, and when. *See id.* Thus, almost by definition, those who hold investments in – and, indeed, those who manage – an index fund could never prove individual reliance on corporate misrepresentations, even if the misrepresentation plainly affected market prices, to the injury of the fund. They would be faced with an unenviable choice – abandon the advantages of passive investment in order to ensure availability of a remedy for such frauds, or absorb the losses occasioned by even the most extreme and injurious frauds with no hope of recovery.

II. Petitioners' Argument In Favor Of Relaxing *Stare Decisis* Constraints In This Case Are Meritless.

Petitioners nonetheless claim that *stare decisis* considerations apply with lesser force in this case for two reasons, neither of which bears scrutiny.

A. *Stare Decisis* Applies With Full Force To Decisions Elaborating The Requirements Of An Implied Private Right Of Action.

Petitioners first argue there "is no occasion for applying the heightened form of *stare decisis* that attends statutory construction, for *Basic*'s presumption stems from a judicially implied cause of action." Petr. Br. 32. Where a rule is judge-made, petitioners argue, this Court – not Congress – bears principal responsibility for corrections and revisions. *Id.* Not so.

To be sure, there are a very few areas of statutory law in which Congress has effectively delegated to the courts responsibility for developing, maintaining, and modifying the operative legal rules. The maritime and antitrust cases petitioners rely upon, Petr. Br. 33, are the principal examples. In those contexts, there is no reason for courts to wait for Congress to act to correct misguided decisions or to modify the law in light of changed circumstances.

But this Court has recognized that Congress intends no such delegation under the Securities Exchange Act. This "is not a case," the Court has explained, "in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). To the contrary, as described above, in recent times Congress has closely supervised this area of law, making modifications as it deems appropriate.[7]

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[7] Petitioners note that there was a time in which Congress left elaboration of the 10b-5 cause of action to this Court with little intervention. *See* Petr. Br. 32-33 ("The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right.") (quoting *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292 (1993)). But that language in *Musick* simply explained why the Court felt free during that period to recognize a new right of contribution. It said nothing to suggest that ordinary principles of statutory *stare decisis* would not apply to that or any other decision elaborating the Rule 10b-5 cause of action. And in *Stoneridge* this Court noted that Congress had since

Thus, this Court has afforded ordinary statutory *stare decisis* effect to its decisions recognizing and defining the Rule 10b-5 implied right of action. For example, even though there is an unusually strong argument that the "judge-made" implied right of action under Rule 10b-5 does not comport with modern standards for finding implied private rights of action, *see Stoneridge*, 552 U.S. at 164, this Court has not overruled it. Instead, the Court has treated "the existence of the private right [as] now settled," *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011),[8] even while declining to recognize similar private rights of action under other provisions of the securities laws.[9] (The Court has applied the same approach with respect to the cause of action implied in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), applying *stare decisis* to preserve previously implied causes of action to enforce certain constitutional rights while declining to extend *Bivens* to new contexts.[10])

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become actively involved in supervising the development of Rule 10b-5 litigation. 552 U.S. at 165.

[8] The Court treated the question as settled even before Congress effectively ratified the implied right of action in various statutory amendments. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy is simply beyond peradventure.").

[9] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 & n.19 (1979) (no implied right of action under Section 17 of the Securities Exchange Act); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41-42 (1977) (no implied right of action under Section 14(e) for defeated tender offeror).

[10] *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("[W]e have consistently refused to extend *Bivens*

The Court has likewise afforded *stare decisis* to decisions, like *Basic*, defining the scope and content of the implied cause of action. Particularly in light of statutes like the PSLRA, the Court has explained, it "is appropriate for us to assume that when" that statute was "enacted, Congress accepted the § 10(b) private cause of action *as then defined*." *Stoneridge*, 552 U.S. at 166 (emphasis added). Accordingly, petitioners are unable to identify any occasion on which the Court has overruled one of its Section 10(b) precedents, much less any case disavowing the constraints of statutory *stare decisis*.

That is hardly surprising. All of the reasons for applying a strong *stare decisis* presumption apply whether a judicial rule arises from an interpretation of statutory language or is developed by the Court in the absence of legislative guidance.[11] In either instance, Congress remains empowered to alter the result; requiring Congress to expressly ratify decisions with which it agrees would impose an unworkable burden on the legislature; and Congress remains better suited to decide whether changes in the world or evolving policy preferences require revising the judicial decision.

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liability to any new context or new category of defendants."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring) (acknowledging that although "the ground supporting it has eroded," nonetheless "*Bivens* stands").

[11] Indeed, the distinction between the two categories is more of a gradient than a bright line; interpretation of vague legislative language often relies on much the same analysis as judicial elaboration of an implied right of action.

Any contrary rule would throw the law into disarray, opening up for re-examination any of the numerous decisions defining the Rule 10b-5 action, including many decisions that *constrain* the action and protect defendants from the harms petitioners cite as justification for departing from *Basic*. For example, it is *Basic* itself that establishes reliance as an element of the implied 10b-5 right of action. *Compare Basic*, 485 U.S. at 243 ("We agree that reliance is an element of a Rule 10b-5 cause of action.") *with Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382-83 & n.5 (1970) (holding that reliance is not an element of the implied right of action under Section 14(a)). And similar "judge-made" rules restrict the types of plaintiffs who may bring Rule 10b-5 actions[12] and the kinds of defendant subject to

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[12] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-49 (1975) (only purchasers or sellers may bring suit); *see also Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1088 (1991) (holding that implied right of action under Section 14(a) not available to minority shareholders whose votes are not required to authorize corporate action subject to a fraudulent proxy solicitation).

suit,[13] or define what the plaintiff must prove to prevail.[14]

B. *Basic* Is Not The Kind Of Procedural Or Evidentiary Rule That Warrants Lesser *Stare Decisis* Protection.

Finally, petitioners are wrong to argue that the *Basic* rule is a procedural or evidentiary rule of the kind this Court has sometimes said warrants a lesser standard of *stare decisis*. Petr. Br. 29.

While the Court has said that *stare decisis* concerns are lessened in cases "involving procedural and evidentiary rules," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), that observation has no application here because "fraud on the market is a *substantive* doctrine of federal securities-fraud law." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). While sometimes couched in procedural terms, the rule effectively determines *what* a plaintiff must prove, rather than the procedures and evidence by which it must be proven. The rule thus applies equally to lawsuits by

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[13] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (no cause of action against aiders or abettors); *Stoneridge*, 552 U.S. at 166-67 (no cause of action against vendors or customers of corporation that issued securities); *Janus Capital*, 131 S. Ct. at 2302 (limiting 10b-5 liability to parties that actually make material misstatements).

[14] *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (rejecting plaintiffs' loss-causation theory as insufficiently demanding).

individual plaintiffs (as it often is invoked in cases brought by opt-outs) and also class-actions.

Nor does the reason for lesser *stare decisis* protection for procedural and evidentiary rules – the lack of reliance interests, *Payne*, 501 U.S. at 828 – apply to *Basic*. As discussed above, Congress, the Executive, and investors have come to rely on the legal regime founded upon the availability of the fraud-on-the-market theory. Moreover, there is every reason to believe that Congress is prepared to modify such rules when it deems appropriate. *Cf., e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-66, § 107, 105 Stat. 1071, 1075-76 (modifying burden-shifting regime established under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for proving discrimination in mixed-motive cases).

The cases cited by petitioners (Petr. Br. 29-30) are not comparable. *See United States v. Gaudin*, 515 U.S. 506 (1995) (overruling constitutional rule permitting court, rather than jury, to decide questions of materiality); *Payne*, 501 U.S. 808 (overruling constitutional rule precluding victim impact evidence in capital trials); *Pearson v. Callahan*, 555 U.S. 223 (2009) (overruling precedent governing order in which judicial opinions should address elements of qualified immunity analysis). In none of these examples was there any claim of reliance by individuals or Congress, which either had no power to alter the constitutional rule at issue (*Gaudin* and *Payne*) or no reason to think that the rule was any of its business (*Pearson*).

CONCLUSION

For the foregoing reasons, the Court should reject petitioners' invitation to overrule *Basic*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF OREGON, CONNECTICUT, PENNSYLVANIA, WASHINGTON, ARKANSAS, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MISSISSIPPI, MISSOURI, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, RHODE ISLAND, TENNESSEE, VERMONT, AND TERRITORY OF GUAM SUPPORTING RESPONDENT

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Dated: February 5, 2014

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Court Should Adhere To Its Decision In *Basic*. 5

II. Private Actions Are A Necessary Supplement To SEC Enforcement. 8

A. Private Actions Are Essential To Proper Enforcement of Securities Laws. 8

B. The SEC's Resources Are Limited. 9

C. Private Actions Have A Critical Deterrent Effect. 13

D. Class Actions Are A Critical Enforcement Tool. 16

III. Private Enforcement of Securities Laws Enhances Economic Efficiency By Ensuring Market Integrity and Investor Confidence. 17

IV. Criticisms of Private Securities Actions Are Misplaced. 21

A. The In Terrorem Effect Of Class Certification Is Overstated. 22

B. The "Circularity" Argument Is Flawed. 23

C. Petitioner's $73 Billion Figure Is Flawed. 27

D. Criticisms of Attorney's Fees Are Misplaced. 30

V. The Decision of States Not To Adopt The *Basic* Presumption For Their Own Statutes Is Irrelevant. 32

CONCLUSION 33

TABLE OF AUTHORITIES

Cases:

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BRIEF OF AMICI CURIAE STATES SUPPORTING RESPONDENT

INTEREST OF AMICI

This brief is filed on behalf of the States of Oregon, Connecticut, Pennsylvania, and Washington, as well as the States of Arkansas, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Mississippi, Missouri, New Mexico, New York, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, and the Territory of Guam.

State governments have an important interest in this case because state employee pension funds are frequently plaintiffs in securities fraud actions. Indeed, because state employee pension funds are often the plaintiffs with the largest claims (measured in monetary terms) in such cases, they are often appointed by courts as Lead Plaintiffs pursuant to the requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995), 15 U.S.C. § 78u-4(B)(iii)(I)(bb).[1] In addition, state attorneys

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[1] In 2007, pension funds were named as lead plaintiffs in 48% of securities class actions. Those cases represented 60% of the cases settling that year, and 94% of the total settlement dollars. (Grace Lamont, PricewaterhouseCoopers, *2007 Securities Litigation Study* 33 (Apr. 8, 2008), http://www.pwc.com/en_US/us/forensic-services/assets/2007_security_litigation_study.pdf.) By 2012, pension funds were projected to constitute 75% of the lead plaintiffs in securities class actions. (Patricia Etzold, *et al.*, PricewaterhouseCoopers, *2012 Securities Litigation Study* 24 (fig. 16), http://www.pwc.com/en_US/us/forensic-services/publications/assets/pwc-2012-securities-litigation-study.pdf.) Lead plaintiff status is a proxy for size of claim, because the PSLRA favors appointing as lead plaintiff the investor of group of investors with the largest financial stake in

general are the chief legal officers of their States and are typically charged with bringing civil actions to recover damages to state agencies. Attorneys general have historically played an important role in ensuring fair and non-deceptive marketplaces for all citizens of their States.

Accordingly, States have an important interest in the continued vitality of the fraud-on-the-market presumption adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The practical reality is that the *Basic* rule is critical both to the feasibility of private securities actions and for securing proper enforcement of the securities laws.

SUMMARY OF ARGUMENT

Petitioner and its amici have sought to convince the Court that private securities fraud actions "force settlement without regard to merit," "poorly compensate investors," "do not deter culpable parties" and "consume excessive judicial resources." Pet. Br. 40, 41, 43, 44. Those arguments do not withstand scrutiny.

The Securities and Exchange Commission has always recognized the important role played by private securities actions in enforcing the federal securities laws – just as private actions supplement federal enforcement in other areas, such as consumer protection and Medicaid fraud. In *Basic*, the SEC (under the Administration of President George H.W. Bush) filed an amicus curiae brief urging this Court to adopt the fraud-on-the-market presumption and warning that, without it, private

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the litigation. *See* 15 U.S.C. § 78u-4(B)(iii)(I)(bb) (creating a rebuttable presumption).

securities actions would face insuperable hurdles. The same is true today. Without the important check provided by *Basic* and private securities actions, the integrity of U.S. capital markets will be diminished, and investor confidence in the fundamental fairness of the financial system will decline.

Objective scholarly data confirm the importance of *Basic*, and this Court should not credit Petitioner's scare tactics. Studies show that private actions play a key role in deterring securities fraud and, in fact, are often more effective at returning compensation to victims than government suits. The SEC simply does not have the resources to adequately police the markets without the essential supplement of private securities litigation. For example, one recent study by Stephen Choi, professor of law at NYU, and A.C. Pritchard, professor of law at the University of Michigan, found that private class actions are more effective than SEC investigations at deterring securities fraud and lead to a higher incidence of top officer resignations. Another study by Brian Fitzpatrick, the first comprehensive empirical study of all types of class action settlements, showed securities class actions recovering more value for plaintiffs than any other type by a startling amount.

The U.S. has the best and strongest financial markets in the world, due in no small part to its vigorous anti-fraud laws and investor protection. Studies have shown that strong enforcement of securities fraud statutes leads to market integrity and investor confidence. Empirical examinations validate the connection between protection from fraud and capital formation. Quite simply, investors fear fraud much more than they fear securities

litigation, and weakening securities law enforcement will damage the nation's economy.

In enacting the PSLRA, Congress intended that institutional investors, including state and local governments, would play a major role in deterring fraudulent conduct in the marketplace. Studies show that the private actions filed after the PSLRA are more meritorious than those filed before it – in effect, that the 1995 legislative reform worked.

The evidence also demonstrates that the criticisms of private securities actions are overblown. The data shows that the "in terrorem" effect of securities class actions is exaggerated.

Further, the evidence shows that Petitioner's "circularity" argument – the contention that private securities actions simply transfer money from one innocent investor to another – is flawed because it ignores incentive effects. The threat of civil liability leads officers and directors (who are often shareholders themselves) as well as large investors to establish procedures to reduce the incidence of fraud in the first place. Petitioner's contention that securities fraud cases have imposed an aggregate $73.1 billion in settlements since the PSLRA was enacted, Pet. Br. 41, is distorted and misleading.

Finally, Petitioner's argument that state courts have not followed the *Basic* presumption in construing their own securities laws (Pet. Br. 24) is irrelevant to how federal law should be interpreted. Federalism is a two-way street, and the states and the federal government are both free within their respective authority to enact their own laws and choose their own approaches.

ARGUMENT

States have an important interest in the fraud-on-the-market presumption adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), because it plays a key role in the enforcement of the securities laws.

I. This Court Should Adhere To Its Decision In *Basic*.

In 1988, under the Administration of President George H.W. Bush, the Solicitor General (representing the SEC) filed an amicus curiae brief in *Basic* urging this Court to follow the decisions of every court of appeals to have considered the question and adopt the fraud-on-the-market presumption of reliance. The brief stressed the importance of the presumption to the effective enforcement of the securities laws:

> The courts have viewed the fraud on the market theory, and the accompanying presumption of reliance, as a means of furthering the statutory goal of ensuring honest securities markets. To the extent that private securities fraud actions may be prosecuted more efficiently by adoption of the fraud on the market theory and its presumption of reliance, the enforcement of the securities laws, and the underlying goal of honest markets, are furthered.[2]

The SEC added that private plaintiffs would face severe practical problems without the presumption:

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[2] Br. of SEC as Amicus Curiae at 25-26, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (No. 86-279) (citations omitted).

> [P]lacing the burden of proof on a plaintiff alleging fraud on the market would impose an unrealistic evidentiary burden. Of course, a plaintiff could offer evidence that he relied on the integrity of the market in making his investment decision. But proving affirmatively that the market price of a security was affected by corporate misstatements may be difficult. A plaintiff might have to present extensive and hard to obtain evidence as to who in fact traded in the stock following the corporate statement, how many of those traders were in fact aware of the statement and whether they in fact relied on the statement in making their trading decisions.
>
> The fraud on the market theory merely accommodates these various concerns by recognizing the obvious, that market prices generally reflect corporate information and that investors generally rely on the integrity of the market price, and by relieving plaintiffs of the need to reprove these matters in each case.

Id. at 26-27 (citations omitted). The brief emphasized that the presumption "promote[s] important policies under the federal securities laws," including the "integrity" of the securities markets and "investor confidence" in them. *Id.* at 24.

The SEC's reasoning in 1988 is equally applicable today. Without the fraud-on-the-market presumption, private plaintiffs will face insuperable barriers in bringing securities fraud actions, either in class form or as individual actions, and the

enforceability of the anti-fraud laws will suffer. Without this important check, the integrity of U.S. capital markets will be diminished, and investor confidence in the fundamental fairness of the financial system will decline.

State securities regulators have supported *Basic* in this Court.[3] Further, this Court has consistently cited the *Basic* presumption with approval, in *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1193, ___ U.S. ___ (2013), *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179, 2186, ___ U.S. ___ (2011) ("*Halliburton I*"), *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008), *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005), and even in other areas of law, *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6, ___ U.S. ___ (2011). All of these decisions cite to the fraud on the market doctrine and *Basic* as an established way to show reliance in securities cases. Under Halliburton's view, all of these decisions should be disregarded.

Now is not the time for this Court to change course in a way that risks disruption of U.S. capital markets. After the financial crisis of 2008, many small investors fled U.S. stock markets out of concern that the system was stacked against them. Many such investors are only now beginning to return. This Court should not create a major roadblock to private securities fraud actions, given the important enforcement role they play. To do so

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[3] *See* Br. of AARP and North American Securities Administrators Assn., Inc. as Amici Curiae Supporting Petitioner, *Erica P. John Fund, Inc. v. Halliburton Co.* (No. 09-1403).

risks loss of investor confidence that would have severe repercussions for U.S. capital markets.

II. Private Actions Are A Necessary Supplement To SEC Enforcement.

A. Private Actions Are Essential To Proper Enforcement of Securities Laws.

This Court has long recognized that private actions to enforce the securities laws are a "necessary supplement" to the Commission's enforcement actions. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

This Court has recognized that "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 778 n.10 (2008) (quoting S. Rep., at 8, U.S. Code Cong. & Admin. News 1995, pp. 679, 687). This Court reaffirmed that "private litigation under § 10(b) continues to play a vital role in protecting the integrity of our securities markets." *Id.* at 778.

Congress has likewise recognized the important role of institutional investors, including state and local governments. Indeed, in the PSLRA, Congress reaffirmed that "private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the

integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (brackets in original and internal quotation marks omitted). When it enacted the PSLRA, Congress adopted provisions favoring the selection of institutional investors as lead plaintiffs in private actions. *See id.* at 331.

B. The SEC's Resources Are Limited.

The SEC simply does not have the resources to police the markets by itself, without the essential supplement of private securities litigation. The drastic expansion of the SEC's responsibilities, coupled with the astonishing growth of trading technologies and strategies,[4] means that the SEC cannot be the sole entity responsible for the enforcement of the Nation's securities laws. Congress's response to the financial crisis caused the SEC's responsibilities to explode. The implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376) ("Dodd-Frank") "thrust [the SEC] into the driver's seat for issuing 100 new rules, creating five new offices, producing more than 20 studies and reports, overseeing the over-the-counter derivatives market and hedge fund advisers, registering municipal advisors and security-based swap market participants, and creating a new

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[4] *FY14 CFTC, SEC Budget Hearing*, Subcomm. on Fin. Servs. and Gen. Gov., Sen. Approps. Comm., 113th Cong. 7 (2013) (statement of Mary Jo White, Chair, Securities and Exchange Comm'n).

whistleblower program, among other new duties."[5] In addition, "[t]he Jumpstart Our Business Startups Act of 2012 added more to the plate, directing the SEC to write rules and issue studies on capital formation, disclosure, and registration requirements."[6]

A GAO report conducted in 2009 measured exactly how overstretched the agency had become. As its responsibilities were expanding, the number of investigative attorneys at the SEC dropped 11.5 percent between 2004 and 2008, from 566 to 501.[7] Total staffing for the Enforcement Division declined between 2005 and 2008.[8] From 2002 to 2008, the number of investigations and enforcement actions remained level[9] – fewer people were doing roughly the same amount of work as the financial crisis brewed. "In interviews and small group meetings, Enforcement management and investigative attorneys agreed that resource challenges have affected their ability to bring enforcement actions."[10] Unsurprisingly, both penalties and disgorgements exacted by the SEC have plummeted: since a high in

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[5] *FY14 CFTC, SEC Budget Hearing*, Subcomm. on Fin. Servs. and Gen. Gov., Sen. Approps. Comm., 113th Cong. 7 (2013) (statement of Sen. Mark Udall).

[6] *Id.*

[7] U.S. Gov't Accountability Office, GAO-09-358, Securities and Exchange Commission: Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement 4 (2009) ("GAO Report").

[8] *Id.* at 17.

[9] *Id.* at 21-22.

[10] *Id.* at 23.

2005, penalties have fallen 84 percent, and disgorgements are down 68 percent since their peak in 2006.[11]

The investment advisor industry, as an example of the SEC's responsibilities, has grown exponentially over the past decade: the number of advisors has risen forty percent, while the amount of assets has more than doubled to over $50 trillion.[12] In addition, the field has grown markedly more complex with the evolution of novel trading strategies, high-frequency and algorithm-based trading, and "complex 'families' of financial services companies with integrated operations."[13] Despite this rapid expansion, the SEC was able to examine only eight percent of investment advisors in FY 2012 and "over 40 percent of advisors have never been examined."[14] The industry is changing faster than the SEC can keep up.

The SEC's supervision of derivatives and clearing agencies is also at a critical juncture. With the evolution of swap-based markets, the SEC has also been tasked with overseeing "new categories of registered entities" such as "security-based swap execution facilities, security-based swap data repositories, security-based swap dealers, and major security-based swap participants."[15] Oversight

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[11] *Id.* at 37.

[12] *FY14 CFTC, SEC Budget Hearing*, 113th Cong. 6-7 (2013) (statement of Mary Jo White, Chair, Securities and Exchange Comm'n).

[13] *Id.* at 7.

[14] *Id.* at 6.

[15] *Id.* at 9.

includes supervision, mandatory reporting, dissemination of public information, and clearing of swaps. These new markets are in a critical phase: "bottlenecks and unintended market disruptions" may occur over the next two years as "the new requirements become operational."[16] The seven active registered clearing agencies are handling roughly $6.6 trillion worth of transactions per day, but the SEC has a full on-site presence in only three, with a total of 14 examiners spread across them all.[17] The number of these clearing agencies is expected to expand.[18] In addition, the SEC's monitoring of those clearing agencies designated as "systemically important" by the Financial Stability Oversight Council is also expected to increase dramatically.[19]

These responsibilities have come at the cost of enforcement of securities laws, particularly in a time of budgetary sequester and government shutdown. In the words of one federal judge, "the SEC has been hard hit by budget limitations," which have forced the agency to husband its resources and instead "to focus on the smaller, easily resolved cases that will beef up their statistics when they go to Congress begging for money."[20] Even before the sequester hit

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[16] *Id.*

[17] *Id.* at 10.

[18] *Id.*

[19] *Id.*

[20] Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?", *The New York Review of Books* (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions.

the SEC, one manager in the Enforcement Division told the GAO that "the division did not have enough resources to pursue many leads involving offering fraud and market manipulation."[21]

C. Private Actions Have A Critical Deterrent Effect.

Even where it brings cases, SEC enforcement does not mean injured investors will recover at all, let alone what they may obtain through private litigation. The comparative results between what the SEC and private litigants recover are stark.[22] For example, in actions against Enron and aiders and abettors in the Enron fraud, the SEC recovered $440 million while investors recovered approximately $7.3 billion from private suits.[23] The SEC settlement fund in connection with WorldCom

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[21] GAO Report at 24. Promising cases were closed and some – including several involving the subprime mortgage crisis – went unstaffed. (*Id.*) The problems were pervasive: "investigative attorneys with whom we spoke cited a number of resource challenges that have undercut their efforts, causing significant delays in bringing cases, reducing the number of cases that can be brought, and potentially undermining the quality of cases." (*Id.*) Because of difficulties conducting thorough investigations, attorneys simply relied on representations made by defense counsel. (*Id.* at 25.)

[22] The GAO Report found that the SEC was hobbled by internal policies that discouraged penalties and forced the SEC to play a losing hand at settlement talks. *See* GAO Report at 43-44.

[23] *Compare* Securities and Exchange Comm'n, *Enron*, http://www.sec.gov/divisions/enforce/claims/enron.htm *with* Kristen Hays, "Enron Settlement: $7.2 Billion to Shareholders," *Houston Chronicle*, http://www.chron.com/business/enron/article/Enron-settlement-7-2-billion-to-shareholders-1643123.php (Sep. 9, 2008).

was $750 million – at the time the largest in the agency's history – compared to $6.1 billion recovered in the private action.[24] Notably, the private settlement with WorldCom included $24.75 million from individual directors while the SEC fine was paid only by the company.[25] The SEC did not recover anything for investors in the Cendant litigation, but the private action recovered $3.2 billion.[26] Similarly, while the SEC settled with Charter Communications in return for a cease-and-desist promise not to violate the securities laws again, the private lawsuits were settled for a $64 million cash fund and an $80 million equity distribution.[27] Hence, the reality is precisely the opposite of Petitioner's claim that SEC enforcement returns more to investors than private actions. *See* Pet. Br. at 41-44.

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[24] *Compare* AccountingWeb, "$750 Million MCI/WorldCom Settlement is Largest in SEC History," http://www.accountingweb.com/topic/750-million-mciworldcom-settlement-largest-sec-history (Jul. 7, 2003) *with Settlements*, http://www.worldcomlitigation.com/html/citisettlement.html (visited Jan. 5, 2014). The website http://www.worldcomlitigation.com is the information site administered by Lead Counsel.

[25] AccountingWeb, *supra*; http://www.worldcomlitigation.com, *supra*.

[26] *See In re Cendant Corp. Litig.*, 264 F.3d 201, 217 (3d Cir. 2001).

[27] *Compare* Business Wire, "Charter Communications Reaches Settlement in Class Action and Derivative Lawsuits," http://www.businesswire.com/news/home/20040805005892/en/Charter-Communications-Reaches-Settlement-Class-Action-Derivative (Aug. 5, 2004) *with* Stipulation of Settlement, Dkt. 292, *In re Charter Comm'cns, Inc., Sec. Litig.*, No. 02-cv-1186, §1.26 (Feb. 17, 2005, E.D. Mo.).

Empirical research confirms the importance of private actions. One recent study found that private class actions are more effective than SEC investigations in policing securities fraud.[28] In particular, the study by Stephen Choi, professor of law at NYU, and A.C. Pritchard, professor of law at the University of Michigan, compared SEC-only investigations with class action-only lawsuits and found a greater deterrent effect and higher incidence of top officer resignation as a result of class actions. The study was notable because it explained that conventional analyses comparing class actions and SEC enforcement actions are comparing apples and oranges. SEC enforcement actions are brought only after the SEC has completed a substantial investigation into the alleged wrongdoing, aided by the SEC's subpoena power, which yields cooperation from defendants even when it is not invoked. By contrast, plaintiffs filing securities class actions must do so on the basis of publicly available information. Accordingly, the more relevant comparison is between SEC investigations and class actions. On that score, the study concluded that the evidence "is consistent with private class actions pursuing more egregious securities law violations than SEC investigations and imposing greater sanctions against companies."[29] The authors conclude, "our findings are consistent with the private enforcement providing at least as much

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[28] *See* Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, University of Michigan Law School Law & Economics Research Paper Series, No. 12-022, Nov. 2012, available at http://ssrn.com/abstract=2144002.

[29] *Id.* (quoting abstract).

deterrent value, if not more, than public enforcement."[30]

D. Class Actions Are A Critical Enforcement Tool.

The utility of securities class actions as a method of deterring wrongdoing is also shown by their effectiveness compared to other class actions. The first comprehensive empirical study of all types of class action settlements, rather than only those under securities laws, showed securities class actions recovering more compensation for plaintiffs than any other type by a startling amount.[31] For the two years studied (2006 and 2007), securities class action settlements constituted 73% and 76% of the amount of monetary value recovered in *all* class actions.[32] The closest comparator in both years clocked in at only 7% of the total.[33] Even setting aside blockbuster securities settlements and focusing on average and median values, securities class action settlements are in the top tier alongside

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[30] *Id.*

[31] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 825-30 (2010).

[32] *Id.* at 825 (table 4). Even though securities class action settlements totaled $16 billion and $8 billion for 2006 and 2007 respectively (*id.*), securities class action settlements recover on average only 3% of investor losses (Cornerstone Research, *Securities Class Action Settlements—2012 Review and Analysis* 8 (fig. 7) (2013)). As enormous as the amount of these settlements are, they pale in comparison to the losses they are attempting to compensate.

[33] Fitzpatrick, 7 J. EMPIRICAL LEGAL STUD. at 825 (table 4).

commercial and antitrust class action settlements.[34] The study found that "securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class," as opposed to in-kind or "coupon" relief.[35] Juxtaposed with other uses for the class action mechanism, securities class actions are able to return more value to plaintiffs both in the aggregate and in the average or median case.

The strength of the class action mechanism to enforce securities laws can also be seen in the low rate of opt-outs. Out of the 1,272 securities class actions in the post-PSLRA period between 1996 and 2011, only 38 cases (0.03%) had parties who opted out and filed a separate suit.[36] While opt-outs do happen, this low figure confirms that the class action mechanism tends to be superior to individual litigation in policing securities fraud.

III. Private Enforcement of Securities Laws Enhances Economic Efficiency By Ensuring Market Integrity and Investor Confidence.

This Court has opined that "[t]he securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud

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[34] *Id.* at 827-29 & table 6 (explaining that the commercial and antitrust averages are distorted by huge outlier settlements and a small *n*).

[35] *Id.* at 825.

[36] Amir Rozen, *et al.*, Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements* 2 (2013).

actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (internal citation omitted).

This Court's assessment is correct. The U.S. has the best and strongest financial markets in the world, due in no small part to its vigorous anti-fraud laws and investor protection. This is no coincidence:

> [R]ecent research documents significant adverse consequences of the failure of a legal regime to protect investors. . . . [W]hen investor protection is poor, investment funds are not allocated efficiently across activities . . . , since entrepreneurs with profitable projects need not be the ones with access to funds and investors do not entrust their funds to entrepreneurs. These failures of markets to work well have significant real consequences. Levine and Zervos (2000) and Rajan and Zingales (1998) show that poor investor protection policies, through their adverse effect on capital market development, retard economic growth.[37]

Empirical studies of capital formation validate the connection between protection from fraud and capital formation. Simply put, investors fear fraud much more than they fear securities litigation.[38] Robust free markets work best only when investors

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[37] Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* 1984 (Oxford 2000) (citations omitted).

[38] Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438, 439-42 (1994).

feel confident enough to take business risks without the added fear of fraud.

A study by Jonathan M. Karpoff of the University of Washington, D. Scott Lee of the University of Nevada, Las Vegas, and Gerald S. Martin of American University confirmed the importance of private actions.[39] The study examined the sizes, types, and determinants of legal penalties imposed for all 697 enforcement actions initiated by the SEC for financial misrepresentation from 1978 through 2004. The penalties included private class action awards, monetary penalties imposed by the SEC and Department of Justice, and such non-monetary sanctions as censures, trading suspensions, and jail time. The study concluded: "Contrary to many criticisms of private lawsuits and regulatory actions, we find that legal penalties are highly systematic, and in particular, are positively related to the size and severity of the harm from the misconduct."[40] Further, the study placed its findings in context with the literature on the importance of both public and private enforcement actions:

> These findings illuminate the importance of public and private enforcement activities for financial misrepresentation. In an investigation of data from 49 countries, La Porta et al. (2007) find that public enforcement – i.e., direct regulatory enforcement activities such as those of the

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[39] Jonathan M. Karpoff, *et al.*, *The Legal Penalties for Financial Misrepresentation* (May 2, 2007) (available at http://ssrn.com/abstract=933333).

[40] *Id.* at 1 (quoting Abstract).

> SEC – is not correlated with financial market development. Rather, private enforcement – in particular, the ability to seek recompense through legal actions – is strongly correlated with financial market development. This implies that public enforcement activities are relatively unimportant or ineffectual at disciplining and deterring financial misconduct. Using alternative measures of public enforcement, Jackson and Roe (2007) reach the opposite conclusion, that "public enforcement [is] more strongly associated with robust financial markets."
>
> Our results address a related aspect of this debate. We show that *both* private and public enforcement activities penalize financial misrepresentation. Both also are sensitive to the costs and complexities of the misconduct. These results indicate that, for the United States at least, private and public enforcement activities both are important in the control of managerial opportunism.[41]

The economic data strongly support the view that regulation of financial markets in the U.S. actually enhances its competitive position against other markets. Recent studies have found that foreign companies listing their stocks on their home exchanges and in the United States are able to raise capital on better terms, at a lower net cost than companies that list only outside the United States.[42]

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[41] *Id.* at 3-4 (emphasis in original).

[42] Craig Doidge *et al.*, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing*

Economists refer to this as a cross-listing premium.[43] By contrast, companies that cross-list in their home exchanges and London, which is widely recognized to have less rigorous regulations than the United States, do not enjoy the cross listing premium.[44] This premium exists in the United States because of the superior protections that the regulatory regime in the United States provides investors.[45]

IV. Criticisms of Private Securities Actions Are Misplaced.

Petitioner contends that securities class action suits are "deadweight loss" Pet. Br. 43 and "gluttonous consumers of judicial resources" Pet. Br. 44 that "force settlement without regard to merit" Pet. Br. 40. To the contrary, an empirical study relating the progress of a private securities class action to proxies for merit shows that the PSLRA increased the number of meritorious lawsuits rather than diminishing it.[46] Petitioner's criticisms of

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Choices Over Time 5, 29 (Fisher Coll. of Bus. Working Paper Series, Paper No. 2007-03-012, 2007), *available at* http://www.ssrn.com/abstract=982193; Luzi Hail and Christian Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulations Matter?*, 44 J. OF ACCOUNTING RES. 485, 485 (2006).

[43] Doidge, *supra*, at 3.

[44] *Id.* at 31.

[45] *Id.* at 29.

[46] Marilyn F. Johnson, *et al.*, *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act* 3-7, 28-30 (U. Mich., John M. Olin Ctr. for Law & Econ., Working Paper No. 02-011, 2006), http://papers.ssrn.com/abstract=883684.

private securities actions fly in the face of how these suits play out in reality.

A. The In Terrorem Effect Of Class Certification Is Overstated.

The "in terrorem" effect of class certification, Pet. Br. 40-41, is greatly exaggerated: Petitioner mistakes correlation for causality, and fails to consider alternative causes. Facially, Petitioner's argument that class certification is the lever that forces settlement is flatly incorrect: 77% of securities class actions are resolved before a motion for class certification is even filed.[47] NERA Economic Consulting "did not find reliable statistical relationships between the resolution of a motion for class certification and expected settlements."[48] Without the causal connection, Petitioner is left with a simple *post hoc ergo propter hoc* mistake. When class certification is litigated, a class is certified 76% of the time,[49] which is hardly the inevitable parade of horribles Petitioner invokes. Pet. Br. 40-41.

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[47] Renzo Comolli, *et al.*, NERA, *Recent Trends in Securities Class Action Litigation: 2012 Full -Year Review* 20 (fig. 18) (2013), http://www.nera.com/nera-files/PUB_Year_End_Trends_2012_1113.pdf.

[48] NERA, *Dynamic Litigation Analysis: Predicting Securities Class Action Settlements as a Case Evolves* 4-5 (2013). While NERA did find a robust relationship between settlement size and the *filing* of a motion for class certification, the report rightly points out that may be as much a reflection of strategic maneuvering rather than some coercive force exerted by the class certification mechanism. (NERA, *Dynamic Litigation Analysis*, *supra*, at 5.)

[49] Comolli, *supra*, at 20 (fig. 18).

The denial of a motion to dismiss exerts a stronger force on settlement than class certification does. While 28% of cases settled prior to a ruling on a motion to dismiss, 71% settled after such a motion was decided.[50] The partial or whole denial of the motion to dismiss is a significant predictor of a larger settlement.[51] Petitioner's logic should have this Court revisiting or abandoning the motion to dismiss, not the private securities class action.

B. The "Circularity" Argument Is Flawed.

Petitioner and its amici take the position that private securities actions simply transfer money from one innocent investor to another. According to this "circularity" argument, when a securities class action goes to judgment, the company and current shareholders (who were not participants in misdeeds at issue) transfer money to the plaintiffs (who were past investors).

There is little empirical support for this criticism, and it suffers from numerous analytic flaws.[52] First, it equates shareholders who buy stock

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[50] Cornerstone, *2012 Analysis*, *supra*, at 6. The 71% includes cases that settle both before (64%) and after (7%) a motion for summary judgment is decided. (*Id.*) Because of the methodology for classification, the sample does not add up to 100%. (*Id.* at n.6.) *See also* Cornerstone, *Accounting Class Action Filings and Settlements: 2011 Review and Analysis* 6-7 (figs. 5A & 5B) (noting that 19% and 10% of accounting and non-accounting securities class actions settle before the motion to dismiss, compared to 32% and 19% afterward, respectively).

[51] NERA, *Dynamic Litigation Analysis: Predicting Securities Class Action Settlements as a Case Evolves* 4-5 (2013).

[52] *See* Thomas Dubbs, *A Scotch Verdict on "Circularity" and Other Issues*, 2009 WIS. L. REV. 455 (2009) (explaining that

after the fraud is disclosed or who hold stock knowing of the fraud, with shareholders who bought stock prior to the disclosure without knowledge of the fraud. However, a purchaser of securities prior to disclosure of the defendants' misdeeds is both "innocent" of the fraud and uninformed of the conditions of the company that underlie the true value of the stock. In contrast, an investor who maintains an investment or purchases an investment after the wrongdoing is disclosed makes a choice to take new investment risk with knowledge of the fraud and is thus not, to the same extent, an "innocent" investor. If the assets of a corporation are used to pay other wronged investors it is a risk that the investor has knowingly undertaken. Moreover, the market already discounts stock prices for litigation risk, which is the reason such litigation requires disclosure. Thus, the investor who buys after disclosure of the fraud has bought the stock at a value that reflects the likelihood that the company will later have to make a settlement payment or pay a judgment.

Second, the circularity argument fails to account for the central role of shareholders in corporate governance and the incentives that private litigation provides in the exercise of that role. Shareholders possess the power to help protect the integrity of the financial markets through their voting and

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the "circularity" objection is unproven and unsupported by evidence). For example, significant private settlements are sometimes paid by wrongdoing directors rather than the corporation. *See* *Settlements*, http://www.worldcomlitigation.com/html/citisettlement.html (visited Jan. 5, 2014).

trading.[53] They compose the sole class of persons legally empowered to determine the composition of corporate boards that select management. Moreover, recent developments have allowed shareholders to assume an increasingly active role in corporate governance. The SEC has taken steps to facilitate shareholder participation, while institutional investors and hedge funds have begun to assert their rights more actively.[54] The pressure from large shareholders has had a significant impact on management composition and sometimes even on corporate strategies and policies.[55]

Shareholders thus comprise an integral part of the mechanism that deters managerial fraud.[56] This is particularly true of long-term shareholders, who have the greatest stake in managerial behavior.[57] Such shareholders have a positive incentive to use their strengthened role to seek more accurate and complete disclosures, which lead to a more efficient

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[53] Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence In Securities Class Actions* 61 (Geo. Wash. Univ. Law Sch. Public Law Research Paper No. 404, 2008), *available at* http://ssrn.com/abstract=1118471.

[54] *Id.* at 58.

[55] *Id.* at 57-58.

[56] *Id.* at 60.

[57] *Id.* at 65. In addition, officers, directors and senior members of management are often among the largest individual shareholders. These individuals, who are in the best position to commit or prevent fraud, thus have a strong incentive to preserve the value of their shareholdings by preventing fraud, and strong disincentives to engage in fraud that would diminish the value of their shareholdings.

market and corresponding higher returns to investors.[58] The threat of litigation promotes this goal, influencing not only potential defendants but also, as an additional incentive to them, shareholders who seek to avoid the costs of such litigation. Indeed, it is precisely because shareholders receive benefits from the threat of private securities litigation in the form of improved disclosures and higher investment returns that it is appropriate that shareholders also share their pro rata portion of the cost of enforcement.[59] Securities lawsuits represent a kind of "user fee" to shareholders for enjoying the benefits of enforcement of our disclosure scheme.[60]

Third, the circularity argument also ignores the participation of outside advisors, such as accountants, attorneys and underwriters. Because of their key roles in corporate securities transactions, these advisors are often deeply involved in the events giving rise to a fraud. Thus, they are in an excellent position both to detect and perpetrate fraud. Settlement payments from outside advisors who commit fraud do not come out of corporate funds and therefore do not diminish the value of the shareholders' interest in the company.[61]

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[58] *See* Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade*, 2009 WIS. L. REV. 297.

[59] *Id.* at 327.

[60] *Id.*

[61] A recent study by two Stanford Law professors found that 1 out of every 7 securities class actions filed since 2000 has involved a bankrupt company. *See* Michael Klausner and Jason Hegland, D&O Diary, *Guest Post: Bankruptcy in Securities Class Actions: Case Outcomes, Individual Liability*

Although this Court has ruled that these advisors cannot be liable in a private action for aiding and abetting a fraud,[62] liability can still attach when they actually commit the fraud.

C. Petitioner's $73 Billion Figure Is Flawed.

Petitioner cites the aggregated $73.1 billion figure for all settlements since the PSLRA was enacted, Pet. Br. 41, but this figure hides a multitude of caveats. First, it includes *all* securities-related settlements, including IPO-laddering, merger objection, and Ponzi allegations, only some of which arise from Rule 10b-5.[63] This figure overstates how much of the aggregate settlement amount arises from suits that would be affected by this case. Comolli breaks down filings by type from 2005 onward; over that period, between 5% (2010) and 96% (2005) were based on core federal securities law (Rule 10b-5, Section 11, and Section 12).[64] Because Sections 11 and 12 do not require proof of

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and Side A Protection, http://www.dandodiary.com/2013/12/articles/securities-litigation/guest-post-bankruptcy-in-securities-class-actions-case-outcomes-individual-liability-and-side-a-protection/ (visited January 28, 2014). In such cases, D&O insurers are often the source of compensation for plaintiffs and therefore have an incentive *ex ante* to prevent the fraud in the first place.

[62] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

[63] Renzo Comolli, *et al.*, NERA, *Recent Trends in Securities Class Action Litigation: 2012 Full -Year Review* 5-6 (2013), http://www.nera.com/nera-files/PUB_Year_End_Trends_2012_1113.pdf.

[64] Comolli, *supra*, at 5-6 (figs. 3 & 4).

reliance, the presence of those figures distorts the relevance of the $73.1 billion aggregate number. Over a different time period (2008-2012), Cornerstone shows a range of 66% to 85% of securities lawsuits make a claim under Rule 10b-5.[65] By including non-10b-5 suits in the aggregate figure, Petitioner distorts the size of the settlements that would be affected by this case. The aggregate figure also distorts the number and size of settlements. Roughly 40% ($29.7 billion) of that aggregate amount is driven by only the top 10 mega-settlements (out of 2,113 total settlements since 1996).[66] Over half of the remaining settlements are for less than $10 million, accounting for a mere fraction of the dollar total.[67] The aggregate number is distorted by a small number of mega-settlements, and underplays the numerous settlements that address smaller-scale frauds.

These smaller settlements are important evidence of the need for private enforcement of securities laws. During the run-up to the PSLRA, these small-value suits were characterized as nuisance or "strike" used to extort a settlement from the beleaguered company.[68] If this argument was

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[65] Cornerstone Research, *Securities Class Action Filings: 2012 Year in Review* 6 (fig. 4), http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_YIR.pdf.

[66] Comolli, *supra*, at 23 (fig. 21) & 30 (table 1).

[67] *Id.* at 31.

[68] *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 505-23 (1991) (analyzing a small sample of cases to determine that merits do not affect settlement size).

true before the PSLRA — evidence suggests that it was incorrect[69] — the story has changed significantly since the PSLRA: fewer frivolous suits survive, and the rise in number of suits is probably due to a rise in actual fraud.[70] Nearly two-thirds (64%) of class actions settle after a court has adjudicated a motion to dismiss,[71] which is a preliminary legal indicator that the suit has some merit. Further, the size of the settlement increases at each stage of the litigation.[72] Thus, a greater proportion of an aggregate settlement figure would come from suits that have survived a motion to dismiss or summary judgment--signs that they are meritorious suits. Contrary to Petitioner's suggestion, Pet. Br. 40-41, the number of small suits may not be evidence of "in terrorem" settlements, but rather is "equally

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[69] Seligman, 108 HARV. L. REV. at 448-54).

[70] James D. Cox, *et al.*, *There Are Plaintiffs And ... There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 379-84 (2008) (arguing that the vast majority of suits are not strike suits, and that the PSLRA works to keep the number down); Marilyn F. Johnson, *et al.*, *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act* 3-7, 28-30 (U. Mich., John M. Olin Ctr. for Law & Econ., Working Paper No. 02-011, 2006), http://papers.ssrn.com/abstract=883684 (concluding that post-PSLRA lawsuits tend to be more meritorious than pre-PSLRA suits); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1492-98 (2004) (canvassing post-PSLRA empirical analysis showing a reduction in frivolous suits); James D. Cox, *Making Securities Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503-08 (1997) (criticizing Alexander's methods).

[71] Ellen M. Ryan, *et al.*, Cornerstone Research, *Securities Class Action Settlements: 2012 Review and Analysis* 6 (2012)

[72] *Id.* at 9 (fig. 9).

consistent with the view that highly meritorious suits are brought, but settled for too little."[73]

D. Criticisms of Attorney's Fees Are Misplaced.

Petitioner complains about the "prime, juicy 'cut'," Pet. Br. 43, that attorneys take from class action settlements, but does so by comparing apples to very small oranges. The criticism that investors pay one-third of their settlement recoveries to their attorneys[74] is simply misleading.[75] This commonly invoked claim originates from a 1999 study analyzing data of which the vast majority preceded the effective date of the PSLRA; its finding is thus outdated and of questionable relevance today.[76] In contrast, Fitzpatrick's exhaustive study of all class action settlements in 2006 and 2007 found that class

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[73] Cox, 39 ARIZ. L. REV. at 502.

[74] Pet. Br. 43; Richard A. Booth, *Class Conflict in Securities Fraud Litigation*, 14 U. PA. J. BUS. L. 701, 703 n.1 (2012).

[75] This criticism mirrors that of class actions generally. In reality, the "empirical evidence strongly suggests that class actions generate adequate compensation for claimants." Myriam Gilles and Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 131 (2006). According to a Class Action Reports analysis of 1,120 class actions from 1990 through 2003, for every dollar recovered, 81.6 cents went to class members, while 18.4 cents went to pay attorneys and other costs. *Id.*

[76] *See* Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 STAN. J.L. BUS. & FIN. 121, 141 (1999). The effective date of the PSLRA was December 22, 1995, while the study's data set covered the period January 1991 through June 1998.

counsel received only 13% and 20% of the total settlement amounts, respectively.[77] When limited to securities class actions, the percentages are 11% and 20%.[78] These benchmarks are solidly *below* the usual 33% taken by a contingency-fee attorney.[79]

Indeed, as with other contingency litigation, the uncertain nature of investing in a private securities class action suit warrants a risk premium. Such lawsuits require attorneys to incur substantial upfront outlays in time and expenses that would never be recovered if the action were dismissed.[80] This risk is a significant one: of the resolved securities class actions that were filed since 1996, 41 percent were dismissed.[81] Courts generally acknowledge and compensate plaintiffs' attorneys for bearing this risk by finding that they are entitled to a risk premium.[82]

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[77] Fitzpatrick, 7 J. EMPIRICAL LEGAL STUD. at 830.

[78] *Id.*

[79] *Id.* at 830 & n.64.

[80] Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* 19 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 06-0034, 2006), *available at* http://ssrn.com/abstract=870577 ("The entrepreneurial plaintiffs' lawyer filing a securities class action obviously bears risk, both in terms of the possibility of non-payment should the case not result in a settlement and, even if a settlement is likely, in terms of how long it will take to reach that settlement and collect its contingency fee.").

[81] Laura E. Simmons and Ellen M. Ryan, Cornerstone Research, *Securities Class Action Settlements: 2007 Review and Analysis* 1, 14 (2008).

[82] Perino, *supra*, at 19.

Courts recognize that larger class actions should create economies of scale, so they award a lower percentage of fees as settlement size increases.[83] According to a 2004 analysis of mostly post-PSLRA data, while plaintiffs' attorney fees averaged 24% overall, "fees as a proportion of settlement declined with settlement size."[84] This conclusion is corroborated by a 2005 study, which found that fees in cases that settle for less than $5 million average 33% of the total settlement, but then drop to 26% for settlements in the $25-$100 million range, and drop even further to 19% for settlements of over $100 million.[85] Securities class counsel do not reap the obscene windfalls Petitioner contemplates.

V. The Decision of States Not To Adopt The *Basic* Presumption For Their Own Statutes Is Irrelevant.

Halliburton contends that the fact that state courts have declined to follow *Basic* and to adopt a fraud-on-the-market presumption under their own state securities statutes is a reason for this Court to disregard the presumption. Pet. Br. 24. Obviously, federalism is a two-way street and compels no such result. The states and the federal government are

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[83] Perino, *supra*, at 19.

[84] Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study* 1, 33 (Cornell Law Sch. Legal Studies Research Paper Series Research Paper No. 04-01, 2003), *available at* http://ssrn.com/abstract=456600. The data set for this study covered the period 1993 through 2002.

[85] Elaine Buckberg et al., NERA Economic Consulting, *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?* 7 (July 2005).

both free, within their respective authority, to enact their own laws and to enforce those laws in the manner they believe to be most suitable

This Court has recognized that the *Basic* presumption is "a substantive doctrine of federal securities-fraud law," ultimately premised on the federal securities statutes. *Amgen*, 133 S. Ct. at 1193. The federal securities laws have their own distinctive structures, histories, and purposes. Just as states are not compelled to follow federal decisions in adopting or interpreting their laws, so the federal government is not compelled to follow the states.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
PETITIONERS,
v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SECURITIES LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

I. *Basic* is Consistent with the Modern Understanding of Market Efficiency 6

A. *Basic* Requires only that Material Information Affects Stock Prices 6

B. Imperfect Market Efficiency is Neither New nor Inconsistent with *Basic* 12

II. Congress Accepted Fraud-on-the Market as Striking an Appropriate Balance in Securities Fraud Enforcement 18

A. Congress Enacted the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act to Refine, not Eliminate, the Class Action Mechanism 18

B. Empirical Evidence Suggests that the PSLRA Struck an Appropriate Balance 24

C. The Court Should Not Import a Reliance Requirement from Section 18 into Section 10(b) 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

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Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are prominent law professors whose teaching and scholarship focus on federal securities regulation. Amici have in total published over 500 scholarly articles and a substantial share of the leading books in the field. This body of scholarship analyzes and interprets the federal securities laws and studies the impact of federal securities regulation on the capital markets and the protection of investors. *Amici*'s expertise spans a range of scholarly methods including doctrinal analysis, empirical methods and historical research. Much of this work focuses on the degree to which stock markets can be informationally efficient and is cited by Petitioners for this proposition.

Amici agree that this Court should not curtail or abandon the fraud-on-the-market presumption of reliance established in *Basic Inc. v. Levinson*, 485 U.S. 224, 241–49 (1988). Because fraud-on-the-market is based on the simple fact that the public securities markets incorporate material information into stock prices, they agree that *Basic*'s presumption is not undermined by evolving academic debates over the degree to which the markets are perfectly efficient. They also agree that the existing framework of private securities fraud litigation, in which fraud-on-the-market is an inherent part, reflects an appropriate balance between the protection of the capital markets and limiting the potential for abusive litigation. Congress played an affirmative role in structuring this balance through the enactment of the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (PSLRA) and the Securities Litigation Uniform Standards Act, Pub.

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[1] No counsel for any party authored this brief in whole or in part. No person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or printing of this brief. All parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

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SUMMARY OF ARGUMENT

Petitioners assert that *Basic* rested on a concept of market efficiency, and that "academic consensus" and "new evidence" justify overruling it. Brief for Petitioners at 15-17. Both assertions are wrong. The fraud-on-the market presumption adopted by this Court in *Basic* rests on a simple premise: investors in the public capital markets rely on prices responding to and incorporating material information. That security prices do respond to financial information is undisputed by academics and unchanged by new economic theories such as behavioral economics. *Basic* did not rest upon a conception of perfect market efficiency or upon any particular economic theory.

Indeed, the Court's opinion explicitly stated that "[b]y accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Basic*, 485 U.S. at 249 n.28. Accordingly, developments in economic theory do not justify overruling *Basic*.

The very essence of the materiality requirement is that material information is sufficiently important to the value of the securities to have the capacity to affect stock prices. Although security prices may fail to move in response to a disclosure, this is not evidence of inefficiency; prices may fail to move for a variety of reasons such as the consistency of the disclosure with prior information (as when an issuer conceals in its announcement an adverse change in its financial condition), bundled disclosures, or prior leakage of the information into the marketplace. This is not only intuitive, but supported by the scholarship in the field.

The operation and regulation of the public capital markets is predicated upon the importance of information in pricing. The mandatory disclosure requirements of the federal securities laws require issuers to provide extensive and timely information to the markets precisely because investors require such information to make pricing decisions. This Court has long recognized that private litigation under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides investors with a socially valuable mechanism for assuring the reliability of such disclosure.

The structure of modern securities fraud litigation is not, as petitioners suggest, the product of unilateral and activist judicial decision-making. Rather, Congress and this Court have collaborated to strike a balance in the scope of litigation that serves the twin objectives of inves-

tor protection and limiting the potential for litigation abuse.

As this Court noted in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), business interests specifically asked Congress to overturn *Basic*. Instead of doing so, Congress adopted the PSLRA which explicitly retained the class action mechanism – in which fraud-on-the-market is an essential component – but adopting reforms addressed to the potential for abuse. The PSLRA's reforms, as this Court recognized in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) "placed special burdens on plaintiffs seeking to bring federal securities fraud class actions."

Congress took a similar approach when it enacted SLUSA. SLUSA preempts state court litigation for covered class actions in order to further the objectives of the PSLRA. By directing its attention to class actions, SLUSA made it clear that Congress had intended the PSLRA to restructure but not eliminate securities fraud class actions. Empirical evidence indicates that the PSLRA and SLUSA struck an appropriate balance in maintaining investor protection while increasing the quality of private litigation.

Finally, this Court should reject Petitioners' efforts to import the reliance requirement from Section 18(a), 15 U.S.C. § 78r(a), into Section 10(b). The two statutory provisions differ substantially in their text, scope of covered conduct and range of permitted defendants. More particularly, Section 18(a) limits liability to misstatements contained in securities filings and is ill-suited to the scope of a statute addressed to open market fraud.

I. *Basic* is Consistent with the Modern Understanding of Market Efficiency

A. *Basic* Requires only that Material Information Affects Stock Prices

Petitioners assert that *Basic* rested on a concept of market efficiency, and that "academic consensus" and "new evidence" justify overruling it. Petitioners' Brief at 15-16. Both assertions are wrong. The fraud-on-the market presumption adopted by this Court's decision in *Basic* transformed private securities fraud litigation for open market misrepresentations. By explicitly holding that plaintiffs were not required to establish eyeball reliance in order to recover, the decision established private litigation as a viable remedy for securities fraud in the public capital markets. *Basic*'s acceptance of the fraud-on-the-market theory was particularly significant for class actions because, as this Court recognized last term in *Amgen*, "without the fraud-on-the-market theory, the element of reliance cannot be proved on a classwide basis through evidence common to the class." *Amgen*, 133 S. Ct. at 1195.

Contrary to petitioners' assertion, however, *Basic*'s holding was not revolutionary. Prior to *Basic*, most of the lower courts had recognized that requiring direct proof of reliance in public market securities litigation was both impractical and illogical. *See* Jill E. Fisch, *The Trouble with Basic: Price Distortion after Halliburton*, 90 Wash. U. L. Rev. 895, 900-903 (2013) (Fisch, *The Trouble with Basic*) (describing lower court decisions analyzing reliance requirement prior to *Basic*). Plaintiffs in public market transactions received information from a variety of sources. Disclosures were often processed by market intermediaries, including brokers, research analysts and the

financial media.[2] Investors rationally relied on these intermediaries to collect and filter the issuers' original statements rather than reviewing statutorily mandated filings directly.[3]

Nor was the application of the efficient capital markets hypothesis to formulate the fraud-on-the-market theory a recent innovation at the time of *Basic*. Professor Adolph Berle explained the nexus of the fraud-on-the-market theory in 1931, writing that, if a public company makes false statements affecting the price of its securities, "any purchaser in the market would seem to have an action in deceit or fraud for damage suffered therefrom." *See* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 269 (1931). In Berle's analysis, the purchaser's claim was based "on the market situation, which in turn resulted from the false statement." *Id.* at 269-70. Similarly in The Modern Corporation and Private Property (1932), one of the most influential books on corporate law of all time, Berle and his coauthor, economist Gardiner C. Means, explained that "if a corporation consciously overstated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made. *Id.* at 314 & n.1, 322.

Indeed, the observations of Berle, Means, and other scholars and policy-makers of their time about the effect of information on security prices formed the foundational

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[2] See, e.g., *Panzirer v. Wolf*, 663 F.2d 365, 367 (2d Cir. 1981), *vacated sub nom. Price Waterhouse v. Panzirer*, 459 U.S. 1027 (1982) in which plaintiff relied upon information reported by financial media based on defendants' misstatements.

[3] *See, e.g.*, Homer Kripke, The SEC and Corporate Disclosure: Regulation in Search of a Purpose 14–15 (1979) (discussing the widely-held belief that prospectuses were typically not read).

premise of the federal securities laws which rely on a system of mandatory disclosure to protect investors and market integrity. William O. Douglas explained in 1934 that "[E]ven though an investor has neither the time, money, nor intelligence to assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the price market." William O. Douglas, *Protecting the Investor*, 23 Yale Rev. 521, 524 (1934). The rationale for a mandatory disclosure system was, and is, simply put, that information matters. As Professor Richard Brealey explains, public company investors "rely on the company's financial statements to provide the necessary information." Richard A. Brealey, *et al.*, Principles of Corporate Finance 704 (10th ed. 2011).

This Court has long recognized that private litigation under Section 10(b) provides investors with a socially valuable mechanism for assuring the reliability of such disclosure. As this Court explained in *Basic*, "In drafting [the Exchange] Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." *Basic*, 485 U.S. at 246. *Basic* made this statement in explaining its resort to a presumption of reliance.

The Exchange Act's legislative history confirms the understanding, expressed in §2. "The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," said House Report No. 1383.[4]

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[4] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted* in 5 J. S. Ellenberger & Ellen P. Mahar, LEGISLATIVE

Congress clearly intended that investors should be entitled to rely on the integrity of prices thus established, even if information was not "instantaneously" reflected. *See id.*

At the same time, courts recognized that evidence of direct reliance was potentially unreliable and self-serving. In impersonal public market trading, direct evidence of the specific factors motivating individual trading decisions was unlikely to exist. As the Court of Appeals for the Seventh Circuit observed in *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1130 (7th Cir. 1993), *aff'd*, 58 F.3d 1162 (7th Cir. 1995) "Prices of even poorly followed stocks change in response to news, including statements by the issuers, and these changes may be better indicators of causation than litigants' self-serving statements about what they read and relied on and about what they would have paid (or whether they would have bought at all) had the issuer said something different."

This was the reality that motivated this Court's decision in *Basic*. As the Court held in *Basic* and reaffirmed in *Amgen*, requiring proof of direct reliance "would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market." *Amgen*, 133 S. Ct. at 1192, citing *Basic* at 245.

That recognition, which reflected securities trading practices in the 1970s and 1980s, is even more appropriate now. Investors today rely on a variety of sources for investment information, including the internet, the financial media and social media.[5] Most retail investors and insti-

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HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18 (1973).

[5] The importance of information disclosed in social media in influencing stock price is vividly reflected by the SEC's recent Section 21(a) report that was triggered by a disclosure by Netflix CEO Reed Hastings about Netflix's streaming volume on his personal Facebook page. Report of Investigation Pursuant to

tutions outsource their investment research to professional advisors and rely on the bottom line recommendations of those advisors. *See, e.g., In re: Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) (describing reliance by investors on research analyst recommendations).[6]

Those same intermediaries, through their recommendations, analysis and trading decisions, have the effect of incorporating the information that they review into market prices. It is this very incorporation of information into stock prices and investors' reliance on the process that underlies the *Basic* presumption. The fact that many investors do not review securities disclosures directly does not mean that the disclosed information has not affected the stock price on which they based their investment decision.

At its core, *Basic* is premised on investors' broad reliance on the fact that material information has the capacity to affect stock prices in public markets. Material information is explicitly defined as information that a reasonable investor would have taken into account, thereby affecting market price. *See Basic* at 244-45. Put differently, as the Court of Appeals for the Ninth Circuit explained in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), the "sem-

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Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, SEC Release No. 69279 (Apr. 2, 2013). According to the SEC, the price of Netflix's stock rose "from $70.45 at the time of Hastings's Facebook post to $81.72 at the close of the following trading day." *Id.* at 4.

[6] Through advances in machine-learning, trading algorithms exist that even trade automatically based on publicly disclosed information. *See, e.g.*, Xiongpai Qin, *Making Use of the Big Data: Next Generation of Algorithm Trading*, ARTIFICIAL INTELLIGENCE AND COMPUTATIONAL INTELLIGENCE, LECTURE NOTES IN COMPUTER SCIENCE, Vol. 7530, at 34-41 (2012) (describing developments in algorithmic trading).

inal" pre-*Basic* fraud-on-the-market case,[7] "[m]ateriality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price—when the purchase is made." *Blackie*, 524 F.2d at 906. Materiality then is "the key component" of fraud-on-the-market theory. *Amgen*, 133 S. Ct. at 1214 (Thomas J., dissenting).

Importantly, *Basic*, as affirmed by *Amgen*, need not require that plaintiffs produce event-study type proof of a price effect at the time of the fraudulent statement. *See Amgen*, 133 S. Ct. at 1192: "If a market is generally efficient in incorporating publicly available information into a security's market price, it is reasonable to presume that a particular public, material misrepresentation will be reflected in the security's price." Evidence that the price of a security incorporates publicly available information can be demonstrated in a variety of ways. *See, e.g.*, Lucian A. Bebchuk & Allen Ferrell, *Rethinking Basic*, at 26-27 (Working Paper Dec. 2013) *available at*, http://ssrn.com/abstract=2371304 (discussing possible tools to establish or rebut the presumption that the fraudulent statement distorted stock price).

Amgen's reluctance to require proof of materiality at the class certification stage also makes sense given the empirical challenge of such a showing. While financial models have long played a role in a wide range of litigation, even non-commercial litigation, models are not perfect, and event studies that are frequently used in securities litigation are subject to some limitations. See Fisch, *The Trouble with Basic*, 90 Wash. U. L. Rev. at 919-21. Requiring evidence of ex ante price impact or "fraudulent distortion" at the class certification stage would accordingly embroil courts in a premature battle-of-experts as judges struggled to ensure that experts and their models are trustworthy. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).

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[7] *Amgen*, 133 S. Ct. at 1213 (Thomas J., dissenting).

This is especially true because many instances of securities fraud involve attempts to avoid or delay disclosure of negative corporate developments. *See* Fisch, *The Trouble with* Basic, 90 Wash. U. L. Rev. at 922.

B. Imperfect Market Efficiency is Neither New nor Inconsistent with *Basic*

Modern financial economics recognizes that markets are imperfectly efficient. That fact is not, however a recent development but was well known at the time of the *Basic* decision.[8] Scholars have measured and debated calendar anomalies such as the January effect for many years.[9] Justice White's dissent in *Basic* cites a prominent law review article observing that the mechanisms of market efficiency were then poorly understood.[10] Recent events such as the May 6, 2010 flash crash clearly demonstrate that, at times, securities prices move for reasons other than the disclosure of information.[11] The existence of these anoma-

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[8] Economist George Taylor recognized the hemline index in 1926 before Congress even adopted the federal securities laws. *See* Michael Sincere, *Hemline Index falls out of fashion*, MarketWatch, (Nov. 24, 2010), *available at*, http://www.marketwatch.com/story/hemline-index-falls-out-of-fashion-2010-11-24 (describing the hemline index).

[9] *See* Jeremy J. Siegel, *Stocks for the Long Run: The Definitive Guide to Financial Market Returns & Long Term Investment Strategies*, at 305 (4th ed. 2007), (describing various calendar anomalies).

[10] Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 549-50 (1984).

[11] *See, e.g.*, Henry T.C. Hu, *Efficient Markets and the Law: A Predictable Past and an Uncertain Future*, 4 Ann. Rev. Fin. Econ. 179 (2012). (describing the flash crash as a "radical departure[] from market efficiency.").

lies is neither a recent discovery nor inconsistent with the premise that that the markets are efficient.

While *Basic* requires materiality to establish reliance, its holding does not depend on a high level of market efficiency but simply on markets that are sufficiently efficient to ensure that material information, as a general matter, will be reflected in stock prices.[12] Petitioners' claim that

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[12] Indeed, information affects prices even in markets that are not efficient. *See* Jim Cox, *Fraud on the Market After Amgen*, 9 Duke J. Const. L. & Pub. Pol. 101 (Dec. 11, 2013), *available at*, SSRN: http://ssrn.com/abstract=2366450 (Cox, *After Amgen*) (describing studies showing price response to information even in small capitalization firms whose trading is typically rejected as inefficient under *Basic* analysis). The Securities Exchange Act recognizes as much in Section 9. Section 9(a)(1) prohibits certain manipulative transactions entered "[f]or the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, *or a false or misleading appearance with respect to the market for any security*." 15 U.S.C.§ 9(a)(1) (emphasis added). Section 9(a)(3) makes it unlawful for a dealer broker or other person "to induce the purchase or sale of any security registered on a national securities exchange [or] *any security not so registered* . . . by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security." 15 U.S.C. § 78i(a)(3) (emphasis added). Thus the statute extends its protection to securities traded in both efficient markets and inefficient markets and recognizes that manipulation can affect securities prices in inefficient markets. *See also* Fisch, *The Trouble with Basic*, 90 Wash. U. L. Rev. at 898 (explaining that "market efficiency is neither a necessary nor a sufficient condition to establish that misinformation has distorted prices"). Bebchuk & Ferrell, *Rethinking Basic*, (Working Paper) at 1 (arguing that, in a fraud-on-the-market case, classwide reliance should not depend on the efficiency of the market for the issuer's securities).

Basic relies on "a robust view of market efficiency," Petitioners' Brief at 14-15, is flatly wrong.

Equally wrong is the claim that academic consensus has rejected *Basic*'s view of market efficiency. Brief for Petitioners at 15. Legal and finance scholars widely accept that the public capital markets demonstrate the required level of efficiency – that prices respond to and incorporate material information.[13] *See, e.g.,* Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1607 (1991); Daniel Fischel, *Efficient Capital Markets, the Crash and the Fraud on the Market Theory*, 74 Cornell L. Rev. 907 (1989). Nobel Prize winner Robert Shiller, in noting his disagreement with co-winner Eugene Fama explained "Of course prices reflect available information." Robert J. Shiller, *We'll Share the Honors, and Agree to Disagree*, N.Y. Times, Oct. 27, 2013, at BU6. It is that almost common-sense conception of market efficiency that *Basic* requires, nothing more. Notable conservative Judge and Law and Economics Scholar Frank Easterbrook recently observed that the semi-strong version of the efficient capital markets hypothesis, on which fraud-on-the-market theory rests, is "widely accepted." *Schleicher v. Wendt*, 618 F. 3d 679 (7th Cir. 2010).

To be clear, this is not perfect efficiency in the sense that all information is incorporated into prices instantaneously. As Professor Donald Langevoort explains, "perfect efficiency is just an ideal; all markets fall short, some more than others." Donald Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, Wis. L. Rev. 151, 167

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[13] In rare cases, the price of some securities, such as those that are thinly traded or where there is a substantial controlling shareholder, may not fully incorporate material information. Basic recognizes this potential by allowing defendants to rebut the fraud-on-the-market presumption by coming forward with evidence of these and other conditions.

(2009). Moreover, informational efficiency is a spectrum, not a binary concept, meaning that the speed with which information is impounded into stock prices varies according to the issuer's information environment and the type of information involved. *See* Tarun Chordia, *et al.*, *Evidence on the speed of convergence to market efficiency*, 76 J. Fin. Econ. 271 (2005). As Professor Langevoort has observed, *Basic* "was not insisting on anything approaching perfect efficiency." Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on Amgen and the Second Coming of Halliburton*, Working Paper at 18 n.66, (Nov. 16, 2013) *available at*, http://ssrn.com/abstract=2281910 (Langevoort, *Judgment Day*), citing, *Owens v. Okure*, 488 U.S. 235, 247 n.24 (1989).

Moreover, *Basic* does not require that market prices be equal to fundamental or true value. Fundamental value efficiency, which means that "the real price of stocks is close to the intrinsic value" is the theory that Robert Shiller termed "one of the most remarkable errors in the history of economic thought." Robert J. Shiller, Market Volatility, 8 (1992). Thus the notion that market prices are intrinsically correct is highly contestable within the financial and economics literature and is not the same as informational efficiency. *See* Richard Thaler, *Markets Can be Wrong and the Price is Not Always Right*, Fin. Times Aug. 4, 2009 (explaining the confusion between information efficiency and fundamental value efficiency). In addressing the issues in this case, the Court should focus only on informational efficiency.

The growing behavioral finance literature has produced substantial evidence that prices likely do not reflect intrinsic value, but even this observation is not testable. Importantly, academics generally agree that we lack sufficiently precise methods for the concept of "correct" prices to be conceptually meaningful. Alon Brav & J.B. Heaton, *Market Indeterminacy*, 28 J. Corp. L. 517, 518-19 (2003).

See James D. Cox, *Understanding Causation in Private Securities Lawsuits: Building on Amgen*, 66 Vand. L. Rev. 1719, 1728 (2013) (Cox, *Building on Amgen*) ("there are no reliable models for determining the 'correct' price of a security").

So long as departures from fundamental value are unbiased, however, in the sense that the deviations are random, they do not undermine informational efficiency. That prices may be inaccurate does not detract from the fact that false information affects those prices, which is all that *Basic* requires. *Schleicher*, 618 F.3d at 679.

The market provides ample evidence that prices react to information and that prices can underreact and overreact to it. Consider for example the SEC's announcement of its lawsuit against Goldman Sachs arising out of the infamous Abacus transaction. Upon release of the news to the market, Goldman's stock price fell by 13%, erasing $12 billion of market capitalization in a single day. Gregory Zuckerman *et al.*, *Goldman Sachs Charged With Fraud*, Wall St. J., Apr. 17, 2010. This price drop may have been an overreaction in that Goldman subsequently settled with the SEC for a far less dramatic $550 million. *See* SEC Press Release no: 2010-123, *Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO*, July 15, 2010.

Similarly when Apple announced the release of the first iPhone in 2007, its stock price jumped by 8.3%. Chip Cutter, *AAPL Down On iPhone 4S: Why Apple's Stock Falls After New Product Announcements*, Huff Post Tech. (Oct. 5, 2011) *available at*, http://www.huffingtonpost.com/2011/10/05/aapl-iphone-4s_n_995786.html. This rise may have been an under reaction. In the subsequent five years, the iPhone became the most profitable product in the world, accounting for almost two-thirds of Apple's profits. Henry Blodget, *In Case You Had Any Doubts About*

Where Apple's Profit Comes From . . ., Bus. Insider (Aug 2, 2012), *available at*, http://www.businessinsider.com/iphone-profit-2012-8.

Neither underreactions nor overreactions to information are problematic for fraud-on-the-market. If the market underreacts to a fraudulent statement, then the market price is less distorted, reducing the extent of plaintiff's harm. In the case of an extreme underreaction, plaintiff may not be damaged at all. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) (describing Halliburton's argument that "[i]f the price is unaffected by the fraud, the price does not reflect the fraud"). To be noted here is that Congress directly addressed problems that flow from short-term market overreactions; if the market overreacts, plaintiff's damages are not calculated based on that overreaction but rather are limited by the PSRLA's loss causation requirement, coupled with the statutory 90-day lookback provision. [14]

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[14] Congress accepted the premise that markets can overreact to information when it adopted, in the PSLRA, a 90-day trading window as a limit on recoverable damages. Securities Exchange Act § 21D(e), 15 U.S.C. § 78u-4(e). *See* Conference Report, H. Rep. No. 104-369, at 42, n.25 (Nov. 28, 1995) (explaining the necessity for the provision by reference to Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 Stan. L. Rev. 7, 12 (1994)). Notably Lev and de Villier explicitly state that "crashes are consistent with both the informational version of the efficient capital markets theory and with the fraud-on-the-market theory." *Id.* at 21. *See also* James D. Cox, *Amgen and the Path Forward* (Working Paper 2013) (arguing that the 90 day window was intended by Congress as "a means to address one concern for noisy markets").

II. Congress Accepted Fraud-on-the Market as Striking an Appropriate Balance in Securities Fraud Enforcement

A. Congress Enacted the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act to Refine, not Eliminate, the Class Action Mechanism

The structure of modern securities fraud litigation is not, as petitioners suggest, the product of unilateral and activist judicial decision-making. Rather, this Court and Congress have collaborated to strike a balance in the scope of litigation that serves the twin objectives of protecting investors and limiting the potential for litigation abuse. The Court has sought to balance these objectives. As the Court observed in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994), the Court based its rejection of aiding and abetting liability under Section 10(b) in part on the fact that securities fraud litigation presented "a danger of vexatiousness." And in *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), the Court justified its decision not to extend the scope of 10b-5 liability to secondary defendants by a concern over "extensive discovery and the potential for uncertainty and disruption in a lawsuit." *Id.* at 163.

At the same time, however, the Court recognized that, in adopting the PSLRA, Congress "accepted the §10(b) private cause of action as then defined . . .." *Stoneridge* 552 U.S. at 165-66. This included the class action. Section

21D(a) of the PSLRA is explicitly entitled "Private Class Actions" and introduces a range of reforms that are targeted specifically to the class action mechanism. The statute makes multiple improvements to the conduct of securities fraud class actions such as the required certification by the plaintiff as a representative party, a mechanism for judicial appointment of a lead plaintiff defined as "the member ... of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members...", provisions concerning payment of costs to the class representative, disclosure of the settlement terms to class members, and provisions concerning fee awards to the attorneys for the plaintiff class. *See, e.g.*, Jill E. Fisch, *Class Action Reform: Lessons From Securities Litigation*, 39 Ariz. L. Rev. 533, 536 (1997) (describing reforms adopted by the PSLRA "that targeted the class action structure in particular").

These reforms, as this Court recognized in *Dabit*, "placed special burdens on plaintiffs seeking to bring federal securities fraud class actions." *Dabit*, 547 U. S. at 82. The scope of their application reflects an implicit decision to retain the class action mechanism and, thereby, the fraud-on-the-market theory that makes the class action possible. As Professor Langevoort explains, "the structure of the PSLRA makes no sense except when read as a political compromise that preserves the foundation of the fraud-on-the market class action while making it harder for plaintiffs to bring, plead and prove a successful claim through a variety of reforms." Langevoort, *Judgment Day*, at 6 (Working Paper). Professor Barbara Black explains "Congress chose not to eliminate the securities fraud class action, but to cure it and thus confirmed its importance to the integrity of the U.S. capital markets." Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, Colum. Bus. L. Rev. 802, 810 (2009).

As this Court noted in *Amgen*, business interests specifically asked Congress to overturn *Basic* in the Common Sense Legal Reform Act. *See* Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong. (1995). Fraud-on-the-market litigation was a core component of the political debate leading up to the adoption of the PSLRA. *See* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. Law. 355 (1996) (recounting the legislative and political history of the PSLRA).

Not only did Congress decide not to overrule *Basic* or legislate a requirement of eyeball reliance, it enacted a statutory mechanism that expressly contemplated continuing the existing private class action structure for enforcing the prohibition of securities fraud. In so doing, Congress accepted this Court's prior judgment that a balanced enforcement mechanism was the best way to protect the capital markets. As the Court noted in *Tellabs*, 551 U.S. at 321 n.4: "Nothing in the [PSLRA], casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—*a matter crucial to the integrity of domestic capital markets*." *Id.* quoting *Dabit*, 547 U. S. at 81 (emphasis added).

Petitioners argue that the Court is free to overrule *Basic* because Congress has been silent with respect to the propriety of the fraud-on-the-market theory. Brief for Petitioners at 34. Contrary to Petitioners' claim, the PSLRA does not reflect mere "congressional silence," however.[15]

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[15] This situation is quite different from that examined by Professor William Eskridge. Eskridge observes that the Court's reliance on Congressional acquiescence is most defensible when legislative inaction "sheds light on current legislative preferences." William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Calif. L. Rev. 613, 670 (1991). With respect to fraud-on-the-market,

Id. Not only did Congress pay specific attention to fraud-on-the-market when it adopted the PSLRA, it adopted an entire statutory section that established new procedures applicable exclusively to private class actions. In restructuring the scope of class actions, Congress clearly rejected the alternative reform approach that critics had explicitly advocated – eliminating class actions entirely – and cannot be understood as a "failure to express any opinion." Brief for Petitioners at 34, quoting *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality op.).

These modifications to the class action mechanism were in the context of a specific Congressional focus on Section 10(b). As the Senate Report explained, litigation pursuant to Section 10(b) was the target of Congress' legislative action:

> Congress has never expressly provided for private rights of action when it enacted Section 10(b). Instead, courts have held that Congress impliedly authorized such actions. As a result, 10(b) litigation has evolved out of judicial decisionmaking not specific legislative action.... The Committee has determined that now is the time for Congress to reassert its authority in this area.

Senate Report No. 104-98 (1995).

Congress took a similar approach when it subsequently enacted SLUSA. Following the adoption of the PSLRA, some plaintiffs began to file class actions in state court in an effort to avoid the requirements of the PSLRA such as the heightened pleading requirement and the discovery stay. In response to the concern that this state court liti-

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Congress's preference with respect to the continued existence of private securities fraud class actions is clear not simply by inference, but from the statutory text.

gation was "being used to frustrate the objectives" of the PSLRA, Congress preempted such litigation by enacting SLUSA.

Specifically SLUSA preempts state court litigation for "covered class actions," not for all securities fraud claims. A "covered class action" is defined as a class action where "damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, *without reference to issues of individualized reliance on an alleged misstatement or omission*, predominate . . .." 15 U.S.C. § 78bb(f)(5)(B)(i) (emphasis added). This definition explicitly incorporates the fraud-on-the-market presumption in determining whether a state securities class action is similar enough to a federal securities class action so it should be preempted.[16] By directing its attention to class actions, and in particular those involving listed companies whose shares are defined as "covered securities," SLUSA made it clear that Congress had intended in the PSLRA, to restructure but not eliminate securities fraud class actions.

That Congress has recognized the utility of the private class action as a valuable tool for enforcing the antifraud

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[16] A report by the Committee of Banking, Housing, and Urban Affairs explained:

> [T]he Supreme Court stated in *Basic, Inc. v. Levinson* . . . that 'requiring proof of individualized reliance would * * * prevent plaintiffs from proceeding with a class action, since individual issues would * * * overwhelm the common ones." To avoid this problem, the definition provides that the predominance inquiry must be undertaken without reference to issues of individualized reliance, so that the necessity of proving reliance on an individualized basis would not defeat treatment of the suit as a class action.

S. Rep. No. 182, 105th Congress, 2d Sess. 7 (1998).

provision is clear.[17] The Statement of Managers Accompanying the Conference Report containing the PSLRA termed private securities litigation "an indispensable tool" both for protecting investors and for "promot[ing] public and global confidence in our capital markets . . ." H.R. Rep. No. 104-369, 104th Cong., 1st Sess. (1995). Congress' rejection of the specific request to overturn *Basic*, as well as the PSLRA and SLUSA Exchange Act amendments that retain and refine securities fraud class actions, provide compelling reasons to affirm the judgment of the court below.

In addition, the Securities and Exchange Commission has long supported the utility of private class actions as a supplement to public enforcement of the antifraud provision. Many factors limit the ability of public enforcement to serve as an adequate substitute for private litigation. *See, e.g.*, Edward Labaton, *Consequences, Intended and Unintended, of Securities Law Reform*, 29 Stetson L. Rev. 395, 401 n.43 (1999) (quoting testimony of SEC Chair Richard C. Breeden before Congress in 1991 that "Private actions under Sections 10(b) and 14(a) of the Exchange Act have long been recognized as a 'necessary supplement' to actions brought by the Commission and as an 'essential tool' in the enforcement of the federal securities laws.").

Given the importance of the class action mechanism in allowing private litigation to function, overturning *Basic* would create a void in the existing enforcement structure that Congress has created. Moreover, numerous market participants use investment strategies that depend for their viability on markets that are untainted by fraud. Their fiduciary duties would not allow them to invest as

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[17] That Congress valued private securities fraud litigation is further evidenced by its decision, in the Sarbanes-Oxley Act to extend the statute of limitations in private litigation. Sarbanes-Oxley Act § 804, Pub. L. No. 107-204, 116 Stat. 745 (2002).

they do without such good faith *reliance* not only on the fairness of markets but also on the fact that market prices reflect public information.[18] As Professor James Cox explains, "The changes in markets, especially the moves toward increasing amounts of passive investing, are a testament to investors' foundational belief that markets are fair." Cox, *Building on Amgen*, 66 Vand. L. Rev. at 1752. Eyeball reliance is, however, inconsistent with indexing and other low cost investment strategies, increasing the need for fraud-on-the-market.

B. Empirical Evidence Suggests that the PSLRA Struck an Appropriate Balance

The PSLRA was a legislative compromise with two major goals. Congress sought to reform securities class actions by giving courts greater power to dismiss cases without merit, while enabling investors with the largest losses to serve as lead plaintiff in order to increase recoveries in cases with merit. *See Tellabs*, 551 U.S. at 322 (explaining that Congress intended the PSLRA to "curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims."). An extensive body of empirical literature establishes that this compromise is working as intended – more meritless cases are being dismissed, and plaintiffs are recovering significant amounts in cases with merit.

The PSLRA requires any fraud-on-the-market class action complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with" scienter or face dismissal without the opportunity to conduct

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[18] Pension fund giant CalPERS, for example, invests more than half of its $255 billion portfolio passively and is considering a move to a totally indexed portfolio. *See* Jason Kephart, *Passive Investing: If Its Good Enough for CalPERS . . .* (Mar. 24, 2013) *available at*, http://www.investmentnews.com/article/20130319/Blog3/130319912#.

discovery. 15 U.S.C. § 78u-4(b). One purpose of this requirement was to encourage the pursuit of securities fraud cases with merit. *See, e.g.*, S. Rep. No. 98, 104th Cong., 1st Sess. 4 (1995) (noting that the PSLRA was intended to "encourage plaintiffs' lawyers to pursue valid claims and defendants to fight abusive claims.").

The PSLRA's heightened pleading requirement has increased the ability of courts to dismiss meritless securities class actions. In a 2006 study, Professor Stephen Choi found that dismissal rates increased from 13.7% for cases filed prior to the PSLRA to 25.8% for cases filed after the PSLRA. *See* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, J. L. Econ. & Org. 598, 617 (2006). A number of other studies have found that dismissal rates increased after the passage of the PSLRA. *See, e.g.*, James D. Cox, *et al.*, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, Wisc. L. Rev. 421, 442 (2009) ; A.C. Pritchard & Hillary A. Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. Emp. Legal Stud. 125, 142 (2005).

The increase in dismissals has reduced the costs of litigation. A study of all securities class actions filed between 2006 and 2010 concludes that "38% of cases ended relatively quickly and painlessly for the defendants." Michael Klausner, *et al.*, *When Are Securities Class Actions Dismissed, When Do They Settle, and For How Much? – An Update*, PLUS Journal 7 (April 2013).

Congress in passing the PSLRA was not solely concerned with dismissing cases without merit but also in ensuring adequate recoveries in meritorious cases. *See, e.g.*, S. Rep. No. 98, 104th Cong., 1st Sess. 6 (1995) (observing that "a 1994 Securities Subcommittee Staff Report found 'evidence * * * that plaintiffs' counsel in many instances

litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrongdoing."). The PSLRA sought to remedy this problem by creating a statutory lead plaintiff to oversee the litigation. *See* 15 U.S.C. § 78u-3(b)(iii)(I)(bb).

Studies show that the lead plaintiff provision has had its intended effect of encouraging institutional investors to become involved in securities fraud litigation. *See, e.g.*, Stephen J. Choi, *et al., Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 Wash. U. L. Q. 869, 889 (2005) (finding public pension funds went "from no representation in the pre-PSLRA period to over 10% of the cases in the post-PSLRA period."). Importantly, multiple studies have found that institutional involvement in securities class actions is associated with higher settlements. *See, e.g.*, Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Emp. Legal Stud. 368, 383-84 (2012) ("public pension participation in securities class actions does indeed lead to higher settlement amounts, all else equal."); C.S. Agnes Cheng, *et al., Institutional monitoring through shareholder litigation*, 95 J. Fin. Econ. 365, 356 (2010) ("securities class actions with institutional owners as lead plaintiffs are less likely to be dismissed and have larger monetary settlements than securities class actions with individual lead plaintiffs."); James D. Cox, *et al., Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1624 (2006) ("institutional investor cases exhibit much larger settlements").

Soon after the PSLRA encouraged institutional involvement in securities class actions, there was an extraordinary period of corporate wrongdoing. Companies such as Enron, WorldCom, Tyco, Global Crossing,

HealthSouth, Cendant, Conseco, and Waste Management committed significant securities frauds. Notably, the securities fraud class actions during this period, a period of substantial fraud, provided billions of dollars in investor recoveries. *See, e.g.*, Todd Foster *et al., Recent Trends in Shareholder Class Action Litigation: Filings Stay Low and Average Settlements Stay High - But are these Trends Reversing?*, NERA Economic Consulting, 1 (Sept. 2007), *available at*, http://www.nera.com/extImage/PUB_Recent Trends_Sep2007-FINAL_4color.pdf (reporting that in 2006-2007, "all of the top ten shareholder class action settlements exceeded $1 billion"). *See also* John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 Va. L. Rev. 707, 729 (2009) (observing that private "securities fraud class action settlements peaked at over $17 billion" in 2006 and observing that "private enforcement obtains greater recoveries than public enforcement.").

After the PSLRA, as Congress intended, the outcome of a securities class action is likely to be driven by the merits, not by the fact that a class has been certified. Cases without merit are dismissed. Meritorious cases result in more substantial recoveries.

C. The Court Should Not Import a Reliance Requirement from Section 18 into Section 10(b)

Petitioners assert that *Basic* was wrongly decided by pointing to Section 18(a) of the Securities Exchange Act, 15 U.S.C. § 78r(a), which Petitioners say is "the closest textual analogue to the Section 10(b) action." Brief for Petitioners at 12. They argue, largely by reference to the legislative history of Section 18(a), that an actual reliance requirement should be imported into Section 10(b). *See*

Brief for Petitioners at 13; *see also* Brief of Former SEC Commissioners *et al.* as *Amici Curiae* at 11-18.[19]

This Court's decision in *Musick, Peeler & Garrett v. Emp'rs Ins.*, 508 U.S. 286, 294 (1993), does indeed instruct the Court to borrow from the "most analogous" cause of action. Arguments about "borrowing" from other statutory provisions must proceed cautiously, however. What may make sense in one statutory context may not necessarily fit well in another, and Section 10(b) and Section 18(a) differ in many key respects. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 211 n.31 (1976) (declining to borrow affirmative good faith defense from Section 18 and instead adopting scienter requirement for Section 10(b) based on identified differences between Section 10(b) and Section 18).

Critically, the language of the two statutes is different. Section 18(a) expressly includes language requiring actual reliance, language that is absent from Section 10(b). Specifically, Congress used the words "in reliance" in Section 18(a). In contrast, Section 10(b) does not contain the words "in reliance." Whatever one might conclude about the judicial development of Section 10(b), it is inconsistent with the text of Section 10(b) to suggest that it contains an "eyeball reliance" requirement.

Nor is this the only difference between Section 18(a) and Section 10(b). Section 18(a), by its terms, applies only to misstatements in documents, applications or reports filed with the SEC. Thus Section 18(a) does not encompass press releases, oral statements by corporate officials,

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[19] Notably, this argument was presented to the Court in *Basic* the Court rejected it. *See, e.g., Basic*, 485 U.S. at 243 ("Petitioners . . . argue that because the analogous express right of action includes a reliance requirement, *see, e.g.*, § 18(a) of the 1934 Act, as amended, 15 U. S. C. § 78r(a), so too must an action implied under § 10(b)").

misleading products information, and the many other sources of fraudulent misinformation that this Court has held actionable under Section 10(b).[20] *See, e.g., Basic*, 485 U.S. at 227, n.4 (premising liability on fraudulent press release and statement by company official). Similarly Section 18(a) extends liability not just to those who make fraudulent statements but those who "cause [such statements] to be made," thereby including within its scope a range of secondary defendants that this Court has held are beyond the scope of Section 10(b). *See Stoneridge*, 552 U.S. at 148. Finally, Section 18(a) does not explicitly require scienter.[21]

Petitioners' attempt to import the legislative history of Section 18(a) should be unpersuasive to anyone who begins analyzing a statute by reading its text. Rather, a careful textual analysis indicates that Congress knew how to require actual reliance and chose to do so when such a requirement was a necessary component of the statutory scheme. In Section 18(a), which imposes liability specifically on misleading statements contained in filed documents, Congress provided a cause of action for investors who relied directly on those misstatements. Section 18(a) does not speak, however, to the scope of the entirely different type of liability imposed by Section 10(b) upon those who engage in open market fraud.

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[20] Similarly Section 18(a) does not apply to the periodic reports issued by the thousands of public companies that are not required to file those reports with the SEC, such as the many companies that are going public pursuant to the provisions of the Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, 126 Stat. 306 (2012).

[21] This Court has not ruled on the question, but lower courts have concluded that Section 18(a) does not contain a scienter requirement. *See, e.g., Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1172 (10th Cir. 2006). *See also Ernst*, 425 U.S. at 211 n.31

If Section 10(b) is to be understood by reference to another statutory provision, a far closer analogy is Section 9(f) of the Exchange Act which, like Section 10(b) deals with a form of market manipulation.[22] Section 9(f) provides that "any person who willfully participates in any act or transaction in violation of subsection (a) . . . shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction." 15 U.S.C. § 78i(f). Notably the statute contains an express private right of action, but it requires no reliance by the purchaser beyond a purchase at an affected price.

Further evidence that *Basic*'s use of fraud-on-the-market is consistent with Congressional intent can be found in the statutory language of the Securities Act of 1933. Specifically in 1934, Congress amended section 11 of the Securities Act to require that investors demonstrate reliance if they purchase securities after the release of a year's worth of audited financials "covering a period of at least twelve months beginning after the effective date of" a registered offering of these securities. 15 U.S.C. § 77k(a).

Notably, Congress excused from proving reliance those who purchased the offered securities prior to the release of the audited financials. Presumably the reason for this decision was Congress' belief that the information contained in the registration statement determined the market price --- that, after all, was the purpose of the mandated disclosure. *See* William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L. J. 171, 176 (1933) (during the early life of a security "the registration statement will be an important conditioner of the market."

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[22] Section 10(b), by its plain terms, prohibits "in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b). This Court has noted the relationship between Section 10(b) and Section 9. *See, e.g., Musick, Peeler*, 508 U.S. at 295-96.

If plaintiff buys in the open market "he may be as much affected by misstatements as if he had read and understood the statement.").

The registration statement's effect would likely have been dissipated, however, by the subsequent release of audited financial statements. As the Conference Report explained, the basis for the change was "that in all likelihood the purchase and price of the security purchased after publication of such an earning statement will be predicated on that statement rather than upon the information disclosed upon registration." H. R. Conf. Rep. No. 1838, 73d Cong., 2d Sess., at 41 (1934).

In addition, even after Congress required proof of reliance, it explicitly provided that "reliance may be established without proof of the reading of the registration statement." 15 U.S.C. § 77k(a). Congress thus also recognized the impracticality of limiting recovery by investors in the public capital markets to cases in which they could demonstrate eyeball reliance. This history makes it clear that the 73rd Congress understood both the concept of reliance on market price, and that such reliance can be established without proof that the investor ever saw the misrepresentations in question.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,

Petitioners,

v.

ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TESTIFYING ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 1

Argument 5

A. Economists Use Multiple Tools, Including Event Studies, in Assessing Whether the Market for a Particular Stock Generally Incorporates Material Public Information Relating to that Stock. 6

B. Event Studies Showing that the Market for a Stock Generally Incorporates Material Public Information Support the Inference of Price Reliance. 12

C. Event Studies Are Widely Used by Defendants and Government Agencies. 15

Conclusion 20

TABLE OF AUTHORITIES

Cases

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 1, 5, 6

Cammer v. Bloom, 711 F. Supp. 1263 (D.N.J. 1989) 2, 6

Carpe v. Aquila, Inc., No. 02-0388-CV-W-FJG, 2005 U.S. Dist. LEXIS 44667 (W.D. Mo. Mar. 23, 2005) 16

Goldkrantz v. Griffin, No. 97 Civ. 9075 (DLC), 1999 U.S. Dist. LEXIS 4445 (S.D.N.Y. Apr. 6, 1999) 16

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 16

In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp.2d 1132 (C.D. Cal. 2008) 16

In re Metropolitan Sec. Litig., No. CV-04-25-FVS, 2010 U.S. Dist. LEXIS 4209 (E.D. Wash. Jan. 20, 2010) 16

Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001) 2, 6

Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010) 19

SEC v. Snyder, Civ. A. No. H-03-04568, 2006 U.S. Dist. LEXIS 81830 (S.D. Tex. Aug. 22, 2006) 17

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196 (2d Cir. 2008) 7

United States v. Ebbers, 458 F.3d 110 (2d Cir. 2006) 17

United States v. Ferguson, 584 F. Supp.2d 447 (D. Conn. 2008) 17

United States v. Gushlak, 728 F.3d 184 (2d Cir. 2013) 18

United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009) 17

United States v. Peppel, 707 F.3d 627 (6th Cir. 2013) 17

United States v. Schiff, 538 F. Supp.2d 818 (D.N.J. 2008) 18

Statutes

15 U.S.C. § 77k 15

Other Authorities

Sanjai Bhagat & Roberta Romano, *Event Studies and the Law, Part I*, 4 AM. L. & ECON. REV. 141 (2002) 8, 9, 14

John Binder, *The Event Study Methodology Since 1969*, 11 REV. QUANT. FIN. & ACC'TING 111 (1998) 9

Stephen J. Brown, *The Efficient Markets Hypothesis: The Demise of the Demon of Chance?*, 51 ACC'TING & FIN. 79 (2011) 9

Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes, and Securities Litigation*, 81 TUL. L. REV. 443 (2006) 7, 13

Eugene Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575 (1991).....8, 11, 12, 13

Jonathan R. Macey, Geoffrey P. Miller, Mark L. Mitchell & Jeffry M. Netter, *Lessons From Financial Economics: Materiality Reliance, and Extending the Reach of* Basic v. Levinson, 77 VA. L. REV. 1017 (1991).....8

Kevin P. McCormick, C*omment: Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 TUL. L. REV. 1145 (2008).....17

Mark L. Mitchell & Jeffrey M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission*, 49 BUS. LAW. 545 (1994).....17

David Tabak & Frederick Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, in LITIGATION SERVICES HANDBOOK, THE ROLE OF THE FINANCIAL EXPERT (3d ed. 2001).....8

Frank Torchio, *Proper Event Study Analysis on Securities Litigation*, 35 J. CORP. L. 159 (2009).....18

INTEREST OF *AMICI CURIAE*[1]

Amici are testifying economists who use statistical methods, including event studies, to examine the efficiency of markets for particular stocks and to determine the impact of public information on the price of stocks. *Amici* pursue such work both in academic and professional capacities. *Amici* include: John Finnerty, Professor of Finance, Fordham University; Steve Feinstein, Associate Professor of Finance, Babson College; H. Nejat Seyhun, The Jerome B. & Eilene M. York Professor of Business Administration, Professor of Finance, Michigan University, Ross School of Business; Anthony Saunders, John M. Schiff Professor of Finance, New York University, Stern School of Business; Frank Torchio, Adjunct Professor of Finance, Rochester University, Simon Business School; Mark E. Zmijewski, Leon Carroll Marshall Professor of Accounting, The University of Chicago Booth School of Business; Tavy Ronen, Associate Professor of Finance and Economics, Rutgers Business School; and Israel Shaked, Professor of Finance, Boston University School of Management.

SUMMARY OF ARGUMENT

The fraud-on-the-market (FOTM) presumption adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), creates a rebuttable inference that securities buyers and sellers rely on the market price to reflect

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the consent of the parties, on file with this Court.

publicly disseminated information relating to those securities. This inference is well-supported by the economics literature and is established in securities-fraud cases by scientifically valid economic evidence.

To trigger the FOTM presumption, plaintiffs generally must meet the multi-factor test developed in *Cammer v. Bloom*, 711 F. Supp. 1263 (D.N.J. 1989), and *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). The factors of the test are valid indicators that the market for a stock is informationally efficient.

Applying these factors, testifying economists typically use an array of tools in reaching their opinions in favor of or against the informational efficiency of the market for a particular security. They examine institutional trading, analyst reports, trading volume, share price reactions to new information, and other market features. Typically, economists consider all relevant evidence and do not restrict their examination to a single factor or analytical tool.

One well-established and common tool is an event study, which identifies a particular event or series of events and uses statistical methods to analyze whether that event or series of events affected the price of a stock, net of other market and industry factors. Such studies can determine, typically to a statistically significant (*i.e.*, 95% confidence) level, whether an event affected the price of a stock. Event studies are not limited to securities litigation; they are one of the most well-established methodologies in economics and are widely used throughout corporate finance and economics generally. There are a

number of generally accepted ways in which such studies can be performed.

There is little dispute among economists that statistically significant price movement in response to new, material public information is evidence that such information is promptly incorporated into stock prices. Thus, economic evidence that the market price for a stock tends to be responsive to new, material public information relating to that stock supports an inference that purchasers and sellers reasonably relied on the price to reflect such information. Such evidence, which is specific to a particular stock (and the impact of new public information on the price of that stock), avoids many of Halliburton's broad criticisms of the Efficient Markets Hypothesis (EMH).

Plaintiffs are not the only parties to use event studies in securities litigation. Defendants frequently use event studies to attempt to show that stock price declines were attributable to factors other than the alleged misrepresentations. And government agencies often use event studies in civil cases that seek disgorgement and in criminal cases that require calculations relating to restitution and sentencing.

Depending on the specific context in which misrepresentations are made, event studies play different roles in different cases. For example, where a misrepresentation constitutes favorable, material news that was unexpected by the market, an economist may be able to use an event study to show that the misrepresentation was directly related to the unexpected price increase.

In price-maintenance cases, however, event studies may not identify any increase in securities prices at the front end of the omissions or false statements, because those misrepresentations merely maintain the price. Often, misstatements simply confirm what the market is expecting (*e.g.*, by falsely reporting that a company met its revenue target when in fact it did not). No price reactions would be expected in response to misleading statements that (falsely) reconfirm pre-existing market expectations.

In those circumstances, event studies can be used in two ways. First, event studies can analyze corporate disclosures unrelated to the misrepresentations to determine whether the market for the subject security is informationally efficient in general. If the market is efficient with regard to other information disseminated at the time of the misrepresentations, there is typically no reason to believe that the market is not efficient with respect to the information at issue. For example, if the market is found to behave efficiently with respect to important new product announcements, the market would also be expected to efficiently incorporate earnings announcements that are in line with the market's expectations, but which are nevertheless misleading.

Second, an event study can be used at the back end of a price-maintenance fraud, when the truth is revealed and the stock-price drop (an abnormal return) relating to the disclosure of the truth can be isolated from market- and industry-wide factors and from non-fraud-related company news to estimate how much of the previously inflated or maintained

price was caused by the fraud. A similar exercise occurs in cases of fraudulent omissions. In these types of analyses, the value of event studies is in detecting the impact of corrective disclosures subsequent to the false statements or omissions at the front end of the fraud.

Given the different uses of event studies as one of several tools in different contexts, Petitioners' suggestion that economists must show price increases at the time of the misrepresentation is inappropriate. Such a result would not even be expected in many cases, and hence should not be required as a predicate for the FOTM presumption to attach.

ARGUMENT

A central insight of *Basic* was that investors in the secondary market rely on a stock's price as being based on the market's collective assessment of public information about that stock: "For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Basic*, 485 U.S. at 247 n. 24. In other words, buyers and sellers on the secondary market use the market as a proxy for investigating public information and view the price of a stock as the market's distilled conclusion as to its value based on that information. "By accepting this rebuttable presumption," the Court wrote, "we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 148 n. 28.

A. Economists Use Multiple Tools, Including Event Studies, in Assessing Whether the Market for a Particular Stock Generally Incorporates Material Public Information Relating to that Stock.

To trigger the FOTM presumption, plaintiffs generally must meet the multifactor tests developed in *Cammer v. Bloom*, 711 F. Supp. 1263 (D.N.J. 1989), and *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). *Cammer* considered the following factors: (1) whether the security traded at a large average weekly volume; (2) whether a significant number of analysts followed and reported on the security; (3) whether the security had numerous market makers; (4) whether the company was eligible to file SEC Form S–3; and (5) whether empirical facts demonstrate a relation between unexpected corporate events or financial information releases, and a prompt response in the security's price. *See* 711 F. Supp. at 1286-87.

In addition to the five *Cammer* factors, courts have also looked at three factors enumerated in *Krogman*: (1) the company's market capitalization; (2) the relative size of the bid-ask spread for the security; and (3) the company's float – *i.e.*, the degree to which shares of the security are held by the public, rather than insiders. *See* 202 F.R.D. at 477-78. These factors typically are used as analytical tools, rather than as a rigid checklist, and "have been routinely applied by district courts considering the efficiency of equity markets." *Teamsters Local 445 Freight Div.*

Pension Fund v. Bombardier Inc., 546 F.3d 196, 204 n. 11 (2d Cir. 2008).[2]

Applying these factors, testifying economists typically use an array of tools in reaching their opinions. They examine institutional trading, analyst reports, trading volume, and other factors. Not surprisingly, efficiency findings are common (and appropriate) in cases involving large public companies that issue millions of shares, are actively traded by investors in open and established markets

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[2] Petitioners' Brief, at 23, cites Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes, and Securities Litigation*, 81 TUL. L. REV. 443, 455 (2006), for the proposition that the *Cammer* factors "do not directly speak to efficiency * * * [and] are best understood as constituting an indirect test by which courts infer efficiency for reliance purposes." Of course, the article states that drawing such an inference from the *Cammer* and *Krogman* factors is entirely appropriate:

> The *Cammer* and *Krogman* courts apparently assumed that if the stock is actively traded by a large number of reasonably informed investors – *i.e.*, if the market is "open and developed" – then a threshold level of efficiency can be inferred for reliance purposes. This assumption makes economic sense. Given that a market can never be fully efficient, but that all securities markets are efficient enough to incorporate a defendant's public statements to some degree, the fundamental question in the reliance context is whether the market is efficient enough that investors can be presumed to have relied on the integrity of the market price and thus to have relied on the defendant's public statements. * * * From an economic perspective, the courts in *Cammer* and *Krogman* got it right. * * * The precise extent to which prices reflect information is irrelevant to the reliance question.

Id. at 455-56.

such as the NYSE and NASDAQ, and are followed by numerous research analysts.

Under the fifth *Cammer* factor, economists often use event studies to show that a market for a particular stock responds to material publicly available information. An event study identifies a particular event or series of events, and uses statistical methods to analyze whether that event or series of events affected the price of a stock net of general market and industry factors. *See* David Tabak & Frederick Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, in LITIGATION SERVICES HANDBOOK, THE ROLE OF THE FINANCIAL EXPERT, Ch. 19 (3d ed. 2001); *see generally* Jonathan R. Macey, Geoffrey P. Miller, Mark L. Mitchell & Jeffry M. Netter, *Lessons From Financial Economics: Materiality Reliance, and Extending the Reach of* Basic v. Levinson, 77 VA. L. REV. 1017, 1025-42 (1991) (discussing event study methodology).

Event studies can and do support an inference that purchasers relied on the market price to incorporate material public information. Event studies have been used not only to determine market efficiency in securities-fraud litigation, but also in much broader contexts throughout the world of finance. A wide variety of events – corporate restructurings, dividend changes, proxy votes, earnings reports, and passage of legislation, among others – can be analyzed in this way. *See* Sanjai Bhagat & Roberta Romano, *Event Studies and the Law, Part I*, 4 AM. L. & ECON. REV. 141, 142-45 (2002); Eugene Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575, 1600-01 (1991) (event

studies used to analyze many types of events with potential impact on stock prices).

Event-study methodology is well-accepted in the professional and academic communities, and event studies are widely used. *See*.Bhagat & Romano, 4 AM. L. & ECON. REV. at 142 ("The event study methodology is well accepted and extensively used in finance. * * * Its use in policy analysis in recent years has become more widespread."). As one scholar has noted, "[t]here are 17,500 working papers that contain the phrase 'Event study.'" Stephen J. Brown, *The Efficient Markets Hypothesis: The Demise of the Demon of Chance?*, 51 ACC'TING & FIN. 79, 84 (2011); *see also* John Binder, *The Event Study Methodology Since 1969*, 11 REV. QUANT. FIN. & ACC'TING 111, 111-37 (1998) (discussing history of event study methodology and the plethora of papers using it).

There are a number of generally accepted ways in which event studies can be performed. Generally, the economist selects information events that would be expected to have a significant valuation impact on the stock price. Through the event study the economist tests whether the actual impact on the stock price was statistically significant.

In certain circumstances an event study can look at the days in which the price of the security is subject to a statistically significant abnormal return, *i.e.*, a return not explained by market and industry share price movements. The economist might then examine the abnormal returns to see if they plausibly can be explained by company-specific events. The economist also could consider unexpected news that theoretically should impact the price to see if such a

statistically significant price impact is observed, remaining mindful of the implications of the event study design regarding observations of statistical significance.

Another way to perform an event study is to divide the days of the class period *ex ante* into expected news days and non-news days before examining price movements, and then compare the stock's price movements in the two categories to see if there is a statistically significant difference in price movement between the two categories. If the study finds a difference in price movement between the two sample sets (*e.g.*, earnings-release dates versus non-earnings-release dates), that is statistical evidence that the market incorporates new public information into the price of the stock. Such an event study methodology simply tests *on an overall basis* whether a *group* of predefined expected news days has a greater likelihood of statistically significant stock price returns versus the remaining *group* of days in the class period.[3]

In short, event studies analyze whether a stock's price reacts to new material information using a test for statistical significance, net of general market and industry movements. An event study thus can support an inference of informational efficiency

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[3] Not every (or even most) of the predefined news dates in an event study would be expected to move the stock price *ex ante*, by an amount high enough to be statistically significant. There is no inherent reason why every news item included actually would contain "new" material information that would alter expectations as to the stock's performance or value by a statistically significant amount (*e.g.*, released earnings that simply meet pre-existing guidance).

without needing to measure the precise degree to which every piece of information is incorporated into a stock price or whether the market "correctly" reacted to each piece of news during the relevant period.

Furthermore, event studies have successfully addressed many of the objections to the EMH. For example, while skeptics often criticize the EMH because of the so-called "joint hypothesis" problem – that any test for efficiency also depends upon a theory for correctly determining the "normal" return on a stock absent the news and hence turns on *two* hypotheses (that the news is incorporated and that the model used to perform the test is valid) – event studies solve this problem:

> [A] powerful advantage of daily data is that they can attenuate or eliminate the joint-hypothesis problem, that market efficiency must be tested jointly with an asset-pricing model. Thus, when the stock-price response to an event is large and concentrated in a few days, the way one estimates daily expected returns (normal returns) in calculating abnormal returns has little effect on inferences.

Fama, 46 J. FIN. at 1601.[4]

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[4] Petitioners' Brief, at 22, cites the 1991 Fama paper for the proposition that "market efficiency *per se* is not testable." That quote is out of context and misleading, however. As Professor Fama explained, "event studies give the most direct evidence of efficiency." 46 J. FIN. at 1577. When Professor Fama stated that "market efficiency *per se* is not testable," he was raising the issue of the joint hypothesis. *Id.* at 1576. But the quote from

B. Event Studies Showing that the Market for a Stock Generally Incorporates Material Public Information Support the Inference of Price Reliance.

The FOTM presumption looks to whether it is reasonable to infer that investors relied on market price to incorporate material public information about a security. An event study that demonstrates that a particular stock's price generally incorporates public information in an efficient manner directly supports the inference that buyers and sellers relied on the price of the stock to incorporate such information regardless whether they had direct personal knowledge of the information.

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him in the text above explains how event studies solve that problem, and he concludes that event studies are highly useful for testing market efficiency:

> Event studies are now an important part of finance, especially corporate finance. In 1970 there was little evidence on the central issues of corporate finance. Now we are overwhelmed with results, mostly from event studies. Using simple tools, this research documents interesting regularities in the response of stock prices to investment decisions, financing decisions, and changes in corporate control. The results stand up to replication and the empirical regularities, some rather surprising, are the impetus for theoretical work to explain them. In short, on all counts, the event-study literature passes the test of scientific usefulness.

Id. at 1600. The paper concludes that event studies constitute "[t]he cleanest evidence of market efficiency (the least encumbered by the joint-hypothesis problem)," *id.* at 1602, and that the evidence from event studies supports "the conclusion that prices adjust efficiently to firm-specific information," *id.* at 1607.

That inference holds true regardless whether the market is truly or perfectly efficient and regardless of whether *every* implication of the EMH can be proven. What matters is "whether the market for a stock *is efficient enough* that reasonable investors can be presumed to have relied on the market price." Cornell & Rutten, 81 TUL. L. REV. at 456 (emphasis added); *cf.* Fama, 46 J. FIN. at 1575 ("A weaker and economically more sensible version of the efficiency hypothesis says that prices reflect information to the point where the marginal benefits of acting on information (the profits to be made) do not exceed the marginal costs.").

Contrary to Petitioners' arguments, the accuracy, precision, or universality of the EMH, either in general or as to a specific stock, has little or nothing to do with that question. It does not matter whether particular market participants draw different conclusions from the same data, weigh some information more than other information, or even are wrong about the significance or future implications of particular data. Market price, after all, is a collective phenomenon, factoring in and averaging out numerous judgments to yield a particular price at any given time. What matters is that purchasers generally rely on the market price to reflect the best estimate of a fair price for a stock that is available at a reasonable transaction cost, given the publicly available information on that stock.

Although this case involves the commonality of reliance, not the commonality of damages, it is worth mentioning that company-specific event studies also bypass much of the criticism of the EMH as they

account for (and "net out" from damages) general market and industry-wide movements, including bubbles. In other words, economists using event studies exclude from their damages calculations market factors other than the misrepresentations or omissions at issue.[5] They isolate the artificial inflation attributable to the securities fraud for each day during the class period. The event study methodology thus provides a means on a class-wide basis for excluding unrelated market movements from damages.

Because events studies show that a specific stock's price generally responds to economically significant new information quickly, many EMH controversies "based on issues regarding the definition and measurement of risk, and the relationship between risk and return" simply play no role in the matter, and there is "agreement that these issues do not invalidate the event study methodology." Bhagat & Romano, 4 AM. L. & ECON. REV. at 143 n. 1.

Event studies also provide a powerful rebuttal of Petitioners' criticism that the fraud-on-the-market theory merely *assumes* the necessary facts for class certification, rather than proving them. Pet. Br. at 27. Rather, by establishing the fact of informational efficiency as to a particular stock (coupled with existing background evidence that the stock market

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[5] Thus, in considering the 42% drop in Halliburton's stock price on December 7, 2001, in apparent response to Halliburton announcing the last in a series of adverse asbestos verdicts and judgments, JA 230, 343-44, an event study could be useful in netting out or controlling for any potential alternative factors relating to that price drop.

in general is informationally efficient as to a broad class of securities traded on well-developed markets), they allow a court to draw an inference that the class members reasonably relied on the price of the stock to incorporate such information. A court's finding to that effect thus does not assume anything, but in fact concludes based on the evidence that *Basic*'s general presumption of price reliance is in fact accurate as to the particular stock and during the particular time period at issue.

C. Event Studies Are Widely Used by Defendants and Government Agencies.

In considering the utility of event studies, it is telling that they are not simply a tool used by plaintiffs, but are widely used by defendants and government agencies as well. For example, defendants use event studies to present defenses to strict-liability claims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which imposes strict liability on issuers for misstatements and omissions in registration statements:

> [Section 11] was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering. If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case. Liability against the issuer of a security is virtually absolute, even for innocent misstatements.

Herman & MacLean v. Huddleston, 459 U.S. 375, 381-82 (1983).

Section 11(e), however allows defendants to avoid liability if they prove that the stock's price decline was not the result of the misrepresentation or omission in the registration statement, and defendants use event studies to establish this negative-causation defense. *E.g.*, *In re Metropolitan Sec. Litig.*, No. CV-04-25-FVS, 2010 U.S. Dist. LEXIS 4209, at *13 (E.D. Wash. Jan. 20, 2010); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp.2d 1132, 1170 (C.D. Cal. 2008); *Carpe v. Aquila, Inc.*, No. 02-0388-CV-W-FJG, 2005 U.S. Dist. LEXIS 44667, at *26 (W.D. Mo. Mar. 23, 2005); *Goldkrantz v. Griffin*, No. 97 Civ. 9075 (DLC), 1999 U.S. Dist. LEXIS 4445, at *11-*12 (S.D.N.Y. Apr. 6, 1999).

In addition, the SEC often relies on event studies in seeking disgorgement, which requires the Government to distinguish between lawful and unlawful profits, and in proving the materiality of false statements:

> The fraud-on-the-market theory is useful to those attempting to satisfy the reliance requirement in private rule 10b-5 suits such as *Basic*. The acceptance of the theory by lower courts and the United States Supreme Court, however, also provided an intellectual basis for the application of financial economics in other contexts such as the SEC's use of financial economics in its enforcement actions. The two primary elements of rule 10b-5 cases that directly relate to SEC

> securities fraud cases are materiality and disgorgement.

Mark L. Mitchell & Jeffrey M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission*, 49 BUS. LAW. 545, 548 (1994); *see also, SEC v. Snyder*, Civ. A. No. H-03-04568, 2006 U.S. Dist. LEXIS 81830, at *7, *28 (S.D. Tex. Aug. 22, 2006) (discussing SEC use of event study to determine egregiousness and disgorgement).

Similarly, in criminal securities-fraud cases brought by the Government, a highly significant factor affecting sentence calculations under the Guidelines is frequently the calculation of market losses, and "the entire theory of market loss is based" on "the conventional market efficiency theory." Kevin P. McCormick, C*omment: Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 TUL. L. REV. 1145, 1166 (2008); *see also United States v. Peppel*, 707 F.3d 627, 646 (6th Cir. 2013) (loss calculation assumes that investors who bought or held stock during the fraud relied "on what *Basic, Inc. v. Levinson* * * * described as the 'integrity' of the existing market price") (quoting *United States v. Ebbers*, 458 F.3d 110, 126-27 (2d Cir. 2006)); *United States v. Ferguson*, 584 F. Supp.2d 447, 452 (D. Conn. 2008) ("sentencing courts must calculate guidelines loss against the backdrop of an efficient market").

In calculating enhancements for market losses under the Guidelines in securities-fraud prosecutions; event studies are used to disaggregate losses caused by the fraud from losses caused by

other factors. *See United States v. Nacchio*, 573 F.3d 1062, 1072-80 (10th Cir. 2009). The Government also uses event studies to compute restitution and forfeiture amounts in criminal securities cases, which also require disaggregation. *See United States v. Gushlak*, 728 F.3d 184, 199-202 (2d Cir. 2013). The Government must also prove the materiality of false statements or omissions in criminal securities prosecutions and sometimes seeks to do so via stock-price movements, in which case it often uses event studies. *See United States v. Schiff*, 538 F. Supp.2d 818, 835-38 (D.N.J. 2008).

Hence, a decision in this case could have wide implications for the use of event studies by the Government and defendants, not merely by plaintiffs. If event studies are deemed inadequate to show that stock prices generally react to material new information, then their use by the Government and defendants alike to measure the impact of a particular disclosure or series of disclosures on a company's stock price also will be undermined.

D. Event Studies Play Different Roles in Different Cases.

Economists appropriately use event studies differently in different situations. Often, misstatements or omissions simply confirm what the market is expecting (for example, by reporting that a company met its revenue targets when in fact it did not or by failing to disclose an adverse, unexpected event). No price reactions would be expected in response to misleading statements or omissions that (falsely) reconfirm pre-existing market expectations. Frank Torchio, *Proper Event Study Analysis on*

Securities Litigation, 35 J. CORP. L. 159, 164-66 (2009). Prices react only to *unexpected* material news, because *expected* news is already incorporated into the security's market price. Thus, a fraudulently inflated earnings report that meets market expectations will have no detectable effect on price (and indeed may have been fraudulently inflated precisely to *avoid* a price drop).

Moreover, as Judge Easterbrook observed in *Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010), a company may commit fraud to slow its losses rather than to actually raise its stock price. Under such circumstances, the stock price may fall, but not nearly as *much* as it would have had the company reported the full truth. A requirement that plaintiffs prove an uptick in securities prices following a false statement would thus fail to detect artificial inflation in a significant number of situations where it actually exists.

Economists treat these situations differently. In price-maintenance cases, event studies may not identify any *increase* in securities prices at the front end of such omissions or false statements, because those misrepresentations merely *maintain* price. In such situations, an economist would use an event study to show a stock price drop at the back end, when the truth is revealed. An abnormal return can be isolated by removing market-wide and industry-wide factors and non-fraud-related company news on the disclosure date, and thus an event study can determine how much of the drop was related to the revelation of the truth. In other words, the economist would use an event study to detect the impact of

corrective disclosures, not of the false statements or omissions at the front end of the fraud. It is from the impact of the newly revealed truth at the back end that one can then estimate the previous artificial price inflation or maintenance that existed when the truth was suppressed by omission or false statement.

Event studies are an important (though not exclusive) tool, and they are not used the same way in every case. An economist using an event study as one tool to determine whether the *Basic* presumption is appropriate in a given circumstance should not be confined, as Halliburton suggests, to having to demonstrate a securities price increase at the time of the misrepresentation in order for the presumption to attach.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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